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# HARVARD LAW REVIEW

VOL. XXXII

1918—1919

CAMBRIDGE, MASS.  
THE HARVARD LAW REVIEW ASSOCIATION

1919

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# HARVARD LAW REVIEW

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VOL. XXXII

NOVEMBER, 1918

NO. 1

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## LETTERS OF CREDIT

THE ordinary circular letter of credit, familiar to tourists, has never played much part in the operations of trade and finance. My aim is not to deal immediately with this form of letter but rather to discuss the legal difficulties growing out of the various forms of so-called "commercial letters of credit" used in financing over-seas trade. This method of trade financing has not been much used by us in our domestic operations, and has come into common use in our foreign trade only since the war. On this account, in spite of the enormous volume of business in which these letters now figure, they show a great lack of uniformity in form and content, and some lack of certainty in their practical construction and their legal scope and meaning.

Commercial letters of credit, while in use for a long time in our business world, have attained no standardization either of kind, form<sup>1</sup> or legal construction. They may be mere informal advices, or more or less formal authorizations from a purchaser to draw on certain bankers here or abroad, or directions to given bankers to accept vendor drafts on certain conditions, or sometimes they are merely requests to negotiate the sale of such drafts. Ordinarily

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<sup>1</sup> J. P. Beal, "Utility of Letters of Credit in Export Trade — a Plea for Standard Forms," 95 *BANKERS' MAGAZINE* (N. Y. 1917), 271. "It is interesting to note the many different forms used by various banks; they all seem to be different in some respects. Some banks merely write an explanatory letter on their regular letter heads, while others have forms set up on which to record the various points in relation to terms of the credit."

where a bank confirms to the addressee the issuance of a letter, commercial usage regards this as a "confirmed letter of credit," entitling those to whom it is confirmed, upon compliance with its conditions, to look to the confirming bank for payment, without recourse. The lay mind, not without judicial authority, seems to regard this as a sort of contract of guaranty.<sup>2</sup> Great importance is attached to the use of the words "confirmed" and "irrevocable" in such letters even though what is said to be "confirmed" and "irrevocable," and is so regarded in practice, may not in some cases be so at all in legal fact.<sup>3</sup>

The conditions and provisions of these letters vary with the exigencies of each case, and no very definite or uniform rules of construction, either in practice or in our courts, seem yet to have been attained. This is due to the fact that before the present war our general foreign business was for the most part financed in other ways. When we suddenly became the world's great selling market, confronted with new and strange buyers, and new business and exchange difficulties, our exporters found it expedient in many cases to demand either cash with the order or confirmed New York credits; with the result that this letter of credit device, which for many years has worked well on occasion here and which was in familiar use abroad, came quickly into extensive use. Whether it will be much used after the war remains to be seen. The provincial desire of the average American exporter to sell for cash or its equivalent with his order, the possible decline of the London discount market, changes in international trade and banking, commercial instability abroad, new and experimental markets and the like, may well tend to a more extensive use of these letters of credit and procure for them an established place in the law merchant. But in any event, their increased use during the last

<sup>2</sup> "Commercial letters of credit are issued at thirty, sixty, ninety days', four or six months' sight, sometimes at other usage. A bank which issues such a letter of credit virtually agrees with the party in whose favor it is issued, although not always in so many words, that his drafts, drawn under and in conformity with and within the amount of the credit, shall be duly honored on presentation, provided that he complies with the text of the credit. This is usually regarded as practically equivalent to a guaranty of payment to the holder." B. OLNEY HOUGH, *PRACTICAL EXPORTING*, 546.

<sup>3</sup> See authorities cited *post*. Business houses seem to regard a letter "confirmed" *eo nomine* as irrevocable before expiration date named therein, while a letter not so "confirmed" is revocable at will. See Beal, *supra*.

four years is bound presently to bring to our courts a variety of perplexing problems.

A study of the English and American decisions bearing on the subject discloses much uncertainty and ambiguity of construction and interpretation. The familiar circular letter of credit is an offer addressed to given addressees, or to the world in general, agreeing to be bound by their acceptance of the offer within its terms and provisions. So we shall find this theory of offer and acceptance made the *ratio decidendi* in cases where other elements clearly should be considered. Other decisions give these letters the attributes and characteristics of negotiable instruments, and so reach conclusions not justified by the law or the facts. Others treat them as contracts of guaranty or of money held to the use of another, or money had and received. Others treat them as contracts between two parties for the use and benefit of a third. Others grant relief on the basis of estoppel or by upholding the customary commercial practice and interpretation of the parties as part of the substantive law merchant. Obviously it is important, both commercially and juristically, to determine if possible a sound legal theory applicable to these cases.

This is so, not only in order to avoid confusion where confusion is unnecessary, but to enable the commercial world to deal with more confidence and safety with this instrument of trade and finance which it has devised. A variety of practical questions of far reaching import to the commercial world impend upon the legal theory applied to the construction and interpretation of these letters. For instance, if we are to proceed on the theory of offer, the question of revocability must be determined differently than if we proceed on the theory of money had to use. If such letters are to be construed, for example, as guaranties, their practical feasibility under our law is much hampered. So that on the legal theory applied by the courts, whatever it may be, will depend not only the standard form these letters should take, but also the ultimate disposition of such practical questions, constantly arising and sure to be litigated as, assignability; revocation; construction of the terms of the contract as to sale and delivery; the relation of the letter to the contract of sale and the extent to which such contract of sale, expressly or by implication, should be or is part of the letter; failure of complete performance of the contract of sale

giving rise to the letter, and controversies as to breach of such contract; rights of issuer and other parties in case of a notice to stop payment; rights in case of failure to perform the sale contract because of *force majeure*, government embargoes, commandeered ships, etc.; insolvency of parties; attempts at rescission by holder or issuer; effect of changes made or of dealings had between purchaser and vendor after issuance of letters; procurement of the credit by fraud or unauthorized use of the letter. And on the legal theory applied may also depend the solution of the question, now apparently somewhat ignored, as to how a bank's outstanding letters of credit are to be treated in its accounting or under the national banking law.

## I

In trying to arrive at any sound theory of law applicable to these letters, one naturally turns first to their place of origin. The letter of credit is an old institution of continental commercial law, well understood as far back as the seventeenth century. When, through trade with Europe, the institution became known to us, our courts turned naturally, in our period of absorption of the law merchant, to the continental books for guidance in construing it and copious citations from these books appear in our earliest letter of credit cases.<sup>4</sup> The subject had a simple theoretical development on the continent which gave effect to the mercantile idea that a promise made in course of business is enforceable. In Anglo-American law, on the other hand, in the generation following Lord Mansfield, it became definitely settled that a merchant's promise in writing made in a business transaction did not suffice of itself to create legal obligation, hence the continental theory could not be adopted. Other reasons, partly economic, prevented letters of credit from assuming much importance in our commerce and as a result there does not seem to have been sufficient litigation over them to compel the working out of a consistent legal theory. When the outbreak of the war required new credit devices in our foreign trade, it was natural that the commercial letter of credit, somewhat dormant with us, but in common use abroad, should be employed to fill the gap without much consideration being given to its legal character and implications.

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<sup>4</sup> Coolidge v. Payson, 2 Wheat. (U. S.) 66 (1817); Russell v. Wiggan, 2 Story (U. S.) 213 (1842); note to Mandeville v. Riddle, 1 Cranch (U. S.) 290, 298, 366 (1803).

The letter of credit discussed in the continental treatises on commercial law<sup>5</sup> is of the sort most familiar to us as the conventional traveler's letter, addressed to a particular correspondent, a group of correspondents or to the world at large (in the latter case called a circular letter of credit),<sup>6</sup> requesting the addressee or addressees to pay money or give credit to the holder up to a certain amount<sup>7</sup> within a time limited and agreeing to become responsible therefor to the addressee or to accept the addressee's bill therefor.

The importance to us of continental law as to letters of credit is twofold. In the first place, as has been said, we got this idea from the continental books and practice, and it has had its fullest theoretical development in their commercial law; and in the second place it has always been legitimate in any discussion of our law merchant, which in its formative period drew so largely on continental sources, to refer to the civil law by way of analogy. Moreover in the present connection it happens that the commercial law of continental Europe is able to furnish us two fruitful suggestions: one, the idea of treating a commercial promise as being enforceable as such; the other, the practice of treating such a letter as an *ouverture de crédit* and as conclusive evidence of money had and received and held for the use of the addressee.

According to the French books, the letter of credit has two aspects, depending on whether it is looked at as between the issuer of the letter and the correspondent or as between the issuer of the letter and the holder. In the former aspect — as between issuer and correspondent — the French treat the letter of credit as a species of mandate.<sup>8</sup> By mandate the Romanist means a transaction whereby one party known as the *mandans* gives to another, known as the *mandatary*, a commission to do something, whereby the mandatary having done the thing in question, is entitled to be

<sup>5</sup> 4 LYON-CAEN ET RENAULT, *TRAITÉ DE DROIT COMMERCIAL*, 4 ed., §§ 736-48; 2 BÉDARRIDE, *DE LA LETTRE DE CHANGE*, 2 ed., §§ 633-41; 2 PARDESSUS, *COURS DE DROIT COMMERCIAL*, § 585; POTHIER, *TRAITÉ DU CONTRAT DE CHANGE*, § 236; COSACK, *LEHRBUCH DES HANDELSRECHTS*, 2 ed., § 188. For the history of the letter of credit see GOLDSCHMIDT, *UNIVERSALGESCHICHTE DES HANDELSRECHTS*, 397 ff.

<sup>6</sup> 4 LYON-CAEN ET RENAULT, § 736, note 3.

<sup>7</sup> This is usual. 4 LYON-CAEN ET RENAULT, § 736. But it may also be unlimited.

<sup>8</sup> 4 LYON-CAEN ET RENAULT, § 738; 2 BÉDARRIDE, *DE LA LETTRE DE CHANGE*, 2 ed., § 633.

reimbursed.<sup>9</sup> Accordingly, as between the issuer of the letter and the correspondent the letter of credit is a mandate. It is a mandate to the correspondent to pay to or give credit to the holder; the correspondent becoming thus entitled to be reimbursed by the issuer of the letter. But the correspondent is not obliged to pay or to give credit. He simply acquires a claim against the issuer by doing so. Hence, as between the issuer of the letter and the correspondent it is revocable down to the time the correspondent acts on it,<sup>10</sup> like any mandate.<sup>11</sup> On the other hand, as between the issuer of the letter and the holder the transaction is treated as one of "opening of a credit" (*ouverture de crédit*) and hence is not revocable.<sup>12</sup> It is taken to show an opening of a credit between the one who gives the letter of credit and the one for whom it is given.<sup>13</sup> This requires some explanation. In continental banking, the borrower from a bank arranges for a credit on which he can draw. In other words, as we should put it, he overdraws to the amount agreed upon.<sup>14</sup> There is not a loan, as in our practice, but an agreement to loan up to a certain amount within a certain time. As the civilians put it, there is not a *mutuum* but a *pactum de mutuo dando*.<sup>15</sup> This doctrine is a result of the modern idea of the binding force of a promise made as a business transaction<sup>16</sup> and of the equally modern notion of the power of the promisee to exact specific performance.<sup>17</sup> Accordingly the promise to make a loan, which in Roman law was unenforceable, as a mere pact, unless made in the form of a stipulation, in the modern law is a binding transaction.<sup>18</sup> Glück says of the *pactum de mutuo dando*:

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<sup>9</sup> INST. III, 26; POTHIER, TRAITÉ DU CONTRAT DE MANDAT, § 1.

<sup>10</sup> 4 LYON-CAEN ET RENAULT, § 738.

<sup>11</sup> FRENCH CIVIL CODE, Art. 1984.

<sup>12</sup> 4 LYON-CAEN ET RENAULT, § 739.

<sup>13</sup> *Id.*, § 736.

<sup>14</sup> 4 LYON-CAEN ET RENAULT, § 709 ff. On this subject, see FALLOISE, TRAITÉ DE L'OUVERTURE DE CRÉDIT.

<sup>15</sup> 4 LYON-CAEN ET RENAULT, §§ 684, 709.

<sup>16</sup> A good account of this in English may be seen in LEE, ROMAN-DUTCH LAW, 197-99.

<sup>17</sup> See Amos, "Specific Performance in French Law," 17 L. QUART. REV. 372.

<sup>18</sup> *Ouverture de crédit* or *promesse de prêt*, 2 COLIN ET CAPITANT, DROIT CIVIL FRANÇAIS, 662; 2 BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL, 10 ed., § 1576; 20 BAUDRY-LACANTINERIE, TRAITÉ DE DROIT CIVIL, § 700; *Promessa di mutuo*, 2 CHIRONI, ISTITUZIONI DI DIRITTO CIVILE ITALIANO, § 354; *Kreditöffnung*, *Darlehensvorvertrag*, *Darlehensversprechung*, 2 DERNBURG, BÜRGERLICHE RECHT, 3 ed.,

"Most civilians are agreed that the bare agreement to make a loan to another binds the promisor and gives rise to an action against him. . . . For according to the Roman law a *stipulatio de mutuo dando* has actionable obligation. But today a bare agreement is as efficacious as a Roman stipulation."<sup>19</sup>

In French law an *obligation à donner* involves a duty to deliver *in specie* and hence is treated much as we do cases to which we apply the equitable maxim of considering that as done that ought to be done.<sup>20</sup> It follows that the promise to loan money or extend credit is not only legally enforceable but the case is treated as if the promisor actually held the money of the promisee.<sup>21</sup>

If, then, a letter of credit is treated as an opening of a credit, it means that the case is considered as one where the person for whom the letter is given has deposited money with the one who gives the letter, to be drawn on by those who advance money upon the letter. The third person who advances money on the letter is treated the same as a depositor drawing on his account. Simply those who give credit on the faith of the letter draw on the deposit instead of the holder of the letter, and they do this by virtue of the contract of mandate between the one who issues the letter and the one to whom it is addressed. As between the issuer of the letter and the holder, the letter is not revocable because the law holds the promisor in the opening of a credit to performance of his promise. But when a mandate has ceased to be executory it has ceased to be revocable.<sup>22</sup> Because of their theory of mandate the French usually provide an express clause as to revocability.<sup>23</sup>

When this French theory of the letter of credit is applied to our law it will be seen that, although at first sight both the theory of the *pactum de mutuo dando* and the theory of the mandate are inapplicable, we have legal doctrines which may be utilized to bring about similar results. If in French law the letter of credit testifies to an opening of a credit, in our law it may be said to amount to an

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§ 236; 2 CROME, SYSTEM DES DEUTSCHEN 'BÜRGERLICHEN RECHTS, § 247, 4; 1 ENNECCERUS, KIPP UND WOLFF, LEHRBUCH DES BÜRGERLICHEN RECHTS, 1912 ed., § 364.

<sup>19</sup> 12 GLÜCK, PANDEKTEN, § 779. See also 4 GLÜCK, § 292; 13 STRYK OPERA OMN., ed. of 1840, 312.

<sup>20</sup> FRENCH CIVIL CODE, Art. 1136.

<sup>21</sup> 20 BAUDRY-LACANTINERIE, TRAITÉ DE DROIT CIVIL, § 701.

<sup>22</sup> INST. III, 26, § 9.

<sup>23</sup> 4 LYON-CAEN ET RENAULT, § 739.

acknowledgment of money received from the holder of the letter to the use of the person to whom it is addressed upon the conditions named in the letter. When acted upon by the person to whom it is addressed this would certainly estop the issuer of the letter from denying that he held the money as acknowledged. As we have no such institution as the Roman mandate, we should not be confronted with the difficulty that the transaction would be irrevocable on the one side and revocable on the other while executory. For our purposes the doctrine of money received to the use of a third person, and the estoppel involved in change of position upon the faith of the acknowledgment, would suffice.

The German law on the subject is substantially the same. It is set forth in convenient form by Cosack.<sup>24</sup> Cosack makes a distinction between a mandate of credit (*kreditauftrag*) and a letter of credit (*kreditbrief*). He says that the letter of credit strictly is in the nature of *anweisung* rather than mandate. The *anweisung* of the older law consisted of two parts, a mandate to pay and a mandate of satisfaction. For this clumsy legal theory of a bill of exchange in terms of Roman law the Germans have now worked out a theory of the bill of exchange as a single formal legal transaction. When, therefore, Cosack says the letter of credit and the bill of exchange are species of this same general theoretical genus, he not only gives us a more scientific analysis but brings out that the letter of credit as a device of finance is really as much a substantive transaction of the law merchant as is a bill or note; a position which it seems our courts might well adopt.

Summing up the situation in the continental commercial law, we may say the letter of credit is a mandate to some particular addressee, or addressed generally to such person as may comply with it, commissioning him to pay money, or give credit to the holder, whereby the addressee or the person (in case of a circular letter of credit) who complies with it, becomes entitled to hold the issuer of the letter for the sum of money advanced or the credit given within the terms of the mandate. So far, translated into our law, there is nothing but an offer to the correspondent or to the world at large, accepted by giving credit or advancing money according to the terms of the offer. And it is significant that in the very

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<sup>24</sup> LEHRBUCH DES HANDELSRECHTS, 7 ed., § 79.



useful analysis at the end of Ames' "Cases on Bills and Notes"<sup>25</sup> he treats the letter of credit precisely on this theory. But this type of letter of credit does not meet the requirements of international business to-day. What does meet it squarely is the French theory of the letter of credit as testifying to an opening of a credit between the holder and the issuer of the letter, so that the letter is really an authorization to the addressee to draw upon the money deposited by the holder with the issuer. That fits in with the requirements of international business to-day exactly, and fits well with our common-law doctrine of money received to a third party's use.

It is worth noting also that the development of the continental law on this subject has been hindered if not warped by two conditions which are paralleled in our own experience. The civilians, familiar with the earliest and simplest or so-called tourist form of letter, could not escape its analogy when confronted with the newer forms, and proceeded on the assumed necessity of fitting every form of letter, including those developed by present-day commerce into a legal theory of third-century Rome. That is to say, the doctrine of mandate being at hand to explain one form of letter, it was assumed that all other forms must be made to fit into that doctrine. So our courts, in the development of the subject, also suffer from this same analogy of the tourist letter and the same assumed necessity of fitting a present-day transaction of commercial usage into some common-law theory of a day that is past. The noticeable disposition of the more recent continental writers,<sup>26</sup> in the language of Maitland,<sup>27</sup> to "face modern times with . . . modern weapons," to distinguish the new from the old and to regard the letter of credit we are here considering as a self-sufficient transaction of the commercial law and as part of the growing law merchant, deserves thoughtful consideration at the hands of common-law lawyers.

## II

Common-law categories have never willingly conceded a place in the sun to the novelties developed by the exigencies of modern business. It required a long struggle culminating in an act of Par-

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<sup>25</sup> 2 CASES ON BILLS AND NOTES, 783.

<sup>26</sup> COSACK, *supra*.

<sup>27</sup> 3 COLLECTED PAPERS, 485.

liament to induce the common law to recognize the written instruments of the law merchant. As enlightened a judge as Lord Holt resisted reception of the promissory note into the company of legal transactions, and even now that bills and notes are established mercantile specialties the courts do not like to admit them as such in theory but seek to fit them into the common-law category of simple contracts. Checks were able to establish themselves as forms of bills, but insurance policies soon ceased to be instruments of the law merchant and have had a common-law development; and to-day bills, notes and checks are the only recognized instruments of the law merchant. At one time it seemed as if letters of credit might be so treated, so that the promise of a merchant or banker as a transaction of the law merchant in the form of an irrevocable letter of credit could stand on its own bottom as a binding and self-sufficing legal transaction.<sup>28</sup> But the development of the law merchant along liberal lines and its free absorption into our common law seem to have stopped with the passing away of our earlier generation of constructive judges, and for the last half of the nineteenth century hard and fast molds were at hand into which all mercantile transactions and inventions must inevitably be fitted.<sup>29</sup> Hence we must perforce deal with this subject on common-law lines, and seek to give effect to the demands of commerce by means of some common-law theory.

The decisions of our courts on this subject in the past have had to do with four common-law conceptions, namely: offer, resulting in simple contract; guaranty; contract for the benefit of a third person; and estoppel.

To-day it is generally assumed that the letter of credit is an offer made into a contract by extension of a credit according to its

<sup>28</sup> Marshall, C. J., in *Coolidge v. Payson*, 2 Wheat. (U. S.) 66, 75 (1817); Story, J., in *Russell v. Wiggan*, 2 Story (U. S.) 213, 231 (1842); Bronson, J., in *Birkhead v. Brown*, 5 Hill (N. Y.) 634 (1843). See also as evidence of this, *dicta* in *Scribner v. Rutherford*, 65 Iowa, 551, 22 N. W. 670 (1885); *Johannessen v. Munroe*, 158 N. Y. 641, 53 N. E. 535, 9 App. Div. 409 (1899), 41 N. Y. Supp. 586; *Liggett v. Bank*, 233 Mo. 590, 136 S. W. 299 (1911); 2 DANIEL, NEGOTIABLE INSTRUMENTS, 3 ed., § 1790.

<sup>29</sup> For example, the clearing-house when it arose, was not recognized for the purposes of the doctrine as to presentation within a reasonable time, and but for the opportune enactment of the uniform Negotiable Instruments Law, legislation would probably have become necessary. *Holmes v. Roe*, 62 Mich. 199, 28 N. W. 864 (1886); *Edmisten v. Herpolsheimer*, 66 Neb. 94, 92 N. W. 138 (1902).

terms.<sup>30</sup> Accordingly, if addressed to a specific person, sometimes called a "special letter of credit,"<sup>31</sup> it cannot be accepted by anyone else.<sup>32</sup> The courts often discuss this as if it were a question of assignability or negotiability,<sup>33</sup> or of strict construction of the liability of a surety or guarantor.<sup>34</sup> If the letter of credit were treated as an institution of the law merchant, requiring no common-law theory to uphold it, the result would be the same, as the instrument does not confer a power upon anyone but the addressee named. But the same courts usually end by putting the matter in terms of offer and acceptance.<sup>35</sup> Where the letter is addressed generally to whomsoever may act upon it (*i. e.*, a general letter of credit), the apparent procedural exigencies of special *assumpsit* and the elusive word "privity" formerly gave rise to difficulties.<sup>36</sup> Our courts, however, soon came to hold that this was a case of an offer addressed to the world at large, which became a contract as soon as anyone accepted or performed its terms, exactly as in the case of an offer of reward.<sup>37</sup> Here also the same result would be reached if the letter were treated simply as an instrument of the law merchant, since by its express terms it confers upon anyone who will act thereon the power of becoming a creditor of the issuer. It should be noted also that the instrument treated as an offer of payment to be accepted by extension of credit to the holder has sometimes been in form a statement addressed by the issuer to the holder, advising the latter of the issuer's willingness to become

<sup>30</sup> Cairns, L. J., *In re Agra and Masterman's Bank*, 2 Ch. App. 391, 395 (1867). "The liability of a writer of a letter of credit is founded on the simple law of contracts, where the minds of the parties must meet in the common purpose. The act of the writer is an offer, or request, or proposition, and the act of him who furnishes the money is an acceptance." *Bank of Seneca v. First National Bank*, 105 Mo. App. 722, 726, 78 S. W. 1092 (1904).

<sup>31</sup> *Birckhead v. Brown*, 5 Hill (N. Y.) 634 (1843); *Union Bank v. Coster*, 3 N. Y. 203 (1850).

<sup>32</sup> *Fletcher Guano Co. v. Burnside*, 142 Ga. 803, 83 S. E. 935 (1914); *Robbins v. Bingham*, 4 Johns. (N. Y.) 476 (1809); *Birckhead v. Brown*, 5 Hill (N. Y.) 634 (1843), *aff'd*, 2 Den. (N. Y.) 375; *Taylor v. Wetmore*, 10 Ohio, 491 (1841).

<sup>33</sup> *Robbins v. Bingham*, *supra*; *Birckhead v. Brown*, *supra*.

<sup>34</sup> *Walsh v. Baillie*, 10 Johns. (N. Y.) 180 (1813); *Birckhead v. Brown*, *supra*; *Taylor v. Wetmore*, *supra*.

<sup>35</sup> *E. g.*, *Bronson, J.*, in *Birckhead v. Brown*, *supra*.

<sup>36</sup> *Bank v. Archer*, 11 M. & W. 383 (1843); see also *Russell v. Wiggin*, 2 Story (U. S.) 213 (1842); *Franklin Bank v. Lynch*, 52 Md. 270, 281 (1879).

<sup>37</sup> *Lawrason v. Mason*, 3 Cranch (U. S.) 492 (1806); *Birckhead v. Brown*, *supra*; *Union Bank v. Coster*, *supra*.

surety for him, if a certain credit was extended,<sup>38</sup> or an offer to guarantee acceptance and payment of drafts,<sup>39</sup> or an offer to the addressee to "see him paid," which would at least suggest an offer to become secondarily liable.<sup>40</sup> Obvious difficulties involved in the law of suretyship and guaranty led the courts to strain the construction a bit in order to bring such cases within the offer theory of letters of credit; though other courts have refused to treat such papers as more than offers to become surety or guarantor and have distinguished them from letters of credit.<sup>41</sup> Where the wider interpretation is given to the paper, it must be upon some notion that the addressee has changed his position upon the faith of an understanding of its terms which though not correct he might reasonably entertain; in other words upon the theory of estoppel.

Confusion has arisen in carrying out this offer theory, which in itself is simple and consistent enough, by importing into it a question of the law of negotiable instruments that seems superficially to be involved but in reality is quite beside the point. If one agrees to accept a bill already drawn, or one to be drawn, in such wise as clearly to point out the very instrument, a court of equity, to prevent embarrassment of the case of the holder because of his want of the written evidence to which he is specifically entitled, would decree the promised acceptance.<sup>42</sup> And courts of law accordingly have treated a promise thus specifically enforceable as amounting to an acceptance and have allowed the promisee to sue the promisor as an acceptor. But the terms of the promise must be clear and definite in order to be specifically enforceable; and so, if the bill or bills are to be drawn in the future, courts may properly

<sup>38</sup> *Lawrason v. Mason*, *supra*.

<sup>39</sup> *Union Bank v. Coster*, *supra*.

<sup>40</sup> *Cheever v. Schall*, 87 Hun (N. Y.) 32 (1895). Here the letter in suit read: "Let Mr. G. have your farm . . . for the term of five years and I will see you paid." G showed this letter to plaintiff, who leased the farm to him on the strength of it. The court said it was "a general letter of credit." If it had been treated as a guarantee, a question would have arisen whether, under the statute of frauds, it was necessary that the name of the addressee appear on the letter. The court obviously sought to avoid this.

<sup>41</sup> *E. g.*, *Scribner v. Rutherford*, 65 Iowa, 551, 22 N. W. 670 (1885). The letter read: "A. P. Kenyon wants a little money; if you want anyone on the note, I will fix it when I come in." The court refused to treat this as more than it professed to be, to wit, an offer to become surety on Kenyon's note if money was loaned him.

<sup>42</sup> *Bank of Montreal v. Thomas*, 16 Ont. 503 (1888).

insist on a considerable particularity of description before allowing promisor to be held as acceptor.<sup>43</sup> When, however, the addressee sues, not on the bill seeking to hold the issuer as an acceptor, but on the contract to accept bills drawn under and within the terms of the letter, no more particularity ought to be required than in any other case of offer and acceptance. If there is enough certainty to make a contract there is a cause of action.<sup>44</sup> Unhappily the origin of the requirement of particularity in the description of the bills to be drawn has often been overlooked, and in actions for breach of contract to accept, the courts have demanded all the certainty involved in a decree for specific performance, and hence involved also in an action to charge the promisor as acceptor.<sup>45</sup> With the relaxation in equity of the strict rule as to certainty, so that it is enough if there is a contract at law which the court is in a position to enforce without making a new contract and without undue hardship,<sup>46</sup> the basis of the doctrine in *Coolidge v. Payson* is doubtful and more than one court long ago gave it up.<sup>47</sup> At all events it has nothing to do on principle with liability upon a letter of credit in an action for non-acceptance or non-payment of drafts drawn in accordance with the terms of the letter.<sup>48</sup>

Letters of credit which might well have been dealt with on the offer theory have sometimes been treated on a theory of guar-

<sup>43</sup> *Coolidge v. Payson*, 2 Wheat. (U. S.) 75 (1817); *Schimmelpennich v. Bayard*, 1 Pet. (U. S.) 264 (1828); *Boyce v. Edwards*, 4 Pet. (U. S.) 111 (1830); *Garrettson v. North Atchison Bank*, 39 Fed. 163 (1889); *Ulster County Bank v. McFarlan*, 3 Den. (N. Y.) 553 (1846); *First National Bank v. Clark*, 61 Md. 400, 406 (1883); *Lewis v. Kramer*, 3 Md. 265, 289 (1852).

<sup>44</sup> *Franklin Bank of Baltimore v. Lynch*, 52 Md. 270, 280 (1879); *Lafargue v. Harrison*, 70 Cal. 380, 11 Pac. 636 (1886); *Nelson v. First National Bank*, 48 Ill. 36 (1868); *Carnegie v. Morrison*, 2 Met. (Mass.) 381 (1841); *Bissell v. Lewis*, 4 Mich. 450 (1857); *Pollock v. Helm*, 54 Miss. 1 (1876); *Bank of Montreal v. Thomas*, 16 Ont. 503. In the latter case the action seems to have been brought upon the bill rather than upon the contract to accept it, but questions of pleading were not raised.

<sup>45</sup> *State National Bank v. Young*, 14 Fed. 889 (1883); *Atlanta National Bank v. Northwestern Fertilizing Company*, 83 Ga. 356, 9 S. E. 671 (1889); *Krakauer v. Chapman*, 16 App. Div. 115 (dissenting opinion) 45 N. Y. Supp. 127 (1897).

<sup>46</sup> *Jones v. Parker*, 163 Mass. 564, 40 N. E. 1044 (1895); *Equitable Gas Company v. The Baltimore Coal Tar and Manufacturing Company*, 63 Md. 285 (1884); 3 POMEROY, EQUITY, §§ 1400 *et seq.*

<sup>47</sup> See *Nelson v. First National Bank*, 48 Ill. 36 (1868); *Bissell v. Lewis*, 4 Mich. 450 (1857).

<sup>48</sup> See the vigorous statement of Story, J., in *Russell v. Wiggin*, 2 Story (U. S.) 213, 231 (1842).

antee.<sup>49</sup> In other cases what seem on their face to be contracts of guarantee or offers to become guarantor have been treated on the offer theory of letters of credit.<sup>50</sup> But courts have not consistently treated such cases as cases of letters of credit.<sup>51</sup> The disadvantages of a guarantee theory are the doctrine as to notice to the guarantor when his offer is accepted by giving credit to the principal,<sup>52</sup> requirements of the statute of frauds as to the contents of the memorandum on which one secondarily liable may be charged,<sup>53</sup> and the danger of releasing parties secondarily liable in the course of dealings with the principal debtor.<sup>54</sup> Because of these, the value of letters of credit as instruments of credit would be seriously impaired if a guarantee theory were to be adhered to, and the courts

<sup>49</sup> *Lafargue v. Harrison*, *supra*; *Walsh v. Bailie*, 10 Johns. (N. Y.) 180 (1813); *Taylor v. Wetmore*, *supra*; *cf. Birkhead v. Brown*, *supra*. In *Lafargue v. Harrison*, the court's proposition that the letter of credit was "a guaranty by them of the credit to Mel and Sons during the time and for the amount specified" seems to be an awkward recognition of the instrument as a transaction of the law merchant. In effect, the court says to the issuer "you can't say the holder did not have funds with you because you guaranteed to the addressee that he had." A better way of putting it would be that the letter could reasonably be so interpreted, and after the addressee had acted on it, the issuer was estopped. But in this particular case, as the letter was drawn, there is no such representation, nor are there any words amounting to a guarantee of anything. If the court means that the legal effect of the letter was that of a guarantee, it is holding the letter of credit a self-sufficing instrument without seal or consideration.

<sup>50</sup> *Boyd v. Snyder*, 49 Md. 342 (1878) ("This contract of guaranty . . . analogous to a general letter of credit"); *Lawrason v. Mason*, 3 Cranch (U. S.) 492 (1806) ("We will become your security for 130 barrels of corn payable in 12 months"); *McLaren v. Watson*, 26 Wend. (N. Y.) 425 (1841), affirming 19 Wend. (N. Y.) 557 (1838) ("I hereby guarantee payment"); *London Bank v. Parrott*, 125 Cal. 472, 58 Pac. 164 (1899) ("and these presents shall be deemed to be, and shall constitute to you, a continuing guaranty by each of us"); *Northumberland v. Eyer*, 58 Pa. St. 97 (1868) (written guarantee indorsed on a note, which, said Sharswood, J., "is not distinguishable from a general letter of credit"); *Cheever v. Schall*, 87 Hun (N. Y.) 32 (1895) ("I will see you paid"). If Judge Sharswood's proposition is well taken, does the general letter of credit stand as a transaction of the law-merchant, requiring no common-law consideration?

<sup>51</sup> *Adams v. Jones*, 12 Pet. (U. S.) 207 ("I will be security for the payment"); *Scribner v. Rutherford*, 65 Iowa, 551, 22 N. W. 670 (1885) ("if you want anyone on the note I will fix it when I come in"). As to the effect of issuer's death where letter is treated as a guarantee, see *Michigan State Bank v. Estate of Leavenworth*, 28 Vt. 209 (1855).

<sup>52</sup> *Adams v. Jones*, *supra*. This led the court to hold the instrument a letter of credit in *London Bank v. Parrott*, *supra*.

<sup>53</sup> *Cheever v. Schall*, 87 Hun (N. Y.) 32 (1895).

<sup>54</sup> *London Bank v. Parrott*, *supra*.

therefore have tried not only to find better ways of treating genuine letters of credit, but have shown some tendency to turn guarantees into letters of credit in the supposed interest of security of mercantile transactions.

As a basis for discussing our third, or contract-for-benefit-of-third-party theory, we may take the case of *Carnegie v. Morrison*.<sup>55</sup> Here one Oliver, the Boston agent of the defendants, a firm of bankers in London, wrote as follows:—

“Messrs. MORRISON, CRYDEN & COMPANY,  
London:

Mr. John Bradford, of this City, having requested that a credit may be opened with you for his account, in favor of Messrs. D. Carnegie and Company of Gottenburg, for three thousand pound sterling, I have assured him that the same will be accorded by you on the usual terms and conditions.”

This letter was delivered to Bradford, but the bankers were notified that the letter was written and would be forwarded by Bradford to Carnegie and Company with a request for credit. This might have been treated as an offer by the defendant addressee to Carnegie and Company and accepted by them when they gave credit to Bradford. Counsel for defendants argued that it was only a contract between defendants and Bradford that the former would give the latter credit, so that the plaintiffs were not parties to it and could not sue on it. Answering this argument, Shaw, C. J., said:

“He (Bradford) had funds either in cash or credit with the defendants and entered into a contract with them to pay a sum of money for him to the plaintiffs. . . . He gave the plaintiffs notice of what he had done and sent them the instrument as authentic evidence of the fact. They assented to and affirmed it as an act done in their behalf and gave the defendants notice thereof and conformable to the terms of the letter of credit drew their bills on the letter of credit. The refusal to accept was a breach of the promise thus made. . . . It would be vain to say that this promise was not made for the benefit or (according to the terms of some of the cases) for the interest of the plaintiffs.”

This looks very much like a theory of a contract between the issuer and holder for benefit of addressee. But such a theory would not

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<sup>55</sup> 2 Met. (Mass.) 381 (1841). See also on “right of third party to sue,” 25 L. R. A. 257, note; *Franklin Bank of Baltimore v. Lynch*, *supra*.

be tenable in jurisdictions which reject entirely the doctrine of allowing actions upon contracts by third party beneficiaries; and even where the doctrine is recognized, as it now generally is, still it involves so many difficulties and uncertainties that it would be a misfortune if it were resorted to and relied upon in connection with any instruments of general commercial importance.

A theory of estoppel was employed in *Johannessen v. Munroe*.<sup>56</sup> Here the holder obtained a letter of credit from the issuer upon false representations and turned it over to the addressee, together with \$500 in cash, in payment of an outstanding indebtedness upon which the addressee was about to sue, whereupon he forbore suit. At the time this was done, the holder wrote (falsely) to the issuer that the letter had been delivered to the addressee in the regular course of business and that the addressee would avail himself of it accordingly. Before closing the transaction addressee inquired of the issuer as to the genuineness of the letter and was advised that it was genuine, that it would not be canceled, and that payment of drafts drawn pursuant thereto would not be stopped unless the holder gave notice that it had fallen into improper hands. Nevertheless on the day on which the addressee concluded his arrangement with the holder, the issuer canceled the letter, claiming it was being used improperly. The grounds of defense were, first, that the letter had been obtained by fraud and plaintiff was not a holder in due course for value; and, second, that the holder was not authorized to use the letter as he did. In the Appellate Division, the majority of the court, in sustaining a judgment for plaintiff, relied upon a passage in Daniel on "Negotiable Instruments,"<sup>57</sup> and held that delivery to the plaintiff and action thereon by plaintiff in good faith by forbearing to sue on his claim would cut off all defenses of the issuer. The Court of Appeals took the better ground of estoppel, saying:

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<sup>56</sup> 158 N. Y. 641, 53 N. E. 535, 9 App. Div. 409, 41 N. Y. Supp. 586, 84 Hun (N. Y.) 594 (1899).

<sup>57</sup> "While not possessing the characteristics of negotiability which pertain to bills and notes [they] partake of them to such an extent as to be necessarily classed as negotiable instruments." 2 DANIEL, NEGOTIABLE INSTRUMENTS, 3 ed., § 1790. All that this means is that if the letter is acted on according to its terms, the issuer cannot set up that he was defrauded into issuing it, nor go into the state of accounts between him and the holder. It is confusing to use the term "negotiable" in this connection. See 2 AMES, CASES ON BILLS AND NOTES, 783.



"We are of opinion that this entire transaction, beginning with the issuing of the letter of credit and closing with the settlement referred to, presents all the elements of an estoppel, and defendants are precluded from setting up a defense based upon the alleged invalidity of the letter of credit for any cause. . . . We have here the representation of certain facts by the defendants with knowledge that the plaintiff proposed to act thereon; the fact that he did so act and took the letter of credit and money in payment of his claim, releasing all parties from further liability. This constituted a taking of the letter of credit in good faith and for value. The plaintiff by the representations of defendants was induced to change his position, to give up his cause of action and proposed legal proceedings, acknowledge full settlement and payment of his claim, and to release all parties."

Gray, J., dissented on the ground that the letter of credit was a mere offer and that when it was discovered that the holder was about to use it for a different purpose than that which he had represented, it might be revoked. He was also of the opinion that taking on a precedent debt and giving a receipt for it did not constitute such a change of position as to raise an estoppel.

This decision obviously is quite out of line with the offer theory. In the first place if the letter was an offer it contemplated acceptance by addressee accepting bills drawn by the holder and in turn drawing on New York.<sup>58</sup> But, so far as appears, the letter had been revoked before any bills were drawn or accepted. If it be held that a promise not to revoke an offer makes it irrevocable, yet here there was no consideration for the issuer's promise, in

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<sup>58</sup> The letter read:

"No. 5687

Office of John Munroe & Co.  
Bankers, 32 Nassau St., New York  
Feb. 26, 1892.

Messrs. Munroe & Co.,

Paris:

Gentlemen:

We hereby open a credit with you in favor of Capt. J. A. Johannessen, S. S. *Raylton Dixon* for fifteen thousand francs (fcs 15,000) available in bills at ninety days date; on acceptance of any bill or bills drawn under this credit you are to draw on Carsten Boe, New York, at seventy-five days date; payable at the current rate of exchange for first-class bankers' bills on Paris on day of maturity. Commission is arranged.

Bills under this credit to be drawn at any time prior to May 1st, 1892.

Truly yours,  
John Munroe & Co."

"The bill may be availed of in sterling, if desired, say six hundred pounds sterling (£600).  
J. M. & Co."

answer to addressee's inquiry, that the letter would not be revoked. The majority of the court speak as if the letter were an evidence of indebtedness or even a negotiable instrument, so that the paper itself was taken by the addressee in payment of the precedent debt. But, if the offer theory is sound, the transaction between holder and addressee was really this: in consideration of the discharge of debt, the holder agreed to and did deliver the written offer to addressee so as to permit the latter to proceed to accept it. The discharge of the debt could not be an acceptance, for the terms of the offer exclude such a construction. Again, what did the issuer represent, which he is now estopped to deny, — addressee having changed his position on the faith of the representations? We may agree that after the letter was acted upon no claim of fraud in its inception might be urged. But in connection with the more difficult point as to revocation and the use made of the letter by the holder, what does the letter represent? It purports to be an authority to draw bills and a clearly implied promise to accept and pay them; and the answer to addressee's inquiry, beyond being a representation of the genuineness of the paper, is but promissory — promising in effect that the letter would not be revoked and that payment of drafts thereunder would not be stopped. And yet the court palpably feels that there is something else involved in the very issuance of a letter of this sort, — that inherently and by general commercial understanding it represents something else. What is this something else? What can it be but that the issuer had funds of the holder to the amount of the letter which he held by the direction of the holder to the use of the addressee subject to the terms of the letter? If the letter amounted to such a representation, then, the moment the addressee acted thereon and changed his position on the faith thereof, the issuer was estopped to deny that he held the money to addressee's use, and was liable, whether the change of position amounted to an acceptance of an offer or not. Other courts have taken a similar view of such letters.<sup>59</sup>

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<sup>59</sup> "He had funds either in cash or credit with the defendants and entered into a contract with them to pay a sum for him to the plaintiffs." *Shaw, C. J., in Carnegie v. Morrison*, 2 Met. (Mass.) 381 (1841).

"Anyone to whom such letter might be shown in the course of business, as the predicate of a transaction, would infer and be justified in the belief, that the writer had agreed to be bound for the use of it, either for his accommodation or because he was indemnified by effects in hand, or upon some good consideration, and would not

Summing up the Anglo-American cases, may we not say: *First*: The orthodox theory undoubtedly is one of an offer, becoming a contract when the addressee complies with its terms. This theory meets most of the cases of the past well enough, but fails in those cases in which the issuer has been held although he revoked before the terms had been complied with or although they had not been complied with. *Second*: The guarantee theory involves too many difficulties and is unsatisfactory, so that courts have inclined not to use it even when the instrument in form called for it. *Third*: The theory of a contract between issuer and holder for the benefit of addressee has only been suggested in the cases and involves so many difficulties and uncertainties as to be unsatisfactory. *Fourth*: The theory of estoppel may be made to meet all the cases if we treat the letter as a representation to the addressee that the issuer has money of the holder to his use, and say that he is estopped to deny this representation when the addressee has acted upon it. This is the only view advanced in the books that will meet the cases where recovery was allowed, although there was revocation before the doing of the act prescribed by the letter, or although the prescribed acts were not done at all. *Fifth*: Throughout the cases we may note the courts feeling, more or less subconsciously, that we

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entertain the thought that it was incumbent on him to inquire into the state of dealings between the writer and the use of the letter, for the purpose of learning whether there was any contingency about it, or whether any change of circumstances between the date of the letter and the advances under it would affect the liability of the writer." *Pollock v. Helm*, 54 Miss. 6 (1876).

Is not this what is meant by the "guaranty of the credit" of the holder in *Lafargue v. Harrison*, *supra*?

"The doctrine of the liability of a party, giving authority to draw, to any *bonâ fide* holder of the bill drawn pursuant to such authority, lies at the foundation of the law governing "letters of credit" in the commercial world. . . . In this case the plaintiff was a holder . . . for *value*, and is not affected by the state of accounts between (holder) and (issuer)." *Franklin Bank of Baltimore v. Lynch*, 52 Md. 270, 282 (1879).

The analogy of money had and received to use of a third person is employed by Marshall, C. J., in *Lawrason v. Mason*, 3 Cranch (U. S.) 494 (1806). See also *Krakauer v. Chapman*, 16 App. Div. 115, 45 N. Y. Supp. 127 (1897). There the letter provided for bills at thirty days. One was drawn and paid. Before a bill could be drawn for the remainder of the indebtedness incurred on the faith of the letter, the holder absconded so that the drawing of a further draft became nugatory. The addressee was allowed to recover directly from issuer the amount of the unpaid indebtedness. Here the offer had not been accepted according to its terms; but the issuer had represented that he held funds of the holder to the use of the addressee and the latter was allowed to recover those funds to the extent of his interest.

have here a substantive institution of the law merchant, which ought to be sustained on its own basis; and that whatever common-law theories may be convenient for the purpose are to be resorted to in order to fortify it. It is significant that no deliberate written promise of a business man or commercial entity made as a business transaction to answer for credit extended on the basis of the writing has failed of enforcement in our courts.<sup>60</sup>

Let us now apply these several theories to the actual form of letters in general use to-day in our export trade and test them by the problems to which those forms and the requirements of modern business give rise.

### III

Although letters of credit in our foreign trade vary greatly in form, it is possible to group them into four well-marked types, with many variations of form in each type. The words "confirmed letter of credit," or "irrevocable letter of credit," or both, appear or seem to be implied in each type; and it is on these words that the business world seems to put its main, if not its whole reliance. Leaving these words out of account for the moment and looking at the purport of the letter apart therefrom, we may take as our first type those whose words suggest immediately a notification or acknowledgment by the issuer of the receipt of money to the use of the addressee, to be paid him upon compliance with the terms of its receipt, which are stated as conditions in the letter.<sup>61</sup> Refer-

<sup>60</sup> The cases in note 45, *supra*, are an apparent exception. But the case in the federal court was one at *nisi prius* and the instrument was vague in its terms and by no means an ordinary letter of credit. In the Georgia case the language used, "we will carry you," was addressed to the holder, and evidently contemplated an extension of existing indebtedness only. What is said as to agreements for acceptance is but *dictum*. In the New York case a majority of the court upheld the letter.

<sup>61</sup> The following is an example of this type:

[Amount]	[No.]	[Date]
[Addressee]:		

At the request and for the account of [holder] we have opened a confirmed credit in your favor, bearing the above number, available by drafts at sight to an aggregate amount of [amount of credit] for [purposes of credit].

Payments to be made against delivery to us of properly endorsed negotiable railroad bills of lading together with receipted invoices in triplicate at the above stated prices.

This credit to remain in force until .....

Any draft drawn under this credit must state that it is drawn under [description,

ence to the forms as set forth in the note will show that they contain (a) a statement that a "confirmed" credit has been opened in favor of the addressee for the account of the holder, which as we have seen courts have construed as a representation to the addressee that funds of the holder of the letter had been received and were held to the use of the addressee; (b) a statement of the conditions of the credit, or in other words, of the terms on which the funds were received and are held to the use of the addressee; (c) an authority to draw drafts on the issuer to the amount and under the conditions set forth; and (d) often an express promise to honor such drafts. This type of letter might be treated on the offer theory and could be upheld in that way. But it is perfectly obvious that those who draw and act on letters framed in such terms have in view something much more assured, permanent, conclusive and irrevocable than an offer.

Letters of the second type are evidently drawn under the advice of counsel impressed with the offer theory of the cases we have discussed. Such letters are drawn in the form of offers, which are to become contracts upon acceptance by performing the terms set forth in the letter.<sup>62</sup> Here there is no direct suggestion that funds

date and number of letter] and must be addressed to [issuer] and the amount of the draft must be noted on the back hereof by the negotiating bank or bankers.

We hereby agree with the *bond fide* holders that all drafts issued by virtue of this credit and in accordance with the above stipulated terms, shall meet with due honor upon presentation at the office of the [issuer] if drawn and negotiated by [expiration date].

[Signature of issuer]

The following form, falling within the same type, suggests both money received and held to the use of the addressee and also notification of a contract between holder and issuer for the benefit of addressee:

[Addressee]

[Date]

We received today from [foreign correspondent bank] a message as follows:

"Account [name of holder] open following confirmed credit [amount of credit] favor [name of addressee] against [terms and purposes of credit]."

Of which kindly take notice.

The credit will remain in force for [period of credit] and the same is hereby confirmed for the account of [foreign correspondent Bank]. [No. of Letter]

[Signature of Issuer]

<sup>62</sup> An example of this type is:

Irrevocable Export Credit No.

[Expiration date]

[Addressee]:

You are hereby authorized to draw upon us for account of [holder] at sight to the extent of [amount of credit] covering [purposes and terms of the credit]. Payment to

are held; at most this could only be inferred from the authority to draw on the issuer for the account of the holder. What is most notable in this type is the care with which the authority to draw upon the issuer is brought within the terms of *Coolidge v. Payson* as interpreted in later cases in the Federal Supreme Court. Summarily stated letters of this type contain (a) a statement by way of caption, but not in their body or text, that they are "confirmed" or "irrevocable;" (b) an authority to the addressee to draw on the issuer for the account of the holder with a precise description of the drafts to be drawn. Looking only at this second element, these letters are clear enough; but they raise at once the question why if this is all there is to them, should the issuer say at the top of the instrument that it is "confirmed" or "irrevocable?" Does he mean to add something to the second element, and if so, what? In business understanding the answer is obvious, but in law we must inquire.

In a third type the form of letter suggests a contract between the holder and the issuer for the benefit of the addressee whereby the addressee is to be paid by the issuer on condition of his performing the terms of a contract which he has made with the holder. The letter takes the immediate form of a notification to addressee of the former contract.<sup>68</sup> Unless, because of the obvious disadvantages involved the courts were to twist such letters into offers, as we have seen them do where the instrument in form used language importing guarantee or suretyship, there is little in the text of this type of letter to lay hold of for any other common-law theory than one of notification of a contract between holder and issuer for the benefit of addressee. But such letters are also usually captioned, or in collateral correspondence are stated to be "con-

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be made against [statement of documents required]. Drawing must clearly specify the number of this credit.

[Signature of Issuer]

<sup>68</sup> Following is an example:

[Addressee]:	[No.]	[Date]
We have received instructions from [holder] to pay you against your receipt in triplicate any sum or sums up to [amount of credit] against shipment of [terms and purposes of the credit]. This letter to be presented with your receipts and documents.		
		[Signature of Issuer]

Sometimes a contract between holder and issuer is expressly stated, e. g., "we have received instructions from [holder] with whom all necessary arrangements have been made"; also such forms may include an authority to draw.

firmed," or "irrevocable," or sometimes "confirmed and irrevocable letters of credit." This raises at once the question whether the text of the instrument is not an informal attempt to express a transaction of another sort rather than that indicated by the text taken alone — a transaction well known to the commercial world by the name given it.

Lastly there is a fourth type drawn apparently with no theory in mind other than the business understanding of a "confirmed and irrevocable letter of credit," and on the assumption that the written promise of a business man in the course of business is self sufficient.<sup>64</sup> Here it will be observed there are no words suggesting the holding of money to the use of the addressee, and unless some meaning is attributed to the very words "confirmed letter of credit" which will bring it within the theory of a representation of money held to the use of addressee or the theory of an offer, the addressee must bestir himself to show a consideration by proof that the letter was issued in exchange for his then and there entering into a contract with the holder, or something of the sort. Either that or we must go outside common-law theory and look to the law merchant to uphold such letters.

As the matter stands in the decisions, the first type, from the standpoint of the exporter, is clearly the most satisfactory. In view of commercial usage, the understanding of the business world, and the decisions of the New York courts in *Johannessen v. Munroe*<sup>65</sup> and *Krakauer v. Chapman*<sup>66</sup> it may well be contended, and it is submitted, that courts which are reluctant to go further should hold, as the minimum of progress demanded, that use of the words

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<sup>64</sup> For example this form:

Irrevocable Letter of Credit

[No.]

[Date]

[Addressee]:

At the request of [holder] we hereby open an irrevocable letter of credit, [No. ] in your favor to the extent of [amount of credit] against [terms and purposes of credit] available until [expiration date] under the contract between yourselves and [holder].

We hereby agree and promise to pay you the amount above mentioned upon presentation of the documents in compliance with the terms of this credit.

[Signature of Issuer]

Other variations of these forms may be found in HOUGH, PRACTICAL EXPORTING, 544 ff.

<sup>65</sup> 158 N. Y. 641, 53 N. E. 535, 9 App. Div. 409, 41 N. Y. Supp. 586 (1899).

<sup>66</sup> 16 App. Div. 115, 45 N. Y. Supp. 127 (1897).

"confirmed letter of credit" or their equivalent should be construed to mean an acknowledgment of money received and held to addressee's use. What does the letter "confirm," if not this? But the more direct statement of the first type obviously gives a better assurance.

So, from the exporter's standpoint, the second type is more satisfactory than the third or fourth. Forms of this type clearly owe their origin to an effort to adapt what I have called the tourist type of letter, and the common-law theory of an offer, to the circumstances of trade to-day, rather than to the French theory of the modern letter as testifying to an *ouverture de crédit*. One conspicuous difference between the first and the second type, if the second is to be handled legally on the offer theory solely, will suffice to show why the first type is better suited to protect the exporter. In a letter contemplating successive instalments of delivery or performance, and authorizing the vendor-addressee to draw for each instalment as delivered, there would be, if the instrument is but an offer, a complete acceptance of the offer *pro tanto* with each delivery, but the offer could be revoked as to future instalments. Yet it may well be that the addressee has changed his position in arranging to take care of the whole series of instalments. In that event if the instrument amounts to an acknowledgment of money held to the use of the addressee, action thereon by the addressee would work an estoppel upon the issuer to deny that it was so held. Hence, as in *Krakauer v. Chapman*,<sup>67</sup> addressee might recover, without exactly doing the things prescribed, if he performed the substance of the conditions on which the money was held to his use. If to avoid an unfortunate result the estoppel theory is applied to a letter of the second type, the effect is to put the letter in our first type by construction.

The third type must be pronounced much less satisfactory. It is true, according to the great weight of American authority, the addressee-beneficiary may sue the issuer-promisor upon such a contract. Also by good authority, after notification of the contract to the addressee-beneficiary, the holder-promisee and issuer-promisor could not rescind so as to cut off the action of the addressee-beneficiary. But these doctrines of suit by third persons

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<sup>67</sup> 16 App. Div. 115, 45 N. Y. Supp. 127 (1897).



upon contracts between others for their benefit and of the effect of notification upon the power to rescind such contracts, are so unsettled in their details, raise so many nice questions and are dealt with so differently in different jurisdictions,<sup>68</sup> that no lawyer would feel justified in advising an exporter to rely upon an instrument where it could only be construed as notification of a contract between issuer and holder for his benefit.

On any purely common-law theory, the fourth type seems thoroughly unsatisfactory. Without some *tour de force* of judicial construction, not without precedent as we have shown, the addressee in this type must establish a consideration, and it may not always be easy or even possible to do so. And yet some brief and simple form on the lines of this fourth type ought to be sufficient. It is late in the day for the law to be insisting that business instruments shall set forth the obvious with elaboration and detail. The days when nothing could be left to inference are past everywhere except in criminal pleading. A deed no longer is required to describe all the appurtenances in detail or even to speak of appurtenances in detail at all. Statutory forms are allowing the one word "warrant" to do the work of four elaborate covenants in a common-law conveyance. Express warranties have more and more been replaced by warranties implied in the transaction, and the whole subject has been settling down to the rational basis of exacting what good faith would require in view of expectations reasonably arising from what was said or done; so that we are beginning to be able to give legal effect to instruments even though they do not "exclude every misinterpretation capable of occurring to an intelligence fired with a desire to pervert."<sup>69</sup> Is there not too much of this sort of archaic legal formalism still involved in instruments having to do with important business transactions? The mere promise to accept drafts, the mere promise not to revoke, the mere deliberate word and deliberate intention of a business man or a commercial entity, committed to writing as a business transaction, avail nothing. Hence, either the courts must recognize the confirmed letter of credit as a legal transaction of the law merchant, standing on its own bottom, or they must treat the words "confirmed letter of

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<sup>68</sup> Williston, "Contracts for the Benefit of a Third Person," 16 HARV. L. REV.

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<sup>69</sup> Holmes, J., in *Paraiso v. United States*, 207 U. S. 368, 372 (1907).

credit" as importing something unexpressed which will accomplish the clear intent of those who issue and those who receive these instruments, or else important business interests must go unsecured and unprotected by law and business men must be driven to find ways of protecting themselves outside of the law.<sup>70</sup>

If we are not yet prepared to treat letters of the fourth type squarely on business usage as part of the law merchant, the burden of sustaining them must fall on that "much enduring word," estoppel. The New York cases show us a way out which has a real basis in the actual course of business. Normally in domestic commerce the purchaser, having contracted with the seller, goes to a bank, deposits money with it or makes arrangements for a loan whereby there is in effect a deposit of the money borrowed, and the bank issues the letter. Here, these facts being proved, the letter evidences that the bank has received and holds money to the use of the seller, upon the conditions named in the letter. In foreign commerce, the buyer contracts usually with the seller's agent abroad. He then goes to a foreign bank, deposits money or opens a credit — which by the continental law is the same thing — and the latter forwards the money to or sets up a credit with a New York bank, or forwards the money to or sets up a credit with such correspondent of the New York bank as the latter may designate. In either event, the New York bank, holding money or what it considers in substance the equivalent, issues the letter of credit, which the buyer-holder then turns over to the seller-addressee, or more commonly sends direct to such addressee at buyer-holder's request. From the nature of the case, it would be an intolerable hardship upon the addressee to compel him to prove that these several steps actually took place in any given case. Therefore, when the letter is issued, may not the addressee reasonably assume that these steps have taken place and understand the letter as so representing to him? If this is a reasonable interpretation and he acts on it, the issuer is estopped to deny the facts so represented. Hence, whenever the words "confirmed letter of credit" or their

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<sup>70</sup> Is this not shown by the way in which business, disgusted with the backwardness of the law or more particularly of legal procedure, constantly resorts to extra-legal ways of adjusting controversies, as through Boards of Trade, Chambers of Commerce, Trade Associations, etc.?

equivalent are used, the letter should be taken as representing that money is held by the issuer to the use of the addressee, subject to the terms of the letter.

From the standpoint of the issuer, assuming that he or it intends to act in good faith, we should come to the same conclusions. If the issuer has funds of the holder or has taken pains to be secured before issuing the letter, he is in nowise prejudiced by a form of letter and a legal attitude towards such letter that will fully protect the addressee; and every issuer will be sure to require funds or proper security if he knows that the law will treat the letter as presupposing them. The point that seems most important to the issuer is to have the terms and conditions set forth so simply and clearly in the letter that he may pay with assurance upon inspection and receipt of documents and will not become involved in possible controversies between holder and addressee over the construction of an elaborate contract between them. In this respect, such express incorporations of the buyer-seller contract into the letter by reference as in the form in note 64 are of doubtful wisdom.

From the standpoint of the holder, again assuming that he intends to act in good faith, there can be no interest in any form or any state of the law which does not fully secure the addressee. The latter can only reach the credit by complying with its terms or, if some breach of contract by the holder makes that impracticable, by complying with his contract with holder so as to make the holder in justice and in law his debtor thereunder; so that for the most part the terms of the letter and the terms of the contract afford him all needed security. Nevertheless as the letter cannot well make all the terms of the contract express conditions without involving the issuer in risks he should not assume, it must be admitted that the buyer-holder, dealing with the seller-addressee at long range may be at a certain disadvantage on any theory of the letter which will be satisfactory to addressee and issuer. The obvious mode of protecting the buyer-holder, by provisions for inspection of goods bought under the contract and making, let us say, an inspector's certificate a condition precedent in the letter, would raise at once the difficulties with which lawyers have become familiar in cases of express conditions calling for architect's certificates, surveyor's certificates, opinions of lawyers as to title,

magistrate's certificates of loss, and the like.<sup>71</sup> Experience of these conditions and of the legal questions involved in them has not been such as to commend them for commercial purposes. It must be for the ingenuity of business to find some better mode of protecting the buyer-holder, if such protection is needed.

#### IV

The authorities say that a special letter of credit, *i. e.*, one addressed to a particular addressee, is not assignable.<sup>72</sup> On the other hand the understanding and custom of business men to a certain extent is different. Questions usually discussed under the head of assignability of letters of credit arise where the addressee seeks to pledge the letter or to assign it as security; in cases of business changes, as where an addressee partnership is changed or incorporated or a new corporation succeeds to the business and good will of an old one, or a merger or a consolidation occurs; in cases of a sub-contract or a number of sub-contracts with the seller-addressee; or further where a letter addressed to a particular addressee nevertheless expressly states that it is assignable, or contains an express power of designating those in whose favor it may be made available. How shall we treat these cases?

Where one attempts to assign such a letter, it is clear that under the offer theory no one may accept the offer, and thereby make a contract with the issuer, except the addressee to whom alone the offer is made. On the guarantee theory, the guarantee runs only to the creditor named, and no secondary liability can be incurred to anyone else except by means of a new contract. This rule has been applied very strictly to cases of business changes.<sup>73</sup> On the theory of contract for benefit of a third person, no one but the third person for whose benefit it is expressly made may avail himself thereof. On the estoppel theory, the representation is made only to the addressee; and it would seem that no one else may reasonably rely on or act upon a representation expressly addressed to a

<sup>71</sup> *Tullis v. Jacson*, [1892] 3 Ch. 441; *Nolan v. Whitney*, 88 N. Y. 648 (1882); *Chicago R. Co. v. Price*, 138 U. S. 185 (1891); *Insurance Co. v. Pulver*, 126 Ill. 329, 18 N. E. 804 (1888).

<sup>72</sup> *Robbins v. Bingham*, 4 Johns. (N. Y.) 476 (1809); *Birkhead v. Brown*, 5 Hill (N. Y.) 634; *Walsh v. Bailee*, 10 Johns. (N. Y.) 180 (1813).

<sup>73</sup> *Sollee v. Mengy*, 1 Bailey, Law (S. C.) 620 (1830); *Smith v. Montgomery*, 3 Texas, 199 (1848); *Crane v. Specht*, 39 Neb. 123, 57 N. W. 1015 (1894).

particular person, for his purposes only, and on its face not intended to be shown to or relied upon by anyone else. Consequently no one else may invoke an estoppel.<sup>74</sup> When, therefore, the addressee assigns or puts up the letter as security, the only legal right of the pledgee would seem to be a right to the possession of the paper. Without the paper, the addressee cannot enforce his rights against the issuer nor negotiate bills. Thus the right of possession of the paper is a valuable one and by its mere possession the pledgee is in a position to exert pressure upon the pledgor for his security. The case is legally like the deposit of title deeds in English law,<sup>75</sup> and suggests the question whether the pledgee of a letter of credit obtains any lien in equity. But what has the addressee-pledgor to give him? Certainly he has nothing *in praesenti* on any of the theories considered.

Turning to the theory of the letter as an acknowledgment of money received and held to the use of addressee, we get a like result. True, in an ordinary case of money had and received, there is a debt enforceable in a money count, which debt may be assigned. But here the money is held to the use of the addressee upon condition and there is no assignable debt until the condition is performed. Nor is the result different upon a theory of the letter as an instrument of the law merchant. For the letter by its very terms does not contain a power of negotiation as in the case of commercial paper payable to order or bearer. Consequently the position of the assignee for security seems to be simply that of one who for his security has possession and right of possession of a document without which the pledgor thereof cannot realize a valuable possibility. When the possibility has come to fruition in an actual claim *in praesenti*, equity might then consider the pledgee of the letter an equitable lien-holder.<sup>76</sup> But this could scarcely happen without the production of the instrument, so that possession of it and consequent control of the situation is the pledgee's real security. In a case like *Krakauer v. Chapman*<sup>77</sup> the theory of money held by the issuer to the use of the addressee would be advantageous to the pledgee. If the addressee may sometimes have a claim against the

<sup>74</sup> *Fletcher Guano Co. v. Burnside*, 142 Ga. 803, 83 S. E. 935 (1914); *Robbins v. Bingham*, *supra*.

<sup>75</sup> 3 POMEROY, EQUITY, 3 ed., § 1264.

<sup>76</sup> *Ibid.*, § 1237.

<sup>77</sup> 16 App. Div. 115, 45 N. Y. Supp. 127 (1897).

issuer *in praesenti* without complying with impracticable terms of the letter, yet obviously he could not sue and enforce that claim without the letter. In such a case, on established principles, the pledgee of the paper would have an equitable lien.<sup>78</sup>

Where business changes take place the case is more difficult. For reasons already set forth there is no help in such a case on theories of offer, or guarantee, or contract for the benefit of a third person. If we think of the letter as an acknowledgment of money held to the use of the addressee upon condition, we must ask whether the condition can be performed. And this resolves itself into a question whether the buyer-seller contract may be assigned. If that contract can be assigned to and enforced by the business successor, it is submitted that the latter may perform the conditions of the letter and enforce it. Ordinarily when such business changes take place the parties no doubt will take care to make an express agreement obviating such questions. But if the buyer-holder should seek to take advantage of the situation to escape from his contract and hence refuse to enter into or sanction a new agreement, the point might well be important.

In case of sub-contracts, what has been said as to pledge of the letter by the addressee becomes applicable. The addressee, where there is a sub-contract given by him, may deposit the letter with the sub-contractor which will raise the same questions as the deposit of the letter for security. Where there are a number of sub-contracts, so that this course is not possible, the addressee might deposit the letter with a trustee for the benefit of the sub-contractors according to their several interests. But the usual plan is to deposit the letter with a bank as security and ask the bank to issue new letters of credit addressed to each of the several sub-contractors.

A letter which is expressly made assignable raises questions like those which arise upon a general letter. Such an instrument amounts to a letter addressed to the addressee or to such person or persons as he may turn it over to. Or, if the letter is in the form of authority to draw, it amounts to a power conferred on the addressee to designate those who may avail themselves of the offer. Letters sometimes contain express powers of designation of this

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<sup>78</sup> *Harrison v. McConkey*, 1 Md. Ch. 34 (1847); *Ruckman v. Ruckman*, 33 N. J. Eq. 354 (1880); *Pringle v. Pringle*, 59 Pa. St. 281 (1868); *Pierce v. Bank*, 129 Mass. 425 (1880); *Hill v. Stevenson*, 63 Me. 364 (1873).

sort. They raise no difficulties on the offer theory, as the terms of the offer provide how the offeree shall be ascertained. They raise no difficulties on the theory of the letter as an acknowledgment of money held to the use of the addressee, for the letter expressly empowers the person to whose use the money is held on condition, to designate the others to whose use it may be held on like conditions, and it is a representation that the money is held to such uses on which any one so designated may reasonably rely and may thus raise an estoppel in his favor.

So much for so-called questions of assignability. Suppose that the buyer-holder becomes insolvent and the security of the issuer fails after the seller-addressee has done a substantial part of the work of manufacture, but before he has made deliveries and drawn on the issuer, and the issuer in this interval seeks to cancel. On the offer theory this brings up the much mooted question of an offer requiring by its terms a series of acts to constitute acceptance, which offer is revoked after part of the series of acts has been performed, to the prejudice of the offeree, but before acceptance is complete.<sup>79</sup> Courts have usually been able to avoid this question by straining construction of the transaction so as to make it a bilateral contract, treating the partially completed acceptance as part performance of a bilateral contract. But if the offer theory of letters of credit is adhered to, this way of escape is not open in the present case since by our hypothesis the letter is but an offer and the action of the addressee admits of no other possible construction than that of acts falling short of acceptance. Moreover, they are acts in performance of the contract with the buyer-holder and not acts directly in acceptance of the issuer's offer. Protection of the seller-addressee in such a case clearly requires a theory of the letter as acknowledging that money has been received and is held to his use or else a theory of the letter as a substantive transaction of the law merchant. A situation similar on principle where the letter is conditioned on instalments of delivery has already been discussed.

Let us carry back the foregoing situation one step further. Suppose the buyer-holder, perhaps to make a more advantageous contract elsewhere, seeks to pull out from the sales contract before

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<sup>79</sup> McGovney, "Irrevocable Offers," 27 HARV. L. REV. 644.

the seller-addressee has done anything toward performance, and so procures the issuer to attempt cancellation of the letter. It would seem that the letter might be canceled on the offer theory, even though it is stated to be irrevocable, since if we concede that a collateral agreement not to revoke an offer will make it irrevocable, there is nevertheless no consideration here for such agreement. Also it would seem that the letter under the theory of its being an acknowledgment of money had to addressee's use, might be canceled, unless the addressee can meet the burden of showing that the issuer *actually* received the money to his use, for the letter would be an admission only and no estoppel would be available. A contrary result would be reached on the theory of the letter as a notification of a contract between holder and issuer for the benefit of addressee, in jurisdictions where it is held that there can be no rescission by the contracting parties after the third-party beneficiary has been notified. This sort of situation calls for a theory of the letter of credit as a self-sufficing instrument of the law merchant.

What is the position of the issuer in case of controversies between the buyer-holder and the seller-addressee as to performance of the sales contract and construction of its conditions? The issuer could hardly become involved in such controversies nor incur risk because thereof if the letter were drawn with judgment, and liability thereunder were expressly made to depend on a few plain simple conditions. But this question may easily become important under some of the forms in current use which seem to incorporate the contract by reference and so make its terms conditions of the letter. If the issuer is in the position of one who has received money from A to the use of B upon a condition, it is obvious that circumstances may arise in which B will claim the money on the ground that the condition has been fulfilled while A will claim it on the ground that the condition has failed. In that event there is a typical case for interpleader, which would afford the issuer full protection were both holder and addressee within the jurisdiction. As the holder is usually abroad, the case is not so simple. But could not the issuer bring his bill of interpleader against the addressee and holder in a court where he could reach addressee and by notifying holder obtain a decree which would at least settle the rights of the addressee and bind the holder so far as the domestic



forum is concerned?<sup>80</sup> Short of this, the issuer's protection must be the conditions of the letter of credit and his security contract with the holder whereby he is protected so long as he abides by and exacts its conditions. It should be observed that in this situation the interests of both issuer and addressee are best subserved by a theory of the letter as showing that issuer holds money to the use of addressee. On such a theory, interpleader may clearly be resorted to, while on other theories of the letter the technical requirements of interpleader would raise many difficulties.

A letter of credit may or may not fix an expiration date, though it may be assumed that the contract between buyer and seller will always contain a time provision. Three possibilities suggest themselves: The letter of credit may expressly fix a date when the credit shall expire, or it may fix no date of expiration, or it may fix no such date but may contain a statement that it is to "expire by limitation." Questions may arise where the buyer-holder and seller-addressee afterwards modify the provisions of the sale contract as to time of performance. If the letter of credit expressly fixes a time, the addressee, on any theory of the letter, may not avail himself of the credit unless he complies with its terms within the time fixed. In mercantile contracts time is an essential term,<sup>81</sup> and whether the expiration date named in a letter be regarded as a limitation of an offer, or a condition precedent in an acknowledgment of money held to addressee's use, the result would be the same.

If no time is fixed much would depend on which theory is adopted. On the offer theory, no time being fixed, the offer would remain open for a reasonable time, and it would seem that in the absence of any other indication the limits of what is reasonable would be determined by the time provisions of the buyer-seller contract. On the guarantee theory the sales contract would be the principal obligation and it would follow that any time modification thereof without the issuer's knowledge and consent would release his liability. On the theory that the letter of credit is a notification of a contract between holder and issuer for benefit of addressee, we should have to be governed by that contract, if we could ascertain

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<sup>80</sup> *Stevenson v. Anderson*, 2 Ves. & B. 407 (1814).

<sup>81</sup> *Norrington v. Wright*, 115 U. S. 188 (1885).

its terms, in the absence of any representation of them in the notification; and as that contract would probably simply be one to pay what should accrue to the addressee under the terms of the then existing buyer-seller contract, in which, as a mercantile contract, time would be an essential element, any modification as to time would thus seem to be a new contract between buyer-holder and seller-addressee to which the contract between buyer-holder and issuer for the benefit of the addressee would not be applicable. On the theory of money received and held to the use of addressee on condition, the issuer would seem to be in the position of a stakeholder for buyer-holder and seller-addressee according to their respective interests, subject to such conditions as the letter may contain. If so, no conditions as to time being imposed, the parties should be able to fix those interests between themselves by further contract, if they choose. In Japanese forms, where no time is fixed, it is not uncommon to find a provision that "this letter expires by limitation." This presumably originates in a provision of the Japanese law,<sup>82</sup> taken from German law,<sup>83</sup> requiring express reservations of power of revocation and express provisions for lapse. It effects nothing that would not take place in our law without such clause, so that what has just been said would apply.

We should also consider the question of inability to perform the conditions, and the effect of supervening events (*e. g.*, government embargo, fire, strikes, etc.) upon the obligations incurred by the letter. It may well be that the buyer-seller contract will contain provisions as to these things and yet they will not be provided for in the letter of credit. No doubt in general, the parties being agreed in desiring the execution of their contract, extensions of credit would be arranged in such cases. But should the buyer-holder be desirous of withdrawing from his contract he might take advantage of the impossibility of performance of the conditions of the credit and, by trying to cancel, seek to embarrass the seller-addressee by compelling him to pursue his remedy for breach of the contract in a foreign land. In such a case, it would seem clear that on the offer theory of a letter, nothing short of the performance of the condi-

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<sup>82</sup> JAPANESE CIVIL CODE (De Becker's translation), Arts. 521, 524.

<sup>83</sup> GERMAN CIVIL CODE (Wang's translation), §§ 145, 147.

tions set forth could be an acceptance, and so if such performance became impossible, we should simply have the case of an offer which could not be accepted. The acts of the seller-addressee in the course of manufacture or filling his order under the contract would not really be acts preliminary to acts of acceptance but would be no more than acts in performance of the sales contract. Hence addressee's recourse would be an action as seller against buyer on the buyer-seller contract. Would the case be different on a theory of money received and held to the use of the addressee, or on a theory of the letter of credit as a self-sufficing instrument of the law merchant? If money is received and held to the use of another on an express condition precedent, it is not easy to see how that condition may be dispensed with. If one of the parties made performance of a condition impossible, he might be said to have "waived" it. But such would not be likely to be the case. It would seem that the addressee should consider the risk before he acts on the letter, and if he has reason to fear difficulty, should insist on provisions in the letter for extension of the credit on given contingencies.

It is true there is authority in New York, where there has been a tendency to deal with express conditions as if they were conditions implied in law,<sup>84</sup> which seems to indicate that where there is a debt between holder and addressee, incurred by holder through use of the letter, the issuer may be liable although performance of the conditions is not possible. In *Krakauer v. Chapman*<sup>85</sup> the letter of credit read as follows:

"X will send you an order for goods he requires and is authorized to draw on me in your favor for the amount of your bill at thirty days' sight."

X ordered goods to the amount of \$1000. Addressee did not have all the goods required to fill the order at the time, but delivered \$900 worth of goods at once and the balance later. When the last delivery was made X drew upon the issuer for half the order and the bill was accepted and paid. Afterwards X absconded and after unsuccessful attempts to collect from him, the addressee after eight months drew on issuer for the balance. When the first

<sup>84</sup> *Nolan v. Whitney*, 88 N. Y. 648 (1882); *COSTIGAN, PERFORMANCE OF CONTRACTS*, 41-43.

<sup>85</sup> 16 App. Div. 115, 45 N. Y. Supp. 127 (1897).

draft was made, issuer had funds of X sufficient to meet the whole amount of the order, but at the time he was notified that there was an unpaid balance, he no longer had funds of X. A judgment for the addressee was affirmed on the ground that as the drawing of a further draft by X became impracticable because he had absconded, the issuer was obligated to pay for the goods in another way. Two of the five judges dissented. As the letter appears to contemplate one draft for the amount of one order, and one draft had been drawn and honored and the issuer, after eight months, had ceased to hold funds for X, one may well ask whether the circumstances did not amount to a representation to the issuer that the credit had been fully used and so raise an estoppel in favor of the issuer who had adjusted his accounts with the holder on the faith of this apparent state of things. Perhaps this was what one of the dissenting judges had in mind in saying that the second draft was not drawn in a reasonable time. At any rate the soundness of this decision of an intermediate appellate court is too questionable to justify reliance upon it for so doubtful a doctrine as one that courts may make parties' transactions over for them by dispensing with express conditions precedent.

In *Krakauer v. Chapman* performance of the conditions of the letter was impracticable because the condition called for the drawing of a draft by a party who had absconded. Another case more likely to arise may occur where the letter is conditioned in substance upon performance of a contract between buyer-holder and seller-addressee and the holder for any reason countermands his order or refuses to go on with the contract. Here after such a breach the law would not permit the seller-addressee to proceed with further performance of the contract, and thus performance of the conditions of the letter would become impracticable. In such cases, if the letter is treated as acknowledging that money of the holder has been received and is held to the use of the addressee upon condition, and a breach of contract by the holder renders it impracticable for the seller-addressee to go on and hence impracticable to perform further the conditions of the letter, how far is the estoppel to deny that money of the holder is in the issuer's hands, raised by the addressee's acting on the faith of the letter, available to the addressee for the purpose of reaching such fund by attachment or garnishment in an action on the contract by ad-

dressee against holder? It will be observed that the forms of contract sometimes used to secure the issuer, prior to his issuance of the letter, cover all loss or damage to him arising from his issuance of the letter and so fully protect him.<sup>86</sup> No inequitable result would follow from the application in this way of estoppel; for the estoppel is raised by the circumstance that the addressee has relied and acted upon a reasonable understanding of the letter as acknowledging that the issuer holds moneys or funds of the holder. Why is this estoppel not as available to enable an addressee who acts promptly to protect himself in case a holder breaks his contract, as it is to enable him to draw drafts where the contract has not been broken but the issuer seeks to cancel his letter? Perhaps some such conception was in the mind of the Court in *Krakauer v. Chapman*.

## V

Of the several common-law theories developed in the cases growing out of the old time letter of credit, we have already seen that the offer theory was on the whole the orthodox theory in the sense that it has the support of the larger number of judicial opinions, but that it failed to explain all the cases; whereas the theory of the letter as an acknowledgment of money held to the use of the addressee on condition will explain all the cases and has the support of some of the strongest decisions. Applied to the forms of export letters of credit now in use and to the problems arising thereunder, the guarantee theory and the theory of notification of a contract between holder and issuer for the benefit of addressee are both as unsatisfactory as they proved to be when applied to the cases of the past, and they may be dismissed without further comment. Of the two more satisfactory theories, that of money held to the use of addressee best meets the test of the present day forms of such letters and the needs of business under the problems they raise. The offer theory is impotent to give effect to the words "confirmed" or "irrevocable" on which the business man sets such store; is inadequate where the issuer in an instalment contract seeks to cancel as to subsequent instalments after the delivery of one or more instalments; is inadequate where the holder seeks to

<sup>86</sup> See form in HOUGH, PRACTICAL EXPORTING, 548; also *Vaughan v. Mass. Hide Corporation*, 209 Fed. 667 (1913), where issuer's indemnity contract also provides for lien on goods and special trust receipts.

withdraw and induces the issuer to try to cancel after the seller-addressee has begun to perform his contract; is inadequate where the buyer-holder seeks to pull out or break the contract by anticipation, before the seller-addressee has done anything thereunder; is unsatisfactory in case of business changes and gives rise to doubtful questions in situations where the issuer may need the protection of a bill of interpleader. In all these cases the theory of money held to the use of the addressee proves much more satisfactory, and if we must have a strictly common-law theory, it is much to be preferred.

But all the requirements of the situation are met and on the whole are better met by treating the letter of credit as a self-sufficing instrument of the law merchant. In the end nothing will do so well as a frank and full recognition by law of the universal understanding of the commercial world. To bring this about, bankers should agree on a simple, uniform letter, and the courts should give effect to it for what it is intended to be. Perhaps the timid, not to say false, conservatism of the courts may compel business men to turn to the Commissioners on Uniform State Laws and invoke the aid of the legislator. But legislation cannot come in time to take care of the litigation that is almost certain to flow presently from the enormous volume of business done under these letters in the last four years. The courts may, if they will, do all that is needed; for, I repeat, it is a false conservatism that stands in their way. Courts are properly cautious in abandoning rules or doctrines, since to do so may endanger the stability of our economic order by disturbing the transactions of the past and unsettling acquisitions; but there is nothing truly conservative in adhering to conditions of uncertainty in the laws governing commerce, or in defeating or unsettling business transactions, carried on in large volume, by insisting on applying to them doctrines or theories developed for earlier and different conditions of trade, or in disturbing credit by making it uncertain whether the deliberate promises of business men made in the course of business as business transactions, and in practice relied upon with confidence in the every day course of our commerce, are to be legally enforceable. In the words of Cockburn, C.J.,<sup>87</sup>

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<sup>87</sup> *Goodwin v. Robarts*, L. R. 10 Ex. 337 (1875). Cf. 2 *MACHEN, CORPORATIONS*, §§ 1734 ff.; *Mercer County v. Hackett*, 1 Wall. (U. S.) 83 (1863); *White v. Vermont*, 21 How. (U. S.) 575 (1858). In *Mercer County v. Hackett*, Grier, J., says (page 95):

"Why is the door to be now shut to the admission and adoption of [commercial] usage, as though the law had been formally stereotyped and settled by some positive and peremptory enactment? . . . Why is it to be said that a new usage which had sprung up under altered circumstances, is to be less admissible than the usages of past time?"

Let us hope that New York, where most of these questions are likely to arise, will prove capable of finding another Kent upon her bench in this twentieth century — when her commercial interests and the commercial development of the country at large call for him no less than did the opening years of the nineteenth century. Lord Mansfield sought to establish a doctrine that no promise in writing made by a business man in the course of business could be held *nudum pactum*.<sup>88</sup> Is it not time that business transactions in our law should stand as such and be entitled to legal protection because they are such, without the necessity of continually giving them artificial forms in order to comply with historical requirements of consideration, and without the risk that they will fail because business has chosen to grow along its own lines instead of hewing eternally to some fixed line of common-law doctrine or tradition. Commerce is able to function safely on the theory that "a business man's word is as good as his bond." Our courts can afford to make this plain theory of business an effective theory of law.

Omer F. Hershey.

BALTIMORE, MD.

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"Usage of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law."

<sup>88</sup> *Pillans v. Van Mierop*, 3 Burr. 1663 (1765).

NATURAL LAW<sup>1</sup>

IT is not enough for the knight of romance that you agree that his lady is a very nice girl — if you do not admit that she is the best that God ever made or will make, you must fight. There is in all men a demand for the superlative, so much so that the poor devil who has no other way of reaching it attains it by getting drunk. It seems to me that this demand is at the bottom of the philosopher's effort to prove that truth is absolute and of the jurist's search for criteria of universal validity which he collects under the head of natural law.

I used to say, when I was young, that truth was the majority vote of that nation that could lick all others. Certainly we may expect that the received opinion about the present war will depend a good deal upon which side wins, (I hope with all my soul it will be mine), and I think that the statement was correct in so far as it implied that our test of truth is a reference to either a present or an imagined future majority in favor of our view. If, as I have suggested elsewhere, the truth may be defined as the system of my (intellectual) limitations, what gives it objectivity is the fact that I find my fellow man to a greater or less extent (never wholly) subject to the same *Can't Helps*. If I think that I am sitting at a table I find that the other persons present agree with me; so if I say that the sum of the angles of a triangle is equal to two right angles. If I am in a minority of one they send for a doctor or lock me up; and I am so far able to transcend the to me convincing testimony of my senses or my reason as to recognize that if I am alone probably something is wrong with my works.

Certitude is not the test of certainty. We have been cock-sure of many things that were not so. If I may quote myself again, property, friendship, and truth have a common root in time. One can not be wrenched from the rocky crevices into which one has grown for many years without feeling that one is attacked in one's

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<sup>1</sup> Suggested by reading FRANÇOIS GENY, *SCIENCE ET TECHNIQUE EN DROIT POSITIF PRIVÉ*, Paris, 1915.



life. What we most love and revere generally is determined by early associations. I love granite rocks and barberry bushes, no doubt because with them were my earliest joys that reach back through the past eternity of my life. But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else. And this again means scepticism. Not that one's belief or love does not remain. Not that we would not fight and die for it if important — we all, whether we know it or not, are fighting to make the kind of a world that we should like — but that we have learned to recognize that others will fight and die to make a different world, with equal sincerity or belief. Deep-seated preferences can not be argued about — you can not argue a man into liking a glass of beer — and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours.

The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere. No doubt it is true that, so far as we can see ahead, some arrangements and the rudiments of familiar institutions seem to be necessary elements in any society that may spring from our own and that would seem to us to be civilized — some form of permanent association between the sexes — some residue of property individually owned — some mode of binding oneself to specified future conduct — at the bottom of all, some protection for the person. But without speculating whether a group is imaginable in which all but the last of these might disappear and the last be subject to qualifications that most of us would abhor, the question remains as to the *Ought* of natural law.

It is true that beliefs and wishes have a transcendental basis in the sense that their foundation is arbitrary. You can not help entertaining and feeling them, and there is an end of it. As an arbitrary fact people wish to live, and we say with various degrees of certainty that they can do so only on certain conditions. To do it they must eat and drink. That necessity is absolute. It

is a necessity of less degree but practically general that they should live in society. If they live in society, so far as we can see, there are further conditions. Reason working on experience does tell us, no doubt, that if our wish to live continues, we can do it only on those terms. But that seems to me the whole of the matter. I see no *a priori* duty to live with others and in that way, but simply a statement of what I must do if I wish to remain alive. If I do live with others they tell me that I must do and abstain from doing various things or they will put the screws on to me. I believe that they will, and being of the same mind as to their conduct I not only accept the rules but come in time to accept them with sympathy and emotional affirmation and begin to talk about duties and rights. But for legal purposes a right is only the hypostasis of a prophecy — the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it — just as we talk of the force of gravitation accounting for the conduct of bodies in space. One phrase adds no more than the other to what we know without it. No doubt behind these legal rights is the fighting will of the subject to maintain them, and the spread of his emotions to the general rules by which they are maintained; but that does not seem to me the same thing as the supposed *a priori* discernment of a duty or the assertion of a preëxisting right. A dog will fight for his bone.

The most fundamental of the supposed preëxisting rights — the right to life — is sacrificed without a scruple not only in war, but whenever the interest of society, that is, of the predominant power in the community, is thought to demand it. Whether that interest is the interest of mankind in the long run no one can tell, and as, in any event, to those who do not think with Kant and Hegel it is only an interest, the sanctity disappears. I remember a very tender-hearted judge being of opinion that closing a hatch to stop a fire and the destruction of a cargo was justified even if it was known that doing so would stifle a man below. It is idle to illustrate further, because to those who agree with me I am uttering commonplaces and to those who disagree I am ignoring the necessary foundations of thought. The *a priori* men generally call the dissentients superficial. But I do agree with them in believing that one's attitude on these matters is closely connected

with one's general attitude toward the universe. Proximately, as has been suggested, it is determined largely by early associations and temperament, coupled with the desire to have an absolute guide. Men to a great extent believe what they want to — although I see in that no basis for a philosophy that tells us what we should want to want.

Now when we come to our attitude toward the universe I do not see any rational ground for demanding the superlative — for being dissatisfied unless we are assured that our truth is cosmic truth, if there is such a thing — that the ultimates of a little creature on this little earth are the last word of the unimaginable whole. If a man sees no reason for believing that significance, consciousness and ideals are more than marks of the finite, that does not justify what has been familiar in French sceptics; getting upon a pedestal and professing to look with haughty scorn upon a world in ruins. The real conclusion is that the part can not swallow the whole — that our categories are not, or may not be, adequate to formulate what we can not know. If we believe that we come out of the universe, not it out of us, we must admit that we do not know what we are talking about when we speak of brute matter. We do know that a certain complex of energies can wag its tail and another can make syllogisms. These are among the powers of the unknown, and if, as maybe, it has still greater powers that we can not understand, as Fabre in his studies of instinct would have us believe, studies that gave Bergson one of the strongest strands for his philosophy and enabled Maeterlinck to make us fancy for a moment that we heard a clang from behind phenomena — if this be true, why should we not be content? Why should we employ the energy that is furnished to us by the cosmos to defy it and shake our fist at the sky? It seems to me silly.

That the universe has in it more than we understand, that the private soldiers have not been told the plan of campaign, or even that there is one, rather than some vaster unthinkable to which every predicate is an impertinence, has no bearing upon our conduct. We still shall fight — all of us because we want to live, some, at least, because we want to realize our spontaneity and prove our powers, for the joy of it, and we may leave to the unknown the supposed final valuation of that which in any event has value to us. It is enough for us that the universe has produced

us and has within it, as less than it, all that we believe and love. If we think of our existence not as that of a little god outside, but as that of a ganglion within, we have the infinite behind us. It gives us our only but our adequate significance. A grain of sand has the same, but what competent person supposes that he understands a grain of sand? That is as much beyond our grasp as man. If our imagination is strong enough to accept the vision of ourselves as parts inseverable from the rest, and to extend our final interest beyond the boundary of our skins, it justifies the sacrifice even of our lives for ends outside of ourselves. The motive, to be sure, is the common wants and ideals that we find in man. Philosophy does not furnish motives, but it shows men that they are not fools for doing what they already want to do. It opens to the forlorn hopes on which we throw ourselves away, the vista of the farthest stretch of human thought, the chords of a harmony that breathes from the unknown.

*Oliver Wendell Holmes.*

August, 1918.

## THE CHILD LABOR LAW CASE

ON June 3, 1918, the Supreme Court of the United States held unconstitutional the act of Congress of September 1, 1916, entitled "An Act to prevent interstate commerce in the products of child labor and for other purposes."<sup>1</sup> Mr. Justice Day delivered the opinion of the majority of the court.<sup>2</sup> With the dissenting opinion, written by Mr. Justice Holmes, Mr. Justice McKenna, Mr. Justice Brandeis, and Mr. Justice Clarke concurred. The first section of the act is in the footnote.<sup>3</sup>

The court held that the act was not a regulation of interstate commerce, but rather of the hours of labor in manufacturing, — a matter exclusively reserved for state control. It was not held that the act was a regulation of interstate commerce and also of manufacturing; and that the two provisions were inseparable, hence the act was invalid.<sup>4</sup> Nor was any point made in either opinion that the act was not confined to the products of child labor, but being directed against the products of the factory in which the child works, was therefore confiscatory and contrary to the Fifth Amendment.<sup>5</sup>

<sup>1</sup> C. 432, 39 Stat. 675.

<sup>2</sup> *Hammer v. Dagenhart*, 247 U. S. 251, 38 Sup. Ct. Rep. 529 (1918).

<sup>3</sup> That no producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the time of the removal of such product therefrom children under the age of sixteen years have been employed or permitted to work, or any article or commodity the product of any mill, cannery, workshop, factory, or manufacturing establishment; situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the age of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock post meridian, or before the hour of six o'clock ante meridian: *Provided*, that a prosecution and conviction of a defendant for the shipment or delivery for shipment of any article or commodity under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such article or commodity before the beginning of said prosecution.

<sup>4</sup> See *United States v. Dewitt*, 9 Wall. (U. S.) 41 (1869); *The Employers' Liability Cases*, 207 U. S. 463.

<sup>5</sup> It is remarkable that no distinction was taken in this respect. It might well have

The majority opinion may be divided into two main phases. The first is devoted to showing that the statute is not a regulation of interstate commerce at all. The second rather assumes that the statute deals with interstate commerce, but nevertheless is invalid because of its necessary effect in regulating "hours of labor of children in factories and mines within the States, a purely state authority." The concluding paragraph combines both phases, as follows:

"Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend."

THE PROPOSITION THAT THE STATUTE IS NOT A REGULATION  
OF INTERSTATE COMMERCE

The words of the statute are entitled to attention. The statute provides "That no producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce any article, or commodity" having the qualities specified.

In the Dagenhart Case the articles were cotton goods produced in a factory employing children. Section 6 of the act is definitive:

"The term 'ship or deliver for shipment in interstate or foreign commerce' as used in this act means to transport or to ship or deliver for shipment from any State or Territory or the District of Columbia to or through any other State or Territory or the District of Columbia or to any foreign country."

Thus the act does not by its terms regulate manufacture or hours of labor or transportation within a state. As the dissenting justices said:

"The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce."

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been said that such an all-embracing prohibition was merely a penalty upon the manufacturer who employed child labor, was not necessary to the accomplishment of the legislative purpose to prevent the interstate movement of products of child labor and hence not within the authority of such cases as *Otis v. Parker*, 187 U. S. 606 (1903); *Purity Extract Co. v. Lynch*, 226 U. S. 192, 201 (1912). These cases hold that, so far as necessary for proper enforcement, the means adopted to abolish the evil aimed at may include transactions innocent of themselves.

It had been regarded as settled that the transportation of commercial commodities across state lines was interstate commerce.<sup>6</sup> It cannot be that the transportation across state lines of cotton goods even though manufactured by children is not interstate commerce.

The majority of the court nevertheless held that

"The act in its effect does not regulate transportation among the States. . . ."

It is said that

"... the power (over interstate commerce) is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroying it as to particular commodities."

To reach this conclusion it was necessary either to overrule or distinguish the many cases in which the court had held that similar prohibitions of the interstate movement of particular commodities are regulations of interstate commerce. The court referred to the Lottery Case, *Champion v. Ames*,<sup>7</sup> the Pure Food Case, *Hipolite Egg Co. v. United States*,<sup>8</sup> two White Slave cases, *Hoke v. United States*<sup>9</sup> and *Caminetti v. United States*,<sup>10</sup> and the Webb-Kenyon Liquor Law Case, *Clark Distilling Co. v. West. Md. Ry. Co.*<sup>11</sup>

The statutes in each of these cases are indistinguishable in terms from that in the Child Labor Case so far as the absolute prohibition of the movement of particular commodities in interstate commerce is concerned.<sup>12</sup>

<sup>6</sup> *Welton v. Missouri*, 91 U. S. 275, 280 (1875); *Railroad Co. v. Husen*, 95 U. S. 465 (1877); *Schollenberger v. Pennsylvania*, 171 U. S. 1 (1898); *Southern Ry. Co. v. Reid*, 222 U. S. 424, 434 (1912).

<sup>7</sup> 188 U. S. 321 (1903).

<sup>8</sup> 220 U. S. 45 (1911).

<sup>9</sup> 227 U. S. 308 (1913).

<sup>10</sup> 242 U. S. 470 (1917).

<sup>11</sup> 242 U. S. 311 (1917).

<sup>12</sup> Absolute prohibitions of the interstate commerce movement of particular commodities are contained in the following statutes:

Act of May 29, 1884, c. 60, 23 Stat. 31 (cattle); Act of February 8, 1897, c. 172, 29 Stat. 512 (obscene literature); Act of May 25, 1900, c. 553, 31 Stat. 188, § 3 (birds killed contrary to state law); *Rupert v. United States*, 181 Fed. 87 (1910); Act of March 3, 1905, c. 1496, 33 Stat. 1264, §§ 2, 4 (cattle); extended in Act of March 4, 1913, c. 145, 37 Stat. 828, 831; *United States v. Nixon*, 235 U. S. 231 (1914); Act of June 30, 1906, c. 3913, 34 Stat. 669, 674, etc. (meat); *United States v. Lewis*, 235 U. S. 282 (1914); Act of April 26, 1910, c. 191, 36 Stat. 331 (insecticides); Act of

The Lottery Act of March 2, 1895,<sup>13</sup> provides:

"That any person who shall cause to be . . . carried from one State to another in the United States, any paper . . . shall be punishable."

The Pure Food Act provides:<sup>14</sup>

"That the introduction into any state . . . or shipment to any foreign country of any article of food or drugs . . . is hereby prohibited; and any person who shall ship or deliver for shipment from any State . . . to any other State . . . or to a foreign country . . . shall be guilty of a misdemeanor."

The White Slave Act of June 25, 1910,<sup>15</sup> provides in section 2:

"That any person who shall knowingly transport . . . in interstate or foreign commerce . . . any woman or girl . . . shall be deemed guilty of a felony."

The Webb-Kenyon Act of March 1, 1913,<sup>16</sup> provides:

"That the shipment or transportation . . . of any spirituous . . . liquor of any kind, from one State . . . into any other State . . . in violation of any law of such State . . . is hereby prohibited."

The cases were not overruled. They were distinguished on the ground that in the Child Labor Case the goods shipped are of themselves harmless and no evil attends their interstate transportation. With reference to the cases cited, the court said:

"They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national,

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August 20, 1912, c. 308, 37 Stat. 315 (nursery stock); Act of March 4, 1913, c. 145, 37 Stat. 828, 832 (virus antitoxins).

Similar prohibitions as to importation in foreign commerce are contained in the following statutes:

Act of June 26, 1848, c. 70, 9 Stat. 237 (drugs and medicinal preparations); Act of August 30, 1890, c. 839, 26 Stat. 414, § 2 (food); Act of October 1, 1890, 26 Stat. 567, c. 1244, 610, 613 (tea); *Buttfield v. Stranahan*, 192 U. S. 470 (1904); Act of August 27, 1894, c. 349, 28 Stat. 509, 552, § 24; repeated in subsequent Tariff Acts of July 24, 1897, 30 Stat. 151, 211, c. 11, § 31; August 5, 1909, 36 Stat. 11, 87, c. 6, § 14; October 3, 1913, 38 Stat. 114, 195, c. 16 (convict-made goods); Act of June 20, 1906, c. 3442, 34 Stat. 313 (sponges); *The Abby Dodge*, 223 U. S. 166 (1912); Act of April 9, 1912, c. 75, § 10, 37 Stat. 81 (white phosphorus matches); Act of July 31, 1912, c. 263, 37 Stat. 240 (prize-fight films); *Weber v. Freed*, 239 U. S. 325 (1915).

<sup>13</sup> C. 191, 28 Stat. 963.

<sup>14</sup> Act of June 30, 1906, c. 3915, 34 Stat. 768, § 2.

<sup>15</sup> C. 395, 36 Stat. 825.

<sup>16</sup> C. 90, 37 Stat. 699.



possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate.

"In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

"This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless."

Thus the doctrine is not that prohibition of the interstate movement of certain commodities can never be a regulation of interstate commerce. Indeed, it is admitted that in some cases it may be. In the *Lottery Case* it had been broadly contended that the power to regulate did not include the power to prohibit certain articles; but as Mr. Justice Holmes stated in the *Child Labor Case*:

"It would not be argued to-day that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something. . . . At all events it is established by the *Lottery Case* and others that have followed it that a law is not beyond the regulative power of Congress merely because it prohibits certain transportation out and out."

The doctrine of the majority opinion is that the prohibition of the interstate transportation of harmful commodities is a regulation of interstate commerce, whereas the prohibition of the interstate transportation of harmless goods is not. Whether or not the regulation is of transportation across state lines, therefore, depends not upon whether the journey is from one state to another, but upon the character of the goods.

The doctrine thus set forth, however, does not take into account, and the majority opinion did not discuss, the many cases in which prohibitions of interstate transportation of harmless commodities have been expressly held to be regulations of interstate commerce.

Section 6 of the Sherman Anti-Trust Act of July, 1890,<sup>17</sup> pro-

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<sup>17</sup> C. 647, 26 Stat. 209.

hibits the transportation of trust-made goods across state lines. The contention that Congress has no power to deal with legitimate articles of commerce was squarely but unsuccessfully pressed by counsel in *United States v. American Tobacco Co.*<sup>18</sup>

The Commodities Clause, in language a simple prototype of section 1 of the Child Labor Law, makes it unlawful for any railroad company "to transport from any State . . . to any other State . . . any article or commodity . . . in which it may have any interest, direct or indirect."<sup>19</sup> The statute was sustained in *Delaware & Hudson Co. v. United States*,<sup>20</sup> with reference to the transportation of coal, a commodity harmless in and of itself.

The Supreme Court decisions have been even more express and to the point. In a series of cases not considered in the majority opinion, state statutes prohibiting the movement of commercial commodities across state lines have been held invalid precisely because they were regulations of the interstate movement of innocuous commodities.<sup>21</sup>

In the *Husen Case* the Missouri statute provided that "no Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into or remain in any county of this State. . . ." The court said:<sup>22</sup>

"It is a plain regulation of inter-state commerce, a regulation extending to prohibition . . . that the transportation of property from one State to another is a branch of inter-state commerce is undeniable, and no attempt has been made in this case to deny it."

The case has been repeatedly followed and approved.<sup>23</sup>

In *Leisy v. Hardin*,<sup>24</sup> an Iowa statute held invalid prohibited the sale in the original package of intoxicating liquors brought from outside the state. The ground was that liquor was at that time a legitimate article of commerce. The court said:<sup>25</sup>

"That ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, like any other commodity in which a right of

<sup>18</sup> 221 U. S. 106, 132 (1911).

<sup>19</sup> Act of June 29, 1906, c. 3591, 34 Stat. 584, 585.

<sup>20</sup> 213 U. S. 366 (1918).

<sup>21</sup> *Railroad v. Husen*, 95 U. S. 465 (1877); *Leisy v. Hardin*, 135 U. S. 100 (1890); *Schollenberger v. Pennsylvania*, 171 U. S. 1 (1898).

<sup>22</sup> Page 469.

<sup>23</sup> *Reid v. Colorado*, 187 U. S. 137 (1902); *M. K. & T. Ry. Co. v. Haber*, 169 U. S. 613 (1898); *Asbell v. Kansas*, 209 U. S. 251 (1908).

<sup>24</sup> 135 U. S. 100 (1890).

<sup>25</sup> 135 U. S. 110 (1890).

traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts, is not denied. Being thus articles of commerce, can a State, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State?"

The court continued as follows:<sup>26</sup>

"To concede to a State the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a State, represented in the state legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect Union which the Constitution was adopted to create."

The last quotation is approved in *Schollenberger v. Pennsylvania*,<sup>27</sup> holding void a state statute which forbade the sale of oleomargarine in the original package which was brought into the state from without. On page twenty-five the court said that the statute substantially prohibited the introduction of a pure article and thereby interfered with interstate commerce.<sup>28</sup>

On the basis of these decisions, state courts have been clear that state statutes, prohibiting shipment into the state from other states of convict-made goods, are invalid.<sup>29</sup> Yet, following the Child Labor Law Case, the Congressional prohibition of importation of convict-made goods, which has stood since the act of August 27, 1894,<sup>30</sup> is *ultra vires*, since the goods are harmless.

Let the subject matter be child-made goods, and let the words of the statute prohibit their transportation across state lines; the goods, the journey, and the governing rule the same; if a state legislature enacts the act, it is a regulation of interstate commerce

<sup>26</sup> Page 125.

<sup>27</sup> 171 U. S. 1 (1898).

<sup>28</sup> *Brimmer v. Rebman*, 138 U. S. 78 (1891), *Voight v. Wright*, 141 U. S. 62 (1891), and *Minnesota v. Barber*, 136 U. S. 313 (1890), are cases of state regulations of interstate commerce in sound commodities such as wholesome beef and wheat flour, with the additional element that the regulations substantially discriminated against interstate commerce, an element entirely wanting in the *Husen*, *Schollenberger*, and *Leisy* cases.

<sup>29</sup> *People v. Hawkins*, 157 N. Y. 1, 51 N. E. 257 (1898); *Opinion of the Justices*, 211 Mass. 604 (1912).

<sup>30</sup> C. 349, 28 Stat. 509, 552.

and invalid, whereas if Congress is the enacting body, it is not a regulation of interstate commerce, and invalid.

It is difficult to believe that the adoption of the Constitution has left this great void of governmental authority. If in the distribution of powers between state and nation a large part of the power to regulate interstate commerce has been lost a weakness in the federal system hitherto unsuspected is developed. Prior to 1787 the states individually were all-powerful to prohibit, by impost, embargo, or otherwise, the importation from other states of any kind of commodity. Sovereign authority has always been understood to embrace power to prohibit for commercial reasons the importation from other states of harmless articles.<sup>31</sup> Conspicuous illustrations of the exercise of such power by the original states between 1783 and 1787 were in the embargoes against commodities brought by British vessels, a matter referred to hereinafter in another connection. There is highest evidence of the existence of such power. The Articles of Confederation state:

"Art. 9. Sec. 1. The United States, in Congress assembled, shall have the sole and exclusive right and power of . . . entering into treaties and alliances; provided that no treaty of commerce shall be made, whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods, or commodities, whatsoever."

It was largely because the power was exercised by each state against harmless products of other states with the selfish view of the effect of the importation upon the commerce and manufacture of the importing state that the Constitution was framed. It was not enough to forbid the states from prescribing rules for the conduct of such interstate shipments. As has been frequently recognized, not part but all the power they had over shipments from one state to another of any character of commodity was vested expressly in the federal government.

As was said in *Gibbons v. Ogden*,<sup>32</sup>

"The 'power to regulate commerce,' here meant to be granted, was that power to regulate commerce which previously existed in the States.

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<sup>31</sup> See *Sligh v. Kirkwood*, 237 U. S. 52, 59, 61 (1915).

<sup>32</sup> 9 Wheat. (U. S.) 1, 227 (1824).

But what was that power? The States were, unquestionably, supreme; and each possessed that power over commerce which is acknowledged to reside in every sovereign State.

"This power (said Mr. Chief Justice Marshall, page 196, 9 Wheat.), like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States."

In *Brown v. Maryland*,<sup>33</sup> after referring to the oppressed and degraded state of commerce previous to the adoption of the Constitution, the Chief Justice said:

"It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States."

In *Welton v. Missouri*<sup>34</sup> the court gave clear expression to the rule:

"The power to regulate conferred by that clause upon Congress is one without limitation; and to regulate commerce is to prescribe rules by which it shall be governed, — that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited."

And in *Houston & Texas Ry. v. United States*<sup>35</sup> the court, in summarizing the law, declared:

"First. It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that where it exists it dominates."

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<sup>33</sup> 12 Wheat. (U. S.) 419, 446 (1827).

<sup>34</sup> 91 U. S. 275, 279, 280 (1875).

<sup>35</sup> 234 U. S. 342, 350 (1914).

Whether a regulation governs the transportation of goods across state lines would seem to depend upon the places where the journey begins and ends, and not at all upon the character of the goods or the evil resulting therefrom. Evil may induce the enactment of a regulation. If despite the presumption in favor of constitutionality there is no conceivable relation between the regulation of interstate commerce and a proper public purpose, it would be confiscatory, hence invalid as taking away property without due process of law contrary to the Fifth Amendment. Such, no doubt, would be the case if Congress should arbitrarily prohibit the movement of sound wheat across state lines; but the regulation would not cease to be one of interstate commerce. Its invalidity would be because of the due-process clause of the Fifth Amendment; just as a state law prohibiting the intrastate transportation of sound wheat would be invalid not as a regulation of interstate commerce but because violating the due-process clause of the Fourteenth Amendment. Questions of due process, however, were not considered in the *Husen*, *Leisy*, and *Schollenberger* cases, *supra*, and the *Child Labor Case*. The only question was as to what constitutes a regulation of interstate commerce.

Let us apply the principle of law that Congress may prohibit interstate transportation if evil results. Whether evil results or not is essentially a question of fact. So far as the validity of the statute depends upon the answer, the judgment of Congress is entitled to great if not conclusive weight. Congress had found that evil did result from the interstate movement of child-made goods. The four dissenting justices were of like opinion.

Whether or not commodities work evil is a matter largely of opinion, as to which the judgment of the community changes. In *Leisy v. Hardin*<sup>36</sup> liquor was thought legitimate. Not many years ago lotteries were a proper method of endowing schools and churches. Evil is as evil does. Healthy persons may be barred from states because their mere presence by reason of the prevalence of disease makes an added source of danger. *Compagnie Franaise v. Louisiana Board of Health*.<sup>37</sup> As was said by Mr. Justice McKenna in *Rast v. Van Deman*,<sup>38</sup>

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<sup>36</sup> 135 U. S. 100 (1890).

<sup>37</sup> 186 U. S. 380 (1902).

<sup>38</sup> 240 U. S. 342, 364 (1916).

"A lottery of itself is not wrong, may be fairer, having less of over-reaching in it, than many of the commercial transactions that the Constitution protects. . . . And at one time it was lawful. It came to be condemned by experience of its evil influence and effects. It is trite to say that practices harmless of themselves may, from circumstances, become the source of evil or may have evil tendency."

In *Seven Cases of Eckman's Alternative v. United States*<sup>39</sup> Mr. Justice Hughes said:

"It is said that a distinction should be taken between articles that are illicit, immoral or harmful and those which are legitimate, and that the amendment goes beyond statements dealing with identity or ingredients. But the question remains as to what may be regarded as 'illicit' . . ."

So, in dealing with the Food and Drugs Act, it was held that Congress could outlaw food as to which misleading statements were made, although the food in itself was perfectly wholesome.

In point of fact the products of child labor are not harmless, and there is a definite evil in their very transportation across state lines. The evil is involved in the movement itself, and its effects are felt both in the state of production and in the state of destination. Transportation of child-made goods encourages the ruin of the lives of future citizens in the state of production. It directly aids this immorality quite as much as the transportation across state lines of girls for the purpose of prostitution. Congress sought to remove the evil caused by the use of facilities over which it alone has control. It sought to remove it no further. Only that child labor was touched which depended upon the use of interstate commerce facilities for consummation of the evil.

Moreover, the interstate transportation of child-made goods unfairly discriminates against citizens of the state of destination. It tends to lower their standards of child-labor protection. It is the same effect sought to be avoided by the prohibition of importation of convict-made goods from foreign countries.<sup>40</sup>

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<sup>39</sup> 239 U. S. 510, 516 (1916).

<sup>40</sup> Act of August 27, 1894, 28 Stat. 509, 552, c. 349, § 24; Act of July 24, 1897, 30 Stat. 151, 211, c. 11, § 31; Act of August 5, 1909, 36 Stat. 11, 87, c. 6, § 14; Act of October 3, 1913, 38 Stat. 114, 195, c. 16; and of the "phossy-jaw" matches, a cheap match causing necrosis in the match-factory worker; Act of April 9, 1912, 37 Stat. 81, c. 75, § 10.

Mr. Justice Holmes, dissenting, said:

"It does not matter whether the supposed evil precedes or follows the transportation. It is enough that in the opinion of Congress the transportation encourages the evil. . . .

"The notion that prohibition is any less prohibition when applied to things now thought evil I do not understand. But if there is any matter upon which civilized countries have agreed — far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused — it is the evil of premature and excessive child labor. I should have thought that if we were to introduce our own moral conceptions where in my opinion they do not belong, this was pre-eminently a case for upholding the exercise of all its powers by the United States.

"But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone, and that this Court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this Court to pronounce when prohibition is necessary to regulation, if it ever may be necessary — to say that it is permissible as against strong drink but not as against the product of ruined lives."

THE PROPOSITION THAT THE LAW IS INVALID BECAUSE ITS NECESSARY EFFECT IS TO INVADE THE PROVINCE RESERVED EXCLUSIVELY TO THE STATES.

The second phase of the opinion assumes that the statute deals with interstate commerce, but that this was only in order to accomplish a result in the states beyond the scope of federal authority. The effect of the statute is to control the hours of labor in manufacturing, and the control over interstate commerce cannot be used to this end; for if it could, the power of the states over local matters would be eliminated and our system of government practically destroyed.

The second phase is represented by the following passages:

"The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture. . . .

"A statute must be judged by its natural and reasonable effect. *Collins v. New Hampshire*, 171 U. S. 30, 33, 34. The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution. . . .



"In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. . . . To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states. . . .

"In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states, a purely state authority. . . . The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed."

It is to be noted that the doctrine thus announced is that the natural and necessary effect of the statute upon pure matters of interstate commerce is to be wholly disregarded. This doctrine is entirely new.

Looking to the substance and disregarding the form, closely investigating the purpose and ulterior motives of Congress, paying strict heed to the natural and necessary effect of the statute, assuredly it operates on the interstate transportation of child-made goods. Whatever else it does indirectly, in terms it rules only interstate transportation. And this is done to remove the evils involved in such transportation.

Still regarding the substantial effect, the statute in terms does not prohibit manufacture and does not regulate hours of labor. The manufacturer may produce as he pleases and employ whom he pleases. The manufacturer, who does not ship outside the state, — and sending goods across state lines is not a right which the state can guarantee, — need never know of the existence of the federal statute. The state may make such regulations as it wishes concerning the employment of children. There is no coercion upon it. The federal statute functions only when the interstate transportation begins, that is, only when the jurisdiction of the state ceases to attach.

In all previous cases, moreover, whether arising under the interstate commerce clause or other grants of power to the federal government, the effect upon state policy of an exercise of delegated power has been held to be immaterial. As Mr. Justice Holmes said:

"I should have thought that that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this Court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State."

Familiar exercise of the power over interstate commerce where it was clear that state policy over manufacture was necessarily interfered with is found in the acts dealing with lotteries, white slaves, pure food and drugs, liquor, trusts and unfair competition, commodities produced and owned by railroads, cattle inspection, meat inspection, and railroad rates.<sup>41</sup>

The manufacture of lottery tickets, of foods whether adulterated and misbranded or not, of liquor, is quite as much matter of local control as the manufacture of cotton goods. The effect of the federal regulation of interstate commerce upon the local manufacturing is in each case the same. The evil of gambling, fraud, poisoning, and drunkenness is quite as local a matter, just as exclusively subject to state control as the evil of premature and excessive child labor. And the encouragement to the evil by shipment of products in interstate commerce is the same. The evil in *Weeks v. United States* was the misrepresentation in New Jersey by a salesman prior to the interstate shipment that a certain extract was a "lemon" product.

As was further said in these cases, it is immaterial that the means adopted by Congress have the character of police regulations.<sup>42</sup>

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<sup>41</sup> In the Lottery Case, *Champion v. Ames*, 188 U. S. 321 (1903); in the Pure Food Case, *Hipolite Egg Co. v. United States*, 220 U. S. 45 (1911); *Seven Cases of Eckman's Alternative v. United States*, 239 U. S. 510, 514, 515 (1916); *Weeks v. United States*, 245 U. S. 618 (1918); as Mr. Justice Holmes said in his dissenting opinion: "The objection that the control of the States over production was interfered with was urged again and again but always in vain."

<sup>42</sup> *Hoke v. United States*, 227 U. S. 308, 323 (1913); *Caminetti v. United States*, 242 U. S. 470, 492 (1917); *Seven Cases of Eckman's Alternative v. United States*, *supra*; *Weeks v. United States*, 245 U. S. 618 (1918).

The same argument was made and rejected in the Anti-Trust cases. The necessary effect of the Anti-Trust Act is to interfere with production in a state. Its design was to break up monopolies, but the actual prohibition of trust-made goods was not held invalid because it has had that necessary effect in states. If unfair competition through transportation in interstate commerce of child-made products cannot be touched by Congress simply because of the effect on local policy, the Sherman Anti-Trust Act and the Clayton Act must be invalid for the same reason. The necessary effect of the Commodities Clause was to nullify the policy which the State of Pennsylvania had followed for generations with reference to combination between coal-producing and coal-carrying companies. This was expressly decided to be no ground for invalidity.<sup>43</sup> Indeed, it has been settled that so far as direct regulation of intrastate rates — as purely a state matter as can be conceived — is necessary in order to effectively carry out the congressional policy with reference to interstate rates, local rates established by state laws may be set aside.<sup>44</sup>

As to foreign commerce, the same objection, repeatedly raised, has suffered the same fate. In *Weber v. Freed*<sup>45</sup> it was urged against the validity of a prohibition of the importation of prize-fight films that the act had the necessary effect and was designed to accomplish a police result within the exclusive cognizance of the states. The contention was held to be frivolous. It was so held with reference to opium in *Brolan v. United States*,<sup>46</sup> with reference to sponges in *The Abby Dodge*,<sup>47</sup> to tea, in *Buttfield v. Stranahan*.<sup>48</sup> So far as matters entirely within the control of the states are concerned, and so far as the necessary effect of the exertion of Congressional power upon such control is concerned, each of these cases is indistinguishable from the Dagenhart Case. If the necessary and designed effect upon state manufacture is the test, every protective tariff measure and the early embargo acts have surely been invalid.

\* *United States v. Delaware & Hudson Co.*, 213 U. S. 366 (1909); *United States v. Del., Lack. & West. R. R. Co.*, 238 U. S. 516 (1915).

\* *Shreveport Case, Houston & Texas Ry. Co. v. United States*, 234 U. S. 342 (1914); *Adams Express Co. v. Caldwell*, 244 U. S. 617 (1917).

\* 239 U. S. 325 (1915).

\* 236 U. S. 216, 217 (1915).

\* 223 U. S. 166, 176 (1912).

\* 192 U. S. 470 (1904).

The settled principle is not confined to cases dealing with interstate or foreign commerce.

As Mr. Justice Holmes said in the principal case:

"The manufacture of oleomargarine is as much a matter of state regulation as the manufacture of cotton cloth. Congress levied a tax upon the compound when colored so as to resemble butter that was so great as obviously to prohibit the manufacture and sale. In a very elaborate discussion the present Chief Justice excluded any inquiry into the purpose of an act which apart from that purpose was within the power of Congress. *McCray v. United States*, 195 U. S. 27. . . . Fifty years ago a tax on state banks, the obvious purpose and actual effect of which was to drive them, or at least their circulation, out of existence, was sustained, although the result was one that Congress had no constitutional power to require. The Court made short work of the argument as to the purpose of the Act. 'The judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers.'"<sup>49</sup>

Administration of local property by executors, administrators and trustees seems a matter purely of local control; and on that ground section 11 of the Federal Reserve Act, empowering the federal banks to act in such capacity within the state, was held invalid by the Supreme Court of Michigan. The judgment was reversed by the Supreme Court of the United States in *First National Bank v. Fellows*.<sup>50</sup> The state was held incompetent

"to prohibit such business from being united by Congress with the banking function, since to do so would be but the exertion of state authority to prohibit Congress from exerting a power which under the Constitution it had a right to exercise."

So Congress is not to be denied the right to exercise its power of eminent domain by reason of the effect on state laws or state policy.<sup>51</sup> Yet the passage of title to lands within the state is a matter peculiarly within the state authority.

A more striking example is with reference to the state power over militia. Before the Constitution was adopted it was generally considered that the state control over militia was essential to the

<sup>49</sup> 247 U. S. 278, 279 (1918).

<sup>50</sup> 244 U. S. 416 (1917).

<sup>51</sup> *Kohl v. United States*, 91 U. S. 367 (1875); *Chappell v. United States*, 160 U. S. 499, 509, 510 (1896).

continued existence of the state, a principle embodied in Art. II of the Amendments, as follows:

"A well-regulated militia being necessary to the security of a free state." . . .

It was argued in the recent Selective Draft Law cases that the power of the federal government to draft militiamen would, if exercised without limit, wipe out a vital state organization. The effect was not indirectly upon state policy, but upon the state governmental institution itself. The argument was held to be without merit.<sup>52</sup>

The principle that local affairs are reserved to the states cuts across every grant of power to the federal government. It matters not whether the delegated power is one over interstate commerce or foreign commerce, or taxation or war. Congress cannot invade the province of the states any more by the exercise of one power than another. The Constitution is the fundamental law in time of war as well as of peace. Is then the recent Food and Fuel Act of August 10, 1917,<sup>53</sup> invalid, which empowers the agencies of the federal government to regulate directly and in detail the manufacture and production of foods, feeds, fuel and other necessities for the conduct of the war?

It may be objected that in each of the cases cited the federal statute was a genuine exercise of authority delegated to meet a real federal problem; that so far as a matter is genuinely interstate, the federal law governing it must prevail; but interstate commerce cannot be used as a pretext for the accomplishment of unlawful results.

Let us assume, despite *Veasie Bank v. Fenno*<sup>54</sup> and *McCray v. United States*,<sup>55</sup> that a congressional enactment would be void which forbids a man to be transported in interstate commerce; who has been divorced according to some non-uniform statute; or who has refused to purchase Liberty Bonds; or who has manufactured colored oleomargarine. The ground of invalidity would be not only violation of the Fifth Amendment but also that the evil sought to be cured has no conceivable connection with the interstate commerce regulated.

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<sup>52</sup> Selective Draft Cases, 245 U. S. 366 (1918).

<sup>54</sup> 8 Wall. (U. S.) 533 (1869).

<sup>53</sup> C. 53, 40 Stat. 276.

<sup>55</sup> 195 U. S. 27 (1904).

Between the two clear extremes there are many cases as to which there must be reasonable difference of opinion as to whether or not Congress is dealing with a genuine interstate matter. Such a case is the Lottery Act, the Pure Food and Drugs Act, the White Slave Act and the Child Labor Act. Statutes forbidding interstate transportation of goods made by African slaves, or by convicts, or by women at night, or of the product of sweat shops, or made by non-union labor, or by women and children employed at less than a minimum wage, may also be put in the arguable class.

How shall it be determined that the problem is truly an interstate one and the exercise of federal power is *bona fide*? Clearly not by the effect on the states, because that is as great in the one case as in the other. The question is essentially one of fact.

In determining the question definite rules have been long established. As an aid the court consults the legislative environment in which the act was passed, the Senate and House committee reports, and the history of the times.

The prime consideration is the language used in the enactment. The deliberate legislative decision that interstate commerce power is being exercised is entitled to great weight. The legislature is a coördinate branch of the government. It has no *prima facie* case to overcome. It need not demonstrate its power under one particular theory rather than another. An enactment passed in due form cannot be upset on proof that a majority of the Representatives acted under erroneous views of legislative policy. If upon the face of the act any legitimate legislative purpose may be discovered, or rather, unless he who attacks can clearly show no possible proper purpose, the act must be sustained. To use the familiar language of the reports: "Every presumption favors constitutionality."

Further, the question as to the existence of a genuine interstate problem is not to be complicated by the fact that solving it would also cure a local evil, and that in the minds of the public or of the members of Congress the local evil loomed large and induced action on the interstate matter. Such was the situation in the Lottery, Pure Food, White Slave, Liquor and Anti-Trust cases. It was the same in the prohibition of use of the mails to defraud.

When the charge was made that a local police result was the object of the Prize-Fight Film statute, the court answered that it had

no power to examine into the motives of the legislature. *Weber v. Freed*.<sup>56</sup> As Mr. Justice Holmes put it:

"But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone, and that this Court always had disavowed the right to intrude its judgment upon questions of policy or morals."

In *Fletcher v. Peck*<sup>57</sup> it was held that a statute good on its face could not be impeached by proof that votes for it had been procured by bribery or corruption. As was said in *In re Kollock*,<sup>58</sup>

"The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue."

Proof that there is a large local problem, therefore, is not sufficient to show that there is not a genuine interstate problem.

With these principles in mind, how shall the supposititious cases in the doubtful class be decided? Closing the channels of interstate commerce to the products of non-union labor must be held *ultra vires*, according to *Adair v. United States*<sup>59</sup> and *Coppage v. Kansas*.<sup>60</sup> As to products of sweat shops, of night work by women, and of work by women and children at less than minimum fixed wages, we may not now have sufficient facts to judge.

The basis of federal action in the Child Labor Case, which the majority held insufficient, is, however, shown by the legislative history of the act. The situation which finally compelled Congressional action arose from the truly interstate character of the child-labor evil. The problem arose not solely because of the effect of transportation across state lines, but also because in the federal system are comprised states each with divergent interests, and the nation with its interest in the people as a whole. Years ago Congress ordered an investigation, and a bulky report was printed styled "Report on Condition of Woman and Child Wage Earners in the United States."<sup>61</sup> It appeared that the child-labor regulations of the states were not uniform, and that manufacturers in high standard states, whether correctly or not, felt at a disad-

<sup>56</sup> 239 U. S. 325, 330 (1915).

<sup>57</sup> 165 U. S. 526, 536 (1897).

<sup>58</sup> 236 U. S. 1 (1915).

<sup>59</sup> 6 Cranch (U. S.) 87, 130, 131 (1810).

<sup>60</sup> 208 U. S. 161 (1908).

<sup>61</sup> SEN. DOC. 645, 61st Cong.

vantage with competitors in the states with low standards. The large development of cotton manufacturing in the South, to cite the most conspicuous example, was said to be due to the employment of cheap child labor.<sup>62</sup> The protest that the "unfair competition" of other states would be ruinous repeatedly defeated salutary state measures proposed for the protection of the children.<sup>63</sup> Because the products met in competition in interstate commerce the states were powerless to protect themselves. Ohio and Massachusetts, calling attention to the immoral competition of other states, formally memorialized Congress to act.<sup>64</sup> The matter was stressed in the debates in Congress, the Congressional hearings, and the Committee Reports.<sup>65</sup> The Senate Committee Report stated:<sup>66</sup>

"So long as there is a single State which for selfish or other reasons fails to enact effective child-labor legislation, it is beyond the power of every other State to protect effectively its own producers and manufacturers against what may be considered *unfair competition* of the producers and manufacturers of that State, or to protect its consumers against unwittingly patronizing those who exploit the childhood of the country. This is true because the States have delegated to Congress the power to regulate interstate commerce, and have thus deprived themselves of the power to prohibit the sale within their own borders of products of the child labor of other States." (*People v. Hawkins*, 157 N. Y. 1 (1898); *People v. Haynes*, 198 N. Y. 622 (1910); Opinion of the Justices, 211 Mass. 605 (1912).)

It was precisely to avoid such interstate friction as developed in child-labor matters that the Constitution was adopted. Would, then, upholding the Child Labor Law result in so much standardization that "our system of government would be practically destroyed?" The question is important, for preservation of local autonomy in local affairs is vital.

Under the tests suggested, standardization would result only so far as necessary to the legitimate exercise of federal power to cure a genuine interstate commerce evil. It would result, moreover,

<sup>62</sup> 51 CONG. REC. 1047, 1054; 53 CONG. REC. 12308.

<sup>63</sup> See 6 REPORT, *supra*, 152, 160, 176, 178, 179, 194, 196; 53 CONG. REC. 1807, 3026, 12208.

<sup>64</sup> 45 CONG. REC. 5245; 53 CONG. REC. 1002.

<sup>65</sup> See HOUSE REPORT 1400, 63d Cong. 3d sess. 7-9.

<sup>66</sup> SENATE REPORT 358, 64th Cong. 21.



only when Congress affirmatively established the uniform rule. Under the salutary doctrine of *Cooley v. Port Wardens*<sup>67</sup> and the Minnesota Rate cases<sup>68</sup> state statutes based on the so-called police power, even though directly interfering with interstate commerce, are valid when not conflicting with the Congressional rule.<sup>69</sup> It may be the national legislature would exercise its power more frequently than in the long run would be politic or expedient. Inexpediency, however, is not lack of power, and often a man as legislator must vote against a bill which as judge he can not say is *ultra vires*.

Our history gives little basis for fear that the legislature would regulate interstate commerce matters too frequently. It would be trite to enumerate the matters within the federal field which the Congress has left to the states.<sup>70</sup> Curiously, in the Webb-Kenyon Law Case it was asserted as ground of unconstitutionality that if the law were sustained, not undue centralization but decentralization would result.<sup>71</sup>

The difficulty with the doctrine of absolute constitutional prohibition of the regulation of interstate commerce because of the effect on local affairs is not solely that expressed in the McCray decision,<sup>72</sup> that the distinction between the judicial and the legislative powers is destroyed, a matter full of danger to the permanence of our institutions; but even more important is the resulting great void in governmental power itself, — the establishment of a zone between nation and state which neither can touch. The result is that the sum total of powers of state and nation is less than the independent states previously had.

During the period from 1783 to 1787 the country had experience with the system under which no common authority existed to de-

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<sup>67</sup> 12 How. (U. S.) 299 (1851).

<sup>68</sup> 230 U. S. 352 (1913).

<sup>69</sup> *Asbell v. Kansas*, 209 U. S. 251 (1908); *Missouri, K. & T. Ry. v. Haber*, 169 U. S. 613 (1898); *Reid v. Colorado*, 187 U. S. 137 (1902); *Plumley v. Massachusetts*, 155 U. S. 461 (1894); *Crossman v. Lurman*, 192 U. S. 189 (1904); *Sligh v. Kirkwood*, 237 U. S. 52 (1915).

<sup>70</sup> For conspicuous examples, see as to interstate ferry rates, *Port Richmond Ferry Co. v. Hudson County*, 234 U. S. 317 (1914), and the utilization of state executive machinery under the Selective Draft Law of May 18, 1917, c. 15, 40 Stat. 76.

<sup>71</sup> *Clark Distilling Co. v. West Md. Ry. Co.*, 242 U. S. 311, 322.

<sup>72</sup> 195 U. S. 27, 54 (1904).

termine the commodities and conditions of interstate commerce, — what to encourage and what to prohibit. The resulting commercial anarchy was intolerable.

The defect consisted not alone in the prohibitions by the states of importation of commodities from other states. The want of a single controlling authority to take into account the commercial interests of the entire people was strongly felt. The individual states had attempted to deal with the British trade restrictions which began in 1783 to exclude American merchandise from the West Indies. Massachusetts enacted a retaliatory embargo.<sup>73</sup> As other states saw in this only a means of attracting British shipping to their own ports, the act was repealed by Act of July 5, 1786,<sup>74</sup> which recited: "Whereas, the good intentions of an act . . . are rendered inefficacious, for want of a coöperation of our sister States . . ." The evil of British trade restrictions could not be met because some of the states by inaction made uniformity of regulation impossible.<sup>75</sup>

The history of the trade convention at Annapolis, leading to the constitutional convention of 1787, is familiar. As was stated by the Chief Justice in *Brown v. Maryland*,<sup>76</sup> no one cause was more operative in the creation of the present constitutional system than the depressed state of commerce during the Confederation, and the deep general conviction that interstate commerce should be subject to single unified control. It was the essence of the system created that the rules governing the transportation of commodities across state lines should not be made by the states with the view to the industry of each particular state but by a single national legislature with the view to the interests of the nation as a whole.

In the conventions of the states called to ratify the Constitution of 1787 the dread was repeatedly expressed by Patrick Henry and others that if the powers delegated to Congress were exercised to the utmost the states would be practically wiped out of existence. Those who favored the new Constitution did not answer that the powers were not granted. The reply was that since the national legislature would be composed of representatives coming from

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<sup>73</sup> Act of June 23, 1785, LAWS AND RESOLVES OF MASSACHUSETTS, 1784-85, 439.

<sup>74</sup> LAWS AND RESOLVES OF MASSACHUSETTS, 1786-87, 36.

<sup>75</sup> 5 ELLIOTT'S DEBATES, 113, 119.

<sup>76</sup> *Supra*, note 33.

the states who would be zealous to protect their local interests, the powers granted would not be abused.<sup>77</sup>

It was realized at the time that local self-government by the states must be preserved, and that too much exercise of federal authority would be pernicious. It was also realized that a single dominant federal authority, especially over interstate commerce, was indispensable. The Constitution embodied both principles. And to insure permanent harmony of operation it was declared in Art. VI, cl. 2, that the federal laws should be the supreme law of the land. Standardization, so far as it was an evil resulting from single control over interstate commerce, was to be suffered rather than the distressful weakness which had preceded.

The result of the decision in the Dagenhart Case seems to be that the grant to Congress of power over commerce among the states was not of complete sovereign power, and not coextensive with the evil sought to be remedied; and that the adoption of the Constitution caused the disappearance — since neither states nor nation may exercise it — of that governmental authority which the states previously had and exercised over the transportation of "harmless" commodities across state lines.

*Thurlow M. Gordon.*

NEW YORK CITY.

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<sup>77</sup> FEDERALIST, Nos. 28, 31, 45, 46.

# HARVARD LAW REVIEW

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Published monthly, during the Academic Year, by Harvard Law Students

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SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER

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JENS IVERSON WESTENGARD, Bemis Professor of International Law, died on Tuesday, September 17, less than a week before the opening of the present school year. His illness was brief and not generally known so that his death came as a shock to his colleagues and to his students. An account of his life and services and tributes to his memory will appear in the December issue. At this time we can do no more than recall his unfailing patience, his uniform courtesy, his tactfulness proceeding from a kind heart and a tolerant mind, and his clearness in exposition. Behind these qualities lay a vigorous but disciplined understanding and a strong will which carried him forward in a notable career despite many obstacles. He was one of the editors of the HARVARD LAW REVIEW in the years 1896-97 and 1897-98.

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THE HARVARD LAW SCHOOL in general, and this REVIEW in particular, have suffered a severe loss by the death in action of Lieutenant D. E. Dunbar. He is the first editor of the HARVARD LAW REVIEW to lose his life in the present war. Graduating with the highest distinction from the School in 1917, he was for his last year Note Editor of the REVIEW. He was especially interested in questions of constitutional law and those in which the economic aspect of the law of public utilities is concerned; and his notes upon cases of this nature are among the best that the LAW REVIEW has published. He was the author of a brilliant essay upon the tin-plate industry which was awarded the Hart, Schaffner and Marx prize in 1915. He was immensely popular both inside and outside the class-room. In the former he was always distinguished by the keenness of his criticism and the width of his interests. He had a real genius for friendship. All those who have known him well realize how ill he can be spared. *Nil tetigit quod non ornavit.*

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THE HARVARD LAW SCHOOL holds high its head in patriotic pride. Not since the fifties have there been so few students in the class-room. From over eight hundred and fifty two years ago the attendance has dropped to about seventy. Those who returned did so only because there was no war service for which they were fit.

Under these conditions the REVIEW faced this year the most serious situation in its entire history. Of last year's editors only one, the treasurer-elect, came back. The choice of new men was necessarily limited. But although the staff will be small and the cases fewer, the same high standard of former years will be maintained. Quantity will be sacrificed to quality.

It should not go unnoted that but for the war Arthur D. Platt of Portland, Oregon, would be president of this year's board of editors. At the spring meeting he was elected to the office, but was reclassified during the summer by his draft board and called into service. Clifton Murphy of Georgetown, South Carolina and Harold Reindel of Cleveland, Ohio, had been appointed by him as note and case editor respectively. The former is already in service and the latter is waiting to be called.

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THE LAW SCHOOL.—The attendance in the school, as was to be expected, has been still further reduced by the war. The total registration at present (October 18) is 69, distributed as follows: First year, 18; Second year, 16; Third year, 20; Graduates, 3; Unclassified, 11; Special, 1.

The vacancies in the teaching staff caused by the death of Professor Westengard and the return of Professor Bates to Michigan have been temporarily filled by the appointment of Manley O. Hudson as lecturer for the current year and of George J. Thompson as Ezra Ripley Thayer Teaching Fellow.

Mr. Hudson received the degrees of A.B. and A.M. from William Jewell College in 1906 and 1907 respectively. He received the degree of LL.B. *cum laude* from this school in 1910 and that of S.J.D. in 1917. Immediately upon graduation in 1910 he was appointed a professor of law at the University of Missouri, where he remained until recently called to Washington as special Legal Adviser to the Department of State. He will teach here Property III and International Law.

Mr. George J. Thompson received the degree of S.B. from the University of Pennsylvania in 1909 and the degrees of LL.B. and S.J.D. from this school in 1912 and 1918 respectively. For two and one-half years he taught law at Pei Yang University in Tientsin, China. He will give the course in Public Utilities.

The following additional changes in courses have been made necessary: Constitutional Law and the entire course in Torts will be given by Dean Pound. Partnership will be given by Asst. Professor Chafee.

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ENGLISH AND AMERICAN ADMINISTRATION OF ROMAN LAW.—It is no doubt gratifying to the student of the common law to see it gradually pushing out the modern Roman law wherever through extension of British or American political power the two systems are brought into

competition. Yet the manner of the process is not always edifying to the thoughtful lawyer. Too often it suggests Mr. Podsnap's backward sweep of the hand and solving phrase "not English." On the one hand we find the Supreme Court of the United States turning to Glanvill in order to understand the Roman law as to universal succession for the purposes of an appeal from Porto Rico.<sup>1</sup> At the other extreme, the Judicial Committee of the Privy Council now express grave doubts about a doctrine in the Roman-Dutch books when it is merely derived from or fortified by the general Romanist juristic writings of the period of the Reception. In *Demerara Turf Club v. Wight*,<sup>2</sup> on a question of offer and acceptance in a sale by auction, a decree of specific performance made by the Supreme Court of British Guiana rested on an alleged rule of Roman-Dutch law requiring express reservation of the right to withdraw. In the course of a decision reversing the decree and denying that there is such a rule of Roman-Dutch law, Sir Walter Phillimore says: "The writers on Roman-Dutch law also avail themselves of the writings of the commentators of other European nations, such as Bartolus, who was an Italian, and Choppinus, who was a Frenchman from Anjou. How far they can be used as authorities on Roman-Dutch law may be doubted."<sup>3</sup> The starting point of the system known as Roman-Dutch law is not later than the setting up of the Great Council at Mechlin in 1473.<sup>4</sup> At this time Roman law was a universal law and Bartolus was its most authoritative exponent.<sup>5</sup> Perhaps if a Romanist were some day to administer Anglo-American law in some Pacific island, he might be found saying: "The writers on American common law also avail themselves of the writings of European nations, such as Coke who was an Englishman. How far he can be used as an authority on American law may be doubted." Then he might cite the American legislation after the Revolution forbidding citation of English authorities and the *dictum* of Judge Dudley that he had never read and never would read Coke or Blackstone.<sup>6</sup>

Both in American administration of Roman-Spanish law and British administration of Roman-Dutch law, the fundamental assumption is that English common law is the order of nature. The burden is on those who assert a rule or principle or mode of thinking at variance therewith to prove it clearly by texts of undoubted authority, and if they are able to do so, our tribunals seem to think of the situation on the analogy of an exceptional modification of the common law by an interloping statute. Hence when Roman-Dutch writers "endeavor to help themselves out by the analogy of the Roman law as to sales by *addictio in diem*,"<sup>7</sup> we are told that the analogy is misleading. So are many analogies upon which rest settled common-law doctrines. But when a court is ad-

<sup>1</sup> *Ubarri v. Laborde*, 214 U. S. 168, 172 (1909).

<sup>2</sup> [1918] A. C. 605.

<sup>3</sup> *Ibid.*, 611.

<sup>4</sup> LEE, ROMAN-DUTCH LAW, 2-4; WESSELS, HISTORY OF ROMAN-DUTCH LAW, 126.

<sup>5</sup> "It may safely be said that the jurisprudence of the later centuries of the Middle Ages — even down to the sixteenth century — is based, in its essentials, on the glossa and the writings of Bartolus." GRUEBER, INTRODUCTION TO SOHM, INSTITUTES OF ROMAN LAW, Ledlie's transl., xvi.

<sup>6</sup> Corning, "The Highest Courts of Law in New Hampshire," 2 GREEN BAG, 469, 470.

<sup>7</sup> [1918] A. C. 611.

ministering a foreign law one may ask whether the mode of reasoning, the judicial method and traditional analogies are not more significant than the detailed rules. At any rate the picture, so often painted, of peoples under British dominion enjoying their own traditional laws, scrupulously administered for them by the British courts, needs some retouching.

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**IMPLIED WARRANTY OF FOOD.** — It is settled by numerous English and American decisions that one who sells food for immediate consumption impliedly warrants that it is wholesome.<sup>1</sup> Obvious as it is, the distinction between the absolute liability of a warrantor of food irrespective of negligence, and the liability of a tortfeasor for negligence is sometimes blurred. Often, perhaps generally, a seller of injurious food has been guilty of negligence, and in a particular case it may become immaterial whether the defendant's liability is absolute or based on negligence. Often, however, the distinction is vital. It is important not only in determining questions of liability between the original parties to a transaction but because a warranty gives a right only to the immediate purchaser,<sup>2</sup> while a negligent seller of dangerous food may be liable to any person ultimately injured.<sup>3</sup>

Several recent decisions call attention to the boundaries of the principle of absolute liability for the wholesome character of food. At the outset it should be said that it is well recognized that unless food is sold by a dealer for immediate consumption, there is no implied warranty except under circumstances where a warranty would be implied in the sale of goods of other kinds.<sup>4</sup> Where the buyer himself examines and selects the food which he purchases, the existence of a warranty has been denied,<sup>5</sup> on the ground that the buyer does not rely on the seller's skill and judgment but on his own. The reasoning seems inconclusive. Such a buyer may rely on the seller's judgment by assuming as he fairly may that all the articles offered to him are suitable for food, and when he chooses one article rather than another, he should be regarded, unless the defect is an obvious one, as seeking merely the best of a number of things all of which are at least not dangerous to eat.<sup>6</sup> The warranty does not extend to sales of food for cattle.<sup>7</sup> It has recently been held inapplicable to the sale of canned goods,<sup>8</sup> because, it is said the seller

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<sup>1</sup> Recent decisions are: *Frost v. Aylesbury Dairy Co. Ltd.* [1905] 1 K. B. 608; *Askam v. Platt*, 85 Conn. 448, 83 Atl. 529 (1912); *Ward v. Great Atlantic & Pacific Co. (Mass.)* 120 N. E. 225 (1918); *Race v. Krum*, 222 N. Y. 410, 118 N. E. 853 (1918).

<sup>2</sup> *WILLISTON, SALES*, § 244.

<sup>3</sup> *Ketterer v. Armour*, 247 Fed. 921 (1912); *Parks v. C. C. Yost Pie Co.*, 93 Kans. 334, 144 Pac. 202 (1914).

<sup>4</sup> *WILLISTON, SALES*, § 242.

<sup>5</sup> *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481 (1908); *Gearing v. Berkson*, 223 Mass. 257, 259, 111 N. E. 785 (1916).

<sup>6</sup> See *Wallis v. Russell*, [1902] 2 Ir. 585; *Sloan v. F. W. Woolworth Co.*, 193 Ill. App. 620 (1915).

<sup>7</sup> *Dulaney v. Jones*, 100 Miss. 835, 57 So. 225 (1911); *F. A. Piper Co. v. Oppenheimer*, 158 S. W. 777 (1913).

<sup>8</sup> *Bigelow v. Maine Central R. Co.*, 110 Me. 105, 85 Atl. 306 (1912) (commented on in 26 HARV. L. REV. 556); *Trafton v. Davis*, 110 Me. 318, 86 Atl. 179 (1913).

cannot possibly discover that a particular can of a reputable brand of goods is defective, and therefore it is unjust to subject him to liability. The same argument, however, may be made in regard to any implied warranty not only of food but of other articles where the seller could not discover the injurious defect. Accordingly if canned goods are to be made an exception to the general rule governing sales of food, the whole law of implied warranty should be revised. As an original question it might well be argued that the rule of the Roman law and modern civil law which denies any other redress than rescission or diminution of the price to a buyer of defective goods, unless the seller makes express representations, or has guilty knowledge of the defect,<sup>9</sup> is a better rule than that of the common law which may subject a seller, guilty of no improper or negligent conduct, to heavy liability for consequential damages.

But the general principle of the common law is well established, and though it may bear heavily on an innocent seller in a particular case, the natural effect of it will be to diminish the sale of defective goods; and it must be remembered that the seller is far better able to hold liable the manufacturer who sold him the goods, than is the ultimate buyer. Certainly if a seller is ever to be made liable for injuries caused by defective goods, where he has been guilty of no fault, the reasons are stronger for holding him liable for selling defective food than in any other kind of sale — whether the matter is considered from the standpoint of precedent or of policy. In accordance with this general principle, the Massachusetts court has recently held,<sup>10</sup> following other recent cases,<sup>11</sup> that the sale of canned food is subject to the same rules of implied warranty as govern sales of other food.

The liability of a restaurant-keeper for damages caused by bad food served by him has also been tested in recent decisions. This question is sometimes supposed to depend on whether the restaurant-keeper makes a sale to the customer of the injurious food. It is indeed true that if the transaction amounts to a sale the numerous authorities referred to above establish liability. On excellent authority,<sup>12</sup> however, it is held that the title to food served by an innkeeper never passes. Whether this analogy holds good in a restaurant where a customer pays not for a meal, but for a definite portion of food, may perhaps be questioned. May not one who secures and pays for a piece of pie at an "automat" or luncheon spa take it from the plate and walk off with it without wrong?<sup>13</sup> Whether or not because the transaction has been held not to be a sale, it has generally been assumed that the liability of a restaurant-keeper is based only on willful fault or negligence, and many cases have been brought on this assumption. In most of them no asser-

<sup>9</sup> See WILLISTON, SALES, § 247. As to a presumption of knowledge on the part of a manufacturer, see *Doyle v. Fuerst and Kraemer, Ltd.* 129 La. 838, 56 So. 906 (1911).

<sup>10</sup> *Ward v. Great Atlantic & Pacific Tea Co. (Mass.)* 120 N. E. 225 (1918).

<sup>11</sup> *Jackson v. Watson*, [1909] 2 K. B. 193; *Sloan v. F. W. Woolworth Co.*, 193 Ill. App. 620 (1915).

<sup>12</sup> See BEALE, INNKEEPERS, § 169, and cases cited.

<sup>13</sup> This distinction is suggested in *Valeri v. Pullman Co.*, 218 Fed. 519, 520 (1914).



tion by the plaintiff of the defendant's absolute liability was made, but in a few recent cases the contention was made and denied.<sup>14</sup>

The Massachusetts Supreme Court,<sup>15</sup> and the Appellate Division of the New York Supreme Court<sup>16</sup> however, have recently upheld it, and with good reason. Even though the transaction is not a sale, every argument for implying a warranty in the sale of food is applicable with even greater force to the serving of food to a guest or customer at an inn or restaurant. The basis of implied warranty is justifiable reliance on the judgment or skill of the warrantor, and to charge the seller of an unopened can of food for the consequences of the inferiority of the contents of the can, and to hold free from liability a restaurant-keeper who opens the can on his premises and serves its contents to a customer, would be a strange inconsistency. A sale is not the only transaction in which a warranty may be implied.

The facts of the Massachusetts case suggest the inquiry, how far does the obviousness of the injurious character of food affect the defendant's liability. The plaintiff ordered baked beans. When the food was served, she noticed two or three dark or black objects almost as big as beans. She thought they were hard baked beans, without preliminary testing she "bit down hard on them" and broke two teeth. It is evident that recoverable damages for breach of warranty cannot include consequences that reasonably should have been avoided,<sup>17</sup> and whether the observed peculiarities of food served or purchased are such as to make consumption of it unreasonable may present a question of fact to be decided by the jury.<sup>18</sup>

An interesting decision to compare with the Massachusetts case just referred to, was handed down by the same court on the same day,<sup>19</sup> deciding adversely to the plaintiff an action of tort alleging negligence. It appeared that a small tack in a piece of blueberry pie served by the defendant had lodged in the throat of the plaintiff, but because of her inability to prove that the defendant was negligent, the decision of the lower court in favor of the plaintiff was set aside. The principle of *res ipsa loquitur* was held inapplicable, the tack being so small that it

<sup>14</sup> *Valeri v. Pullman Co.*, 218 Fed. 519 (1914); *Merrill v. Hodson*, 88 Conn. 314, 91 Atl. 533 (1914); *Travis v. Louisville, etc. R. Co.*, 183 Ala. 415, 62 So. 851 (1913); *Sheffer v. Willoughby*, 163 Ill. 518, 45 N. E. 253 (1896).

<sup>15</sup> *Friend v. Child's Dining Hall Co.* (Sup. Jud. Ct. Mass., October, 1918).

<sup>16</sup> *Leahy v. Essex Co.*, 164 N. Y. App. Div. 903, 148 N. Y. Supp. 1063 (1914); *Muller v. Child's Co.*, 171 N. Y. Supp. 541 (1918); *Barrington v. Hotel Astor*, 171 N. Y. Supp. 840 (1918).

The first of these cases was decided before the determination by the Court of Appeals of *Race v. Krum*, 222 N. Y. 410, 118 N. E. 853 (1918). That case involved the liability of a druggist for serving bad ice cream of his own manufacture, and the court, without intimating what its decision would be in case of an innkeeper or restaurant-keeper who did not "make or prepare" the food in question, expressly stated that its decision did not necessarily control such a case.

In the later decisions of the Appellate Division, however, a restaurant-keeper and an innkeeper were held liable. In *Muller v. Child's Co.*, the qualification in *Race v. Krum* was not noted, and in *Barrington v. Hotel Astor*, it was said that the hotel "prepared" the dish of kidney sauté which was in question.

<sup>17</sup> *WILLISTON, SALES*, § 614, note 31.

<sup>18</sup> The Massachusetts decision admits that the question is one of fact. See also *Sloan v. F. W. Woolworth Co.*, 193 Ill. App. 620, 625 (1915).

<sup>19</sup> *Ash v. Child's Dining Hall Co.* (Sup. Jud. Ct. Mass., October, 1918).

readily might have been imbedded in a blueberry and escaped the most careful scrutiny. The consistency of the decision with that previously discussed seems open to question. It is held in Massachusetts,<sup>20</sup> following the early law of England, still generally prevailing where common-law forms of action are preserved,<sup>21</sup> that action on a warranty may be in tort and neither *scienter* nor negligence on the part of the defendant need be alleged or proved. Since this is true, it is difficult to see why a plaintiff should lose his case by the superfluous allegation of negligence, if, as can hardly be doubted, his pleading contained a statement of all the facts necessary to establish an implied warranty within the principle simultaneously announced by the Massachusetts court.<sup>22</sup>

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RIGHT OF PUBLIC SERVICE COMPANY TO ALTER RATES FIXED BY CONTRACTS. —The problem which the public utilities of the country are seeking to solve to-day is how they may legally increase their rates in spite of long term contracts with private consumers, which in many instances call for service at prices below present costs,<sup>1</sup> and especially do they want to know whether they may do this on their own initiative, or must they first obtain the permission of the commission or other rate regulating body.

In *V. & S. Bottle Co. v. Mountain Gas Co.*<sup>2</sup> the Supreme Court of Pennsylvania recently upheld the legal right of the defendant natural gas company to discontinue service under a low-rate, ten-year contract entered into between its predecessor and the plaintiff in October, 1913, and to require the latter to pay increased rates as per schedule filed by the defendant with the State Public Service Commission, on the ground that though said contract was valid and binding between the parties when made it became unlawful and inoperative when the public utility act<sup>3</sup> went into effect January 1, 1914, as it contravened the provisions of that statute against discrimination.

It is settled that the general police power of the state embraces the regulation of the service and rates of public utility enterprises for the promotion of public convenience and the general welfare,<sup>4</sup> and that

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<sup>20</sup> *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 274, 84 N. E. 481 (1908).

<sup>21</sup> *Shippen v. Bowen*, 122 U. S. 575 (1887).

<sup>22</sup> *Ash v. Child's Dining Hall Co.* follows *Crocker v. Baltimore Dairy Lunch*, 214 Mass. 177, 100 N. E. 1078 (1913), where it appears that the plaintiff declined to amend his declaration by adding a count in contract, and the court, making the common but erroneous assumption that implied warranty is based on promise rather than representation, said, "whether the plaintiff might have relied upon an implied warranty . . . is not now to be considered." Presumably the counsel for the plaintiff in both the *Crocker* and the *Ash* cases failed to urge upon the court the reasoning here suggested.

<sup>1</sup> See *Re Marion Light & Heating Co. (Ind. Pub. Serv. Com.)*, P. U. R. 1918 D, 692; *Re Oklahoma Gas & Electric Co. (Okla. Corp. Com.)*, P. U. R. 1918 D, 216.

<sup>2</sup> Pa. Sup. Ct., June 3, 1918, 13 Rate Research, 335.

<sup>3</sup> Pennsylvania Public Service Company Law (1913), 6 PURDON'S DIGEST, 7206; Supplement, 1915.

<sup>4</sup> *Munn v. Illinois*, 94 U. S. 113 (1876); *Chicago, Burlington & Quincy R. Co. v. Iowa*, 94 U. S. 155 (1876); *Chicago, Burlington & Quincy R. Co. v. Nebraska*, 170 U. S. 57, 71-72 (1898); *Portland Railway, Light & Power Co. v. Oregon Railroad*

the exercise of this power may be delegated to a municipality, commission or other administrative body.<sup>5</sup>

Thus the courts hold that all contracts or grants relating to public service entered into between the private person or corporation operating a public utility and the municipality or the private consumer contain from the very nature of their subject matter an implied reservation of the right of the state to lawfully exercise its police power for the general welfare, and that there is no impairment of obligations of contract within the guarantees of the state or federal constitution even though said contract is thereby rendered partially or wholly invalid.<sup>6</sup>

This development has wrought a fundamental change in view-point in the law of public utilities, and to-day the primary consideration is not whether the exercise of the state's regulatory power impairs the obligation of the public service contract, but whether that contract tends to abridge this power of the state.<sup>7</sup>

To return to our problem, the public utility proprietor must needs know when this long-term contract, which the courts agree was binding at the time made, ceases to be so, and what then become his rights or duties in the premises.

In the instant case the court held the point of cleavage to have been on the day the public service act took effect, — yet the facts showed that on two different occasions thereafter the defendant utility company filed with the commission a tariff for that class of service at the same rate provided for under said contract and charged and collected said rate until April, 1917. As pointed out by a recent writer,<sup>8</sup> this fact may

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Commission, 229 U. S. 397 (1913); *City of Woodburn v. Public Service Commission of Oregon*, 82 Ore. 114, 161 Pac. 391 (1916); *Onondaga Golf & Country Club v. Syracuse & S. R. Co.*, 96 Misc. 499, 160 N. Y. Supp. 693 (1916); *Mississippi R. R. Commission v. Mobile & Ohio R. R. Co.*, 244 U. S. 388 (1917); *Winfield v. Public Service Commission*, 118 N. E. 531 (Ind.) (1918); *State ex rel. City of Sedalia v. Public Service Commission*, 204 S. W. 497 (Mo.) (1918).

<sup>5</sup> *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047 (1894). See *Atlantic Coast Electric Ry. Co. v. Board of Public Utility Commissioners*, 104 Atl. 218 (N. J.) (1918); *Trustees of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.*, 191 N. Y. 123, 146, 83 N. E. 693 (1908).

<sup>6</sup> *Kansas City Bolt & Nut Co. v. Kansas City Light & Power Co.*, 204 S. W. 1074 (Mo.) (1918); *City of Fulton v. Public Service Commission*, 204 S. W. 386 (Mo.) (1918); *Collingswood Sewerage Co. v. Borough of Collingswood*, 102 Atl. 901 (N. J.) (1918); *Raymond Lumber Co. v. Raymond Light & Water Co.*, 92 Wash. 330, 159 Pac. 133, P. U. R. 1916 F, 437 (1916); *McCook Irrigation & Water Power Co. v. Burtless*, 99 Neb. 250, 152 N. W. 334 (1915); *Union Dry Goods Co. v. Georgia Public Service Corporation*, 142 Ga. 841, 83 S. E. 946, 947 (1914); *Minneapolis, St. Paul, etc. Ry. Co. v. Menasha Wooden Ware Co.*, 159 Wis. 130, 150 N. W. 411, 413 (1914); *Idaho Power & Light Co. v. Blomquist*, 26 Idaho, 222, 141 Pac. 1083 (1914); *Re Rates of the Bridge Operating Co.*, 3 P. S. C. R. (1st Dist. N. Y.) 226 (1912); *aff'd* 153 App. Div. (N. Y.) 129, 138 N. Y. Supp. 434 (1912); *Portland Ry. Light & Power Co. v. City of Portland*, 200 Fed. 890 (1912).

*A fortiori* the same principles govern contracts between two private companies which function successively in furnishing a public service — the one producing and the other distributing the product supplied. *Oklahoma Natural Gas Co. v. Corporation Commission*, P. U. R. 1918 D, 515 (1918).

<sup>7</sup> See *Kansas City Bolt & Nut Co. v. Kansas City Light & Power Co.*, 204 S. W. 1074 (Mo.) (1918); *City of Chicago v. O'Connell*, 278 Ill. 591, 116 N. E. 210, P. U. R. 1917 E, 730; *President & Trustees of Village of Kilbourn City v. Southern Wisconsin Power Co.*, 149 Wis. 168, 135 N. W. 499 (1912).

<sup>8</sup> See Ralph J. Baker, "The Binding Force of Term Contracts as Applied to Pub-

have no significance as to the real legality of said contract, for the plaintiff may have been the only consumer of this class of service, or likely to require it, and, irrespective of that, the publishing and filing of a low contract rate as a class rate does not prevent it being unlawful if it results in actual discrimination against other classes of consumers, as the court found it did here.

The most important feature of the case from the view-point of our problem is that in a suit in equity by the consumer for specific performance of the contract, and for an injunction restraining the defendant from cutting off its service in violation thereof, the court dismissed the bill and sustained the legal right and power of the utility company to take the initiative in increasing its rates and discontinuing service under the old contract without going to the Public Service Commission for leave to do so.

This case represents what may be termed the first of two general views in upholding the legal right of the public utility company, subsequent to the passing of a public service law creating a commission empowered to regulate rates, to increase on its own initiative its rates for service above the maximum fixed by contract made with a private consumer prior to said act, and admittedly valid when made.<sup>9</sup>

The second view is presented in several recent cases which have held

lic Utility Rates," page 34. Paper read at Third Annual Convention of the New Jersey Utilities Association, Atlantic City, N. J., October, 1917.

<sup>9</sup> *Onondaga Golf & Country Club v. Syracuse & S. R. Co.*; *Denver & South Platte Ry. Co. v. City of Englewood, Colo.*, 161 Pac. 151, P. U. R. 1916 E, 134 (1916); *Mullen & Co. v. Denver & Rio Grande R. Co. (Colorado Public Utilities Commission)*, P. U. R. 1916 E, 128; *Minneapolis, St. Paul & S. S. Ry. Co. v. Menasha Wooden Ware Co.*, 159 Wis. 139, 150 N. W. 411 (1914); *Wolverton v. Mountain States Telephone & Telegraph Co.*, 58 Colo. 58, 142 Pac. 165 (1914); *Alpena Electric Light Co. v. Kline*, 180 Mich. 279, 146 N. W. 652 (1914); *State v. Martyn*, 82 Neb. 225, 117 N. W. 719 (1908).

It has been held in New Jersey that the Public Utilities Act permits the utility to file a new schedule of rates without first obtaining permission of the Board.

*Re Public Service Electric Co. (New Jersey Board of Public Utility Commissioners)*, P. U. R. 1918 E, 898 (1918).

And in New York a very recent case holds the Public Service Commissions Law (CONSOL. LAWS, c. 48) places no restriction on the right of gas companies to increase rates and make the increase effective prior to the time when the Public Service Commission shall determine whether the proposed increase is just and reasonable. *Pub. Service Commission, Second District, v. Iroquois Natural Gas Co.*, 171 N. Y. Supp. 379 (1918).

Under the Illinois Public Utilities Act the same decision has been reached, but restricted to the original schedules of rates only. *State Public Utilities Commission v. Chicago & West Towns Ry. Co.*, 275 Ill. 555, 114 N. E. 325 (1916).

Cases to the same effect under the Interstate Commerce Act, as to contracts made before the act and valid when made: *Southern Wire Co. v. St. Louis Bridge & Tunnel Co.*, 38 Mo. App. 191 (1889); *Louisville & Nashville R. Co. v. Mottley*, 219 U. S. 467 (1911); *Dorr v. Chesapeake & Ohio Ry. Co.*, 78 W. Va. 150, 88 S. E. 666 (1916); *Carter Planing Mill Co. v. New Orleans R. Co.*, 112 Miss. 148, 72 So. 884 (1916).

In the following cases the customers of the utility companies were subjected to penalties for accepting service at rates fixed by contract made subsequent to the passage of the Interstate Commerce Act, and valid when made, but rendered invalid under the act by the public utilities raising the rates for like service to others in the manner provided by law: *New York, New Haven & Hartford R. Co. v. Interstate Commerce Commission*, 200 U. S. 361 (1906); *Armour Packing Co. v. United States*, 209 U. S. 56 (1908).

that the public service acts of their respective jurisdictions worked no change in existing rates; that, therefore, rates fixed by a previously valid contract remain binding on the parties and do not become unlawful unless and until the State Commission duly determines them to be so, and that the utility company accordingly has no legal right to discontinue said contract on its own initiative prior to such decision.<sup>10</sup>

In some states<sup>11</sup> this point is expressly provided for in the public service statute denying to the public utility the right to itself increase the maximum rates fixed in any contract or grant under which it was operating at the time the act took effect during the term of said contract or grant.

These statutes have been construed to in no way limit the power of the commission to increase said maximum rates during the life of the contract or grant, nor to deprive the utility of the right to apply to the commission for such an increase before the expiration of said term.<sup>12</sup> It has been held that a statute which denies the utility an opportunity to apply for an alteration in rates is unconstitutional.<sup>13</sup>

It is submitted that in the absence of such statutory provisions the first of the two views discussed is more in accord with the fundamental principles of the law of public utilities, and that the same view should be taken of term contracts made subsequent to the passage of the public service law, or other regulating statute, unless the provisions of the act do not permit of that construction.<sup>14</sup>

A *fortiori* the public service commission, or similar body, may alter rates fixed by long term contract during said term, whether such contract was made before or after the empowering act,<sup>15</sup> unless said act is con-

<sup>10</sup> *Manitowoc v. Manitowoc & Northern Traction Co.*, 145 Wis. 13, 28, 129 N. W. 925 (1911); *Sultan Timber Co. v. Great Northern R. Co.*, 58 Wash. 604, 109 Pac. 320 (1910), (Washington statute in force then did not expressly except existing contract rates from the prohibition against discrimination).

A case going much further and holding that even the commission did not have power to increase rates in spite of such a contract is *Public Service Electric Co. v. Board of Public Utility Commissioners and City of Plainfield*, 88 N. J. L. 603, 96 Atl. 1013 (1916).

<sup>11</sup> Washington Public Service Commission Law, 1911, § 34 (GEN. STAT. 1915), §§ 8626-34, relating to gas, electric and water companies, but there is no corresponding provision as to common carriers (*semble*, §§ 20-21) GEN. STAT., §§ 8626-20, 21. Indiana Public Service Act, 1913, § 7 (BURNS' ANN. STAT. 1914), ch. 124 A, §§ 10052 g-7); Illinois Public Utilities Act, § 36 (HURD'S REV. STAT., 1915-16, c. 111 a, § 36); Utah Public Utilities Commission Act, Laws of Utah, 1917, ch. 47, art. 3, § 5.

<sup>12</sup> *Raymond Lumber Co. v. Raymond Light & Water Co.*, 92 Wash. 330, 159 Pac. 133, P. U. R. 1916 F, 437 (1916); *Winfield v. Public Service Commission*, 118 N. E. 531, 537 (Ind.) (1918); *State Public Utilities Commission v. Chicago, Peoria & St. Louis Railroad Co.*, 118 N. E. 427 (Ill.) (1917); *Salt Lake City v. Utah Light & Traction Co.*, 173 Pac. 556 (Utah), P. U. R. 1918 F, 377.

<sup>13</sup> *Trustees of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.*, 191 N. Y. 123, 83 N. E. 693 (1908).

<sup>14</sup> *Osborne v. San Diego Land & Town Co.*, 178 U. S. 22 (1900), affirming *Lanning v. Osborne*, 76 Fed. 319 (1896); *President & Trustees of Village of Kilbourn City v. Southern Wisconsin Power Co.*, 149 Wis. 168, 135 N. W. 499 (1912); *Birmingham Waterworks Co. v. Brown*, 67 So. 613 (Ala.) (1914).

<sup>15</sup> *Atlantic Coast Electric Ry. Co. v. Board of Public Utility Comm'rs*, *supra*; *Salt Lake City v. Utah Light & Traction Co.*, *supra*; *Whitcomb v. Duquesne Light Co.* (Pa. Pub. Serv. Com. 1916), P. U. R. 1917 B, 979; *City of Woodburn v. Public Service Commission*, *supra*; *Raymond Lumber Co. v. Raymond Light & Water Co.*, *supra*;

strued to be prospective only as to that particular type of contract;<sup>16</sup> and increases made in rates by the public utility pursuant to the determination of the commission as to what is a just and reasonable rate become effective when filed and apply alike to contract and non-contract consumers.<sup>17</sup>

To determine when the contract rate becomes unlawful, we must consider the situation in states which have not yet adopted commission regulation of public service rates, and in those jurisdictions where certain utilities are not governed so strictly in this respect by the public utilities act in force.

The basic principles of the law of public utilities require that rates must be just and reasonable in order to provide a fair return on the investment,<sup>18</sup> and to enable the utility to maintain a safe, adequate and efficient service. Therefore it seems clear that whenever the rates for the public service, though fixed by long termed contracts between the utility and its customers, become so low as to be unjust and unreasonable and to directly tend to disable the company from performing its public service obligations, as defined above, said rates are *ipso facto* unlawful and void, and it is the legal duty, not the privilege, of the public utility enterprise to discontinue performance of said contracts and to increase

Pinney & Boyle Co. v. Los Angeles Gas & Electric Corporation, 168 Cal. 12, 141 Pac. 620 (1914); Portland Railway Light & Power Co. v. City of Portland, *supra*.

For cases distinctly upholding power of commission, or other lawfully authorized administrative body, to reduce rates below those fixed by contract, see Rogers Park Water Co. v. Fergus, 180 U. S. 624 (1901); City of Chillicothe v. Logan Natural Gas & Fuel Co., 8 Ohio N. P. 88 (1901).

Recent decisions to effect that power to establish just and reasonable rates includes power to increase them, in excess of the maximum fixed by contract or agreement. Collingswood Sewerage Co. v. Borough of Collingswood, 102 Atl. 901 (N. J.); P. U. R. 1918 C, 261. People *ex rel.* New York & North Shore Traction Co. v. Public Service Commission of New York, Second District, 175 App. Div. 869, 162 N. Y. Supp. 405; P. U. R. 1917 B, 957 (1916). See 31 HARV. L. REV. 1168.

And even though the contract rate was approved by the commission when made: The Golden Cycle Mining & Reduction Co. v. The Colorado Springs Light, Heat and Power Co. (Col. Pub. Util. Com.), 13 Rate Research, 131 (1918); *Re* Public Service Electric Co., P. U. R. 1918 E, 898.

The unique case of a public utility company objecting that a minimum rate was too rigid was presented in Economic Gas Co. v. City of Los Angeles, 168 Cal. 448, 143 Pac. 717 (1914).

The so-called beneficiary right of the consumer in public service rate-contracts between other parties which tend to redound to his benefit has been discussed in some recent cases: Borough of North Wildwood v. Board of Public Utility Commissioners, 88 N. J. L. 81, 95 Atl. 749; P. U. R. 1916 B, 77 (1915). See Collingswood Sewerage Co. v. Borough of Collingswood, *supra*. Cf. Natick-Framingham-Marlboro Gas Petition (Mass. B'd Gas & Electric Light Comm'rs, May, 1918), 13 Rate Research, 200.

<sup>16</sup> Public Service Electric Co. v. Board of Public Utility Commissioners and City of Plainfield, 88 N. J. L. 603, 96 Atl. 1013 (1916). See Salt Lake City v. Utah Light & Traction Co., *supra*.

<sup>17</sup> *Re* Public Service Electric Co., *supra*; The Golden Cycle Mining & Reduction Co. v. The Colorado Springs Light, Heat & Power Co., *supra*.

<sup>18</sup> Smyth v. Ames, 169 U. S. 466 (1897); Knoxville v. Knoxville Water Co., 212 U. S. 1 (1908); Willcox v. Consolidated Gas Co., 212 U. S. 19 (1908); Cedar Rapids Gas Co. v. Cedar Rapids, 223 U. S. 655 (1912), affirming 144 Ia. 426 (1909); Mississippi Railroad Commission v. Mobile & Ohio R. Co., 244 U. S. 388; P. U. R. 1917 E, 791; Darnell v. Edwards *et al.* (Miss. R. Comm.), 244 U. S. 564 (1917). See State *ex rel.* Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861 (1915).

its rates to the point that they are again just and reasonable.<sup>19</sup> Of course, the converse is true as to contract rates which changing conditions may render too high and unjust and unreasonable to the public.<sup>20</sup> These principles apply equally to contracts which for any reason become discriminatory.<sup>21</sup> As stated in a recent case the public service acts have not changed the law in this respect.<sup>22</sup>

Obviously, a contract the performance of which thus conflicts with the legal duty owed by the utility enterprise to the public is unlawful and outside the protection of the contract clause of the State or Federal Constitution.

*Quere*: — Would it not be desirable, in view of the modern public service acts empowering the commissions to restrict competition, to treat all long term contracts fixing rates for public service as void *ab initio*, because inherently tending to violate the basic policy of regulation of public utility rates as herein explained.<sup>23</sup>

## RECENT CASES

ADMINISTRATION — RES ADJUDICATA — EFFECT OF DECREE OF PROBATE COURT ON INTESTATE REALTY. — An intestate decedent, domiciled in Illinois with all his real and personal property in that state, left a son and several brothers and sisters all domiciled in Kansas. The Illinois county court, with probate jurisdiction over his estate, decreed after service by publication on the non-residents that the brothers and sisters were the heirs. The personal property was distributed accordingly. The son did not appear. He now brings a bill in equity in the Illinois Circuit Court to obtain the real estate as sole heir. *Held*, he is not estopped by the probate adjudication. *Mosier v. Osborn*, 119 N. E. 924 (Ill.).

At common law realty passed directly to the heir. But in Illinois by statute realty is treated in the same manner as personalty for the law of descent of real property. See 1917, HURD'S REV. STAT. ILL., c. 39, § 1. The Illinois Constitution also says that the county court, having probate juris-

<sup>19</sup> *Oklahoma Natural Gas Co. v. Corporation Commission of Oklahoma* (Okla.); P. U. R. 1918 D, 515 (1918); *Northampton, Easton & Washington Traction Co. v. Board of Public Utility Comm'rs*, 102 Atl. 930 (N. J.) (1918); *State Public Utilities Commission v. Chicago & West Towns Ry. Co.*, 275 Ill. 555; 114 N. E. 325 (1916); *City of Louisiana v. Louisiana Water Co.* (Mo. Pub. Serv. Comm.) P. U. R. 1918 B, 774.

For these principles applied to a municipal franchise see *Atlantic Coast Electric Ry. Co. v. Board of Public Utility Comm'rs*, 104 Atl. 218, 220 (N. J.) (1918).

<sup>20</sup> *Whitcomb v. Duquesne Light Co.* (Pa. Pub. Serv. Com. 1916), P. U. R. 1917 B, 979.

<sup>21</sup> *State ex rel. American Union Telegraph Co. v. Bell Telephone Co. of Missouri*, 22 ALBANY LAW JOURNAL, 363 (St. Louis Cir. Ct.) (1880); *The Inter-Ocean Publishing Co. v. The Associated Press*, 184 Ill. 438, 450; 56 N. E. 822 (1900); *Birmingham Waterworks Co. v. Brown*, 191 Ala. 475, 67 So. 613 (1914).

<sup>22</sup> See *Atlantic Coast Electric Ry. Co. v. Board of Public Utility Comm'rs*, *supra*.

<sup>23</sup> See *Manitowoc v. Manitowoc & Northern Traction Co.*, 145 Wis. 13, 129 N. W. 925 (1911); *Wolverton v. Mountain States Telephone & Telegraph Co.*, 58 Colo. 58, 142 Pac. 165 (1914); *Atlantic Coast Electric Ry. Co. v. Board of Public Utility Comm'rs*, *supra*.

diction, shall be a court of record. See 1917, HURD'S REV. STAT. ILL., Art. 6, § 18. Furthermore, in the matter of admitting to probate wills involving realty, Illinois has held that the county court decision is final and not subject to collateral attack. *James White Memorial Home v. Price*, 195 Ill. 279, 62 N. E. 872. *Keister v. Keister*, 178 Ill. 103, 52 N. E. 946. Then logically in intestate succession the county court decree should be as binding as in testate succession, for if one is a probate matter, the other also is probate. The decree of the court for probate matters on a probate question should then be binding on an equity court in a collateral attack. *Stone v. Wood*, 16 Ill. 177; *Hanna v. Vocum*, 17 Ill. 77; *Lynch v. Baxter*, 4 Tex. 431; *Klingensmith v. Bean*, 2 Watts (Pa.), 486; *State v. McGlynn*, 20 Cal. 233. And as the county court judgment was given in proceedings with due service according to the Illinois statute, it should be binding on the world as probate proceedings are *in rem*. *Mulcahey v. Dow*, 131 Cal. 73, 63 Pac. 158; *Greenwood v. Murray*, 26 Minn. 259, 2 N. W. 945; *Fry v. Taylor*, 1 Head (Tenn.), 594; *State v. McGlynn*, 20 Cal. 233; *Liginger v. Field*, 78 Wis. 367, 47 N. W. 613. Hence the case seems to be a remnant of the common-law view of intestate succession and therefore wrong.

**BILLS AND NOTES — CHECKS — NEGLIGENCE OF DRAWER — YOUNG VERSUS GROTE.** — The plaintiff's confidential clerk, whose duty it was to prepare checks for signature, presented a check blank as to words of amount but having "£2. 0. 0" in the space provided for figures. The plaintiff signed. The clerk subsequently wrote "one hundred and twenty pounds" in the space provided for words, inserted "1" and "0" on either side of the "2", cashed the check for £120 with the drawee bank, and absconded. The plaintiff sues the bank for the amount charged to his account less £2. In the Court of Appeal it was held he could recover. The case was subsequently carried to the House of Lords on appeal. *Held*, he could not recover. *London Joint Stock Bank, Ltd., v. Macmillan*, 145 L. T. 163.

For discussion of this case see 31 HARV. L. REV. 779, with which the final decision is in harmony.

**CONSTITUTIONAL LAW — ADVISORY OPINIONS — APPEALS.** — The Workmen's Compensation Act authorizes the Industrial Commission to certify to the Appellate Division of the Supreme Court "questions of law involved in its decision." The Commission certified a question as to the validity of certain rules it proposed to promulgate. Certain employers were allowed to appear and file briefs as *amici curiae*. The Appellate Division answered the question in favor of validity. The interveners appealed to the Court of Appeals. *Held*, appeal dismissed for want of jurisdiction. *In re Workmen's Compensation Fund*, 119 N. E. 1027 (N. Y.).

In the absence of a constitutional provision, a statute requiring the judiciary to render advisory opinions at the request of the other departments is held unconstitutional, because it imposes duties not properly judicial. *Rice v. Austin*, 19 Minn. 103; *State v. Baughman*, 38 Ohio St. 455. Even where the Constitution requires opinions, it is generally held that the advisory opinion has not the quality of judicial authority. See *Taylor & Co. v. Place*, 4 R. I. 324, 362; *Laughlin v. Portland*, 111 Me. 486, 497, 90 Atl. 318, 323; *Opinion of the Justices*, 126 Mass. 557, 566. See also J. B. THAYER, "American Doctrine of Constitutional Law," 7 HARV. L. REV. 129, 153; H. A. DUBUQUE, "The Duty of Judges as Constitutional Advisers," 24 AM. L. REV. 369, 374, 375. But see *contra*, *In re Senate Resolution*, 12 Colo. 466, 467, 21 Pac. 478, 479. In the principal case, advisory opinions were not required by the Constitution or by the statute, which was construed to authorize the Industrial Commission to certify on questions arising only out of litigated con-



troversies. WORKMEN'S COMPENSATION ACT, § 23. And there was no litigation before the Commission. So neither an advisory opinion nor a binding decision could be given by the Appellate Division on the question certified. This case, however, raises an interesting point. If an advisory opinion were given in pursuance of a constitutional provision, could that opinion be reviewed by a higher court? Such opinions are generally given without a hearing and without the aid of research and argument by counsel. However, if the advisory opinions are rendered after the filing of briefs by *amici curiae*, as in the principal case, they might have some judicial authority and so be reviewable. The only objection is that there is no judicial proceeding between parties litigant which the ultimate court is asked to review. See H. A. DUBUQUE, "The Duty of Judges as Constitutional Advisers," 24 AM. L. REV. 369 *et seq.*, for a valuable historical discussion of advisory opinions.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — CHILD LABOR LAW. — The federal Child Labor Law prohibits the transportation by interstate commerce of certain products of child labor. ACT SEPT. 1, 1916, 39 STAT. 675, c. 432 (COMP. STAT. 1916, §§ 8819 a-8819 f). A bill to enjoin threatened prosecutions of children was brought by their father, who alleged that the act is not a regulation of interstate and foreign commerce and that it contravenes the Fifth and Tenth Amendments to the Constitution. In support of the act the District Attorney relied upon the commerce clause of the Constitution. *Held*, the act is unconstitutional and the order allowing an injunction is affirmed. *Hammer v. Dagenhart*, 38 Sup. Ct. R. 529.

For a discussion of this case, see the article by Thurlow M. Gordon, "The Child Labor Law Case," p. 45.

CONSTITUTIONAL LAW — STATE AND FEDERAL JURISDICTION — MILITARY NECESSITY. — A man in the naval service of the United States while acting under orders from a competent authority to proceed with dispatch broke the speed laws of the state. *Held*, that state laws regulating speed upon the highways are subordinate to exigencies of military operations in cases where military necessity exists. *State v. Burton*, 103 Atl. 962 (R. I.).

The activities of the navy are within the control of the federal government. U. S. CONST., Art. I, § 8, ¶ 14. Unless clearly illegal on its face the order of a superior officer protects the subordinate. *United States v. Clark*, 31 Fed. 710. But it is not *per se* a justification nor is he removed from the jurisdiction of the civil authorities. *Mitchell v. Harmony*, 13 How. (U. S.) 115; *Dow v. Johnson*, 100 U. S. 158. Control of vehicles upon the highway falls within the police power of the state. *State v. Swagerty*, 203 Mo. 517, 102 S. W. 483. But the state cannot interfere with the due exercise of the federal authority. *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316. Within its sphere the federal government transcends the police power of the state. *Ohio v. Thomas*, 173 U. S. 276. The necessities of war will justify a "private mischief." *Commonwealth of Pa. v. Sparhawk*, 1 Dall. (U. S.) 357. Winning the war is paramount to any rules for personal safety. But courts, even when recognizing federal superiority and the right of military authorities in case of military necessity to interfere with private rights, jealously guard their prerogative of judging whether there is such an emergency. *Philadelphia Company v. Stimson*, 223 U. S. 603, and cases cited.

CONTRACTS — DEFENSES — PUBLIC POLICY AS A DEFENSE FOR NON-PERFORMANCE. — The defendant refused to perform his part of a contract for a baby show on account of an epidemic of infantile paralysis. *Held*, the defendant was, as a matter of public policy, excused from performance. *Hanford v. Conn. Fair Ass'n, Inc.*, 103 Atl. 888 (Conn.).

Mere impossibility never excuses performance of a contract, but unforeseen difficulties of performance due to domestic law, destruction of the specific subject matter of the contract, or to the death or illness of a party are sometimes defenses. 15 HARV. L. REV. 63. These defenses are equitable; if the parties had contemplated the particular contingency, they would have agreed that the contract should be justly modified or terminated thereby. See WALD'S POLLOCK ON CONTRACTS, 525, 536, 543. See also 15 HARV. L. REV. 418; 19 HARV. L. REV. 462. Reasonable fear of bodily harm arising subsequently to the making of the contract also excuses a party from performance. *Lakeman v. Pollard*, 43 Me. 463; *Walsh v. Fisher*, 102 Wis. 172, 78 N. W. 437; *Sibbery v. Connelly*, 22 L. T. R. 174. In a contract that is against public policy, however, the law denies recovery because the tendency of the contract was bad from the outset. *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790; *Egerton v. Brownlow*, 4 H. L. 1. Obviously one who contracts to hold a baby show does no wrong thereby. In the principal case the court should not excuse performance on the ground of a demand by public policy, but because the parties, if they had contemplated the epidemic, would have agreed that such a happening would justly terminate the contract.

CONTRACTS — SUITS BY THIRD PERSONS NOT PARTIES TO THE CONTRACT — SOLE BENEFICIARY. — The deceased drew up his wife's will. She expressed her dissatisfaction with it in that the plaintiff, her niece, was not amply provided for by it. He promised thereupon that if she would sign the will as it stood, he would leave the plaintiff enough in his testament to make up the difference, and the wife accordingly executed the instrument. Thereafter, when the deceased came to die, it was discovered that his will provided in no way for the plaintiff. *Held*, that she could recover on the promise. *Seaver v. Ransom*, Ct. App. (N. Y.) October 1, 1918.

On a contract for the sole benefit of a third party the promisee may not recover more than nominal damages for the promisor's breach. *Burbank v. Gould*, 15 Me. 118; *Watson v. Kendall*, 20 Wend. 201; *Adams v. Union R. R. Co.*, 21 R. I. 134, 137. Justice, therefore, demands that the beneficiary recover, since he alone suffers damage, and the promisor, otherwise, is permitted to retain valuable consideration, given for a promise never performed. The New York courts have been prevented from reaching this conclusion because of the rule laid down by former decisions, limiting the right of action by a beneficiary to cases, where the promisee owed him some duty. *Vrooman v. Turner*, 69 N. Y. 280, 283; *Lorillard v. Clyde*, 122 N. Y. 498, 25 N. E. 292; *Sullivan v. Sullivan*, 161 N. Y. 554, 56 N. E. 116. See 15 HARV. L. REV. 780-82. But to prevent injustice to some extent, the courts went to the length of declaring that a moral duty was sufficient to sustain such an action. *Buchanan v. Tilden*, 158 N. Y. 109, 52 N. E. 724; *Matter of Kidd*, 188 N. Y. 274, 80 N. E. 924; *De Cicco v. Schweizer*, 221 N. Y. 431, 117 N. E. 807. The principal case refuses to invoke such an absurdity. It virtually permits recovery by any sole beneficiary and disregards completely the restriction imposed by former cases.

DAMAGES — NATURE AND ELEMENTS — COMPOUND INTEREST. — At a partnership settlement the defendant failed to disclose his ownership of certain stocks which were to be shared by the partners. The Supreme Court of Massachusetts awarded damages, with interest from the date of settlement to the date of the bill; and the case was recommitted to the master to ascertain the value of the stock, but the terms of the decree were to be settled before a single justice, who reported the case to the full court on the question whether compound interest may be computed from the date of settlement to the date of filing the bill, with a rest as of the date of filing the bill and interest there-

after to the date of the decree, to prevent the fiduciary from acquiring unjust gain. *Held*, compound interest allowed. *Arnold v. Maxwell*, 119 N. E. 776 (Mass.).

Compound interest may be allowed in order to prevent a fiduciary from acquiring unjust gain. *Schiefflin v. Steward*, 1 Johns. (N. Y.) 620; *Jennison v. Hapgood*, 10 Pick. (Mass.) 77. But the law of the case is as handed down in the prior adjudication of the court; *i.e.*, simple interest from the settlement to the bill. *Arnold v. Maxwell*, 223 Mass. 47, 111 N. E. 687. And the court now declares that decision to be the law of the case. Compound interest might have been awarded at the outset, but this decision is inconsistent with itself when it announces a former award of simple interest to be the law of the case and then proceeds to allow compound interest. The court may have been unconsciously invoking the Massachusetts rule that a decree might bear interest. *East Tennessee Land Co. v. Leeson*, 185 Mass. 4, 69 N. E. 351. See MASS. R. L. c. 177, § 8. However, the decision is still difficult to explain, since under the Massachusetts rule interest would be computed from the settlement to the bill with interest on that total from the date of the first decree, and not with a rest at the date of the bill. No interest at all would be allowed during the interval between the bill and the first decree.

**ELECTIONS — ELECTION CERTIFICATES BINDING TILL DIRECTLY OVERTURNED.** — Art. 4, Pt. 3, § 17 of the Maine Constitution provides for a referendum of any statute passed but not yet in force on petition of ten thousand electors filed with the Secretary of State within ninety days after the recess of the legislature. Each petition must be accompanied by a certificate of the city or town clerk stating that all the signatures on the petition are names of electors on the voting list. Within the ninety days a city clerk who had done such certifying wrote to the Secretary of State, saying that he had not ascertained whether all the petitioners had their names on the voting list. *Held*, the names of these petitioners should be counted. *In re Opinion of the Justices*, 103 Atl. 761 (Me.).

It is well settled that a certificate drawn in due form by the proper official is final and binding until it is directly, and not collaterally, attacked. *In re Rothwell*, 44 Mo. App. 215; *State v. Kersten*, 118 Wis. 287, 95 N. W. 120; *Ryan v. Varga*, 37 Ia. 78; *Ewing v. Thompson*, 43 Pa. St. 372; *State v. Churchill*, 15 Minn. 455; *Warner v. Meyers*, 4 Ore. 72; *Morgan v. Quackenbush*, 22 Barb. (N. Y.) 72; *United States v. Arredondo*, 6 Pet. (U. S.) 691. Indeed, even the officer issuing the certificate cannot issue a later valid certificate unless definitely allowed a reviewing power by statute. *Bowen v. Hixon*, 45 Mo. 340; *Hadley v. Mayor of Albany*, 33 N. Y. 603. In the principal case the city clerk might within the ninety days have made a formal cancellation or amendment in accord with facts upon the certificate and petitions. Until he did so, they remained valid. But to prevent a miscarriage of the intent of the constitutional provision the governor or some interested party may attack the certificate directly by *quo warranto* process. *State v. Freeholders of Hudson County*, 35 N. J. L. 269; *State v. Chosen Freeholders of Camden*, 35 N. J. L. 217; *People v. Miller*, 16 Mich. 56; *Atherton v. Sherwood*, 15 Minn. 225; *State v. Churchill*, 15 Minn. 455; *Warner v. Meyers*, 4 Ore. 72. Or it may be attacked by *mandamus* where such procedure is allowed. *State v. Peacock*, 15 Neb. 442, 19 N. W. 685; *State v. Stearns*, 11 Neb. 104, 7 N. W. 743; *Flanders v. Roberts*, 182 Mass. 524, 65 N. E. 902.

**EVIDENCE — CORONER'S VERDICT — INDUSTRIAL BOARDS.** — In a proceeding before the Illinois Industrial Board to recover compensation under the Workmen's Compensation Act, a coroner's verdict was admitted in evidence to show the circumstances under which the deceased met his death. *Held*,

that the evidence was properly admitted. *Morris & Co. v. Industrial Board*, 119 N. E. 944 (Ill.).

Workmen's compensation laws frequently exempt industrial boards from the common-law rules of evidence. See 1914, CONSOL. LAWS N. Y., c. 64, Art. 4, § 68; PAGE AND ADAMS, ANN. OHIO GEN. CODE, §§ 1465-44; BULLETIN NO. 203, U. S. BUREAU OF LABOR STATISTICS, 284. In Illinois, however, there is no such statutory provision, and so the common-law rules apply. *Victor Chemical Works v. Industrial Board*, 274 Ill. 11, 113 N. E. 173; *Goelitz Co. v. Industrial Board*, 278 Ill. 164, 115 N. E. 855. See 1917, HURD'S REV. STAT. ILL., c. 48, § 141. By the weight of authority in the United States a coroner's verdict is not admissible either in civil or criminal actions to prove the cause of death. *Aetna Life Ins. Co. v. Milward*, 118 Ky. 716, 82 S. W. 364; *Wasey v. Traveler's Ins. Co.*, 126 Mich. 119, 85 N. W. 459. Illinois, on the contrary, follows the early English rule, admitting the coroner's verdict as a judicial record and hence as an exception to the hearsay rule. *United States, etc. Ins. Co. v. Vocke*, 129 Ill. 557, 22 N. E. 467; *Armour & Co. v. Industrial Board*, 273 Ill. 590, 113 N. E. 138. See 15 HARV. L. REV. 664. The Illinois courts are apparently influenced by a statute which provides that coroner's verdicts shall be recorded. See 1917, HURD'S REV. STAT. ILL., c. 31, § 19. According to the Illinois doctrine, the decision in the principal case is therefore correct. On principle, however, the prevailing American rule seems preferable. In view of the hurried and careless manner in which inquests are frequently conducted, the coroner's verdict, though relevant in determining the cause of death, is of slight probative value and should not be excepted from the operation of the hearsay rule. *Germania Life Ins. Co. v. Ross Lewin*, 24 Colo. 43, 51 Pac. 488; *Kane v. Lodge*, 113 Mo. App. 104, 87 S. W. 547.

**INJUNCTION — INVASION OF FRANCHISE RIGHT BY PUBLIC SERVICE CORPORATION HAVING NO LICENSE TO DO BUSINESS.** — A public service commission had authority to license a duplication of service by a competing public utility if required by public necessity. An established and licensed telephone company sought to enjoin the defendant telephone company, which was beginning construction in the same municipality without a license from the commission. *Held*, that a permanent injunction was properly granted. *Farmers' & Merchants' Co-op. Telephone Co. v. Boswell Telephone Co.*, 119 N. E. 513 (Ind.).

The mere usurpation of a public privilege cannot, without more, constitute a private wrong to another public utility. *Jersey City Gaslight Co. v. Consumers' Gas Co.*, 40 N. J. Eq. 427, 2 Atl. 922; *Coffeyville M. & G. Co. v. Citizens' Natural M. & G. Co.*, 55 Kan. 173, 40 Pac. 326. But where the plaintiff's special interests or property rights are threatened, equity will grant relief. *Williams et al. v. Citizens' Ry. Co.*, 130 Ind. 71, 29 N. E. 408; *City Ry. Co. v. Citizens' St. Ry. Co.*, 166 U. S. 557, 17 Sup. Ct. Rep. 653; *Hudspeth v. Hall*, 111 Ga. 510, 36 S. E. 770; *Douglass's Appeal*, 118 Pa. St. 65, 12 Atl. 834. And a franchise is a contractual or proprietary right. *Barllesville E. L. & P. Co. v. Barllesville I. Ry. Co.*, 26 Okl. 453, 109 Pac. 228; *Millville Gas Co. v. Vineland L. & P. Co.*, 72 N. J. Eq. 305, 65 Atl. 504; *Louisville v. Cumberland T. Co.*, 224 U. S. 649, 32 Sup. Ct. Rep. 572. Moreover, an exclusive monopoly is universally considered a property right, and an illegal interference will be enjoined. *Croton Turnpike v. Ryder*, 1 Johns. (N. Y.) Ch. 611; *N. O. Gas Co. v. N. O. Light Co.*, 115 U. S. 650, 6 Sup. Ct. Rep. 252; *Atlantic City W. W. Co. v. Atlantic City*, 39 N. J. Eq. 367. A franchise not exclusive in its terms is exclusive against those having no license to compete, and should be dealt with similarly. *Delaware & R., etc. Co. v. Camden & A., etc. Co.*, 18 N. J. Eq. 546; *Millville Gas Co. v. Vineland L. & P. Co.*, *supra*. See *Patterson v. Wollmann*, 5 N. D. 608, 611, 67 N. W. 1040, 1042, and cases cited. See also

3 DILLON, MUNICIPAL CORPORATIONS, 1992. Moreover, the defendant's unauthorized construction of its poles and lines on a street or highway is a public nuisance. *Von Horne v. Newark P. Ry. Co.*, 48 N. J. Eq. 332, 21 Atl. 1034. And one suffering a pecuniary loss proximately resulting from a public nuisance may abate it in equity. *Griswold v. Brega*, 160 Ill. 490, 43 N. E. 864. Some courts have refused to grant an injunction because the plaintiff seeks to prevent competition. *Coffeyville M. & G. Co. v. Citizens' N. G. & M. Co.*, *supra*; *Baxter T. Co. v. Cherokee C. M. T. A.*, 94 Kan. 159, 146 Pac. 324. Public welfare especially requires that public utilities shall compete whenever conditions warrant it. *East St. L. Ry. Co. v. East St. L. U. Ry. Co.*, 108 Ill. 265. But free competition in the principal case would be subversive of the public interest, because adequate service there requires no duplication.

**MALICIOUS PROSECUTION — CIVIL SUIT — ABSENCE OF ARREST OR SEIZURE.** — In an action for malicious prosecution in a civil suit, where there had been neither arrest of the person of the plaintiff nor seizure of his property, *held*, that the plaintiff could recover. *Pearson v. Ashcraft Cotton Mills*, 78 S. W. 204 (Ala.).

Alabama, meeting this question for the first time, takes its place among the states allowing such recovery. The English rule, owing to the Statute of Marlbridge (52 HEN. III, c. 6), which allowed heavy costs *pro falso clamore* to the defendant in a civil action, denies such relief in a separate action for malicious prosecution. *Savile v. Roberts*, 1 Ld. Ray. 374. Formerly the weight of American authority was in accord with the English rule. *Welmore v. Mellinger*, 64 Ia. 741, 18 N. W. 870; *Potts v. Imlay*, 4 N. J. L. 382. See cases cited in AMES'S and SMITH'S CASES ON TORTS, Pound's ed., 1917, 650. But now the weight of authority seems to have swung to the other side. *Kolka v. Jones*, 6 N. D. 461, 71 N. W. 558. On principle, American costs being meagre, the view of the principal case seems sound. The fear of multiplying litigation is without merit. To deny relief might often lead to persecution without remedy. See 9 HARV. L. REV. 538.

**MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT — CHARITABLE INSTITUTION.** — An employee sued a purely charitable institution under the Act for injury by a buzz planer. The Massachusetts Workmen's Compensation Act in terms includes all employees, one clause specifically excepting farm laborers and domestic servants. MASS. STAT. 1911, c. 751, §§ 1, 2. *Held*, that charitable institutions are impliedly excepted. *Zoulalian v. New England Sanatorium & Benevolent Association*, 119 N. E. 686 (Mass.).

Charitable organizations are generally not liable for the negligence of servants or agents. *McDonald v. Mass. General Hospital*, 120 Mass. 432. In England the law is in some confusion as regards their liability at common law; hence a decision holding such an institution liable under the Act may not apply to the principal case. *MacGillivray v. Institute for The Blind*, 1911, S. C. 897, 48 Scot. L. R. 811. Public commissions managing essentially private or quasi-public enterprises have been held to come under the Act. *In re Ryan*, N. S. Wales St. Rep. 33; *Gilroy v. Makie*, 1909, S. C. 466, 46 Scot. L. R. But see *Brown v. Decatur*, 188 Ill. App. 147. The California Act specifically includes "the state . . . and all . . . having persons in service for hire." 1917 STAT. c. 2143, § 7. The Massachusetts court properly holds that the specific exemption of farm laborers and domestic servants does not necessarily imply that all other workmen are included. More doubtfully the court finds an implied exception in the general intent expressed in the law. The economic principle on which Workmen's Compensation Acts are often justified obviously would not apply to charitable institutions. Yet, as apparently in California, it may be thought that on humanitarian principles every enterprise should

bear its casualties. See BOHLEN, "Drafting of Workmen's Compensation Acts," 25 HARV. L. REV. 328, 329. In the setting of the Massachusetts Act, however, the decision seems sound.

**MASTER AND SERVANT — WORKMEN'S COMPENSATION ACTS — COMMON RISKS.** — An employee working in a trunk factory was directed to go to the factory maintained by the same company on the opposite side of the street to letter a trunk. While returning, after he had completed his task, he slipped on the ice in the street and sustained fatal injuries. *Held*, that the accident arose out of his employment. *Redner v. H. C. Faber & Son Co.*, 119 N. E. 842 (N. Y.).

The greatest difficulty in determining whether an accident arises out of an employment is experienced in cases where the workman's injuries result from risks run by every one, yet in contact with which he is brought in the course of his employment. Most courts have applied the test that there must exist a frequency or peculiarity of subjection to the common risk to make the accident one arising out of the employment. *Andrew v. Failsworth Industrial Society*, [1904] 2 K. B. 32; *Pierce v. Provident Clothing & Supply Co., Ltd.*, [1911] 1 K. B. 997; *Fensler v. Associated Supply Co.*, 1 Cal. I. A. C. Dec. 447. But what frequency or peculiarity is required has never been definitely established, and it is precisely this uncertainty that has caused such a hopeless conflict among the decisions involving the question. Late English and American decisions, however, have discarded this test and have adopted one more determinate in character. It suffices that the risk resulting in the accident was one which the workman incurred through his employment, and the fact that the risk was a common one also, avails nothing. *Dennis v. White & Co.*, [1917] A. C. 479; *Bett v. Hughes*, [1914] 52 Scot. L. Rep. 93; *Milwaukee v. Althoff*, 156 Wis. 68, 145 N. W. 238. This reasoning has been applied in the principal case. Since this criterion dispenses with the indefinite elements of "frequency" and "peculiarity," it is more certain and will cause much less confusion in the cases. See also 25 HARV. L. REV. 530-37.

**MASTER AND SERVANT — WORKMEN'S COMPENSATION ACTS — STATUTE PROVIDING EITHER COMPENSATION OR DAMAGES: WHEN RECOVERY AGAINST EMPLOYER IS NOT A BAR TO RECOVERY AGAINST NEGLIGENT THIRD PARTY.** — Under Workmen's Compensation Act of Rhode Island an employee negligently injured by a third party may take action against him or the employer, but shall not recover both damages and compensation. LAWS, 1912, c. 831, art. 3, 21. A written agreement for compensation was, in accordance with the act, filed and approved in the Superior Court. The employee now sues the tortfeasor in accordance with an agreement with his employer providing that the employee should, out of the money thus recovered, repay the employer the sums advanced for compensation. Did receipt of compensation under these circumstances bar recovery against the tortfeasor? *Held*, it did not. *Mingo v. Rhode Island Co.*, 103 Atl. 965 (R. I.).

The case has apparently no American precedents. Under the English Act of 1897, repealed by that of 1906, an employee might at his option proceed against either employer or tortfeasor, but not both. 60 & 61 VICT. c. 37. Under this act an agreement to take compensation "without prejudice" did not bar action against the tortfeasor. *Oliver v. Nautilus Steam Shipping Co.*, [1903] 2 K. B. 639, 19 T. L. R. 607. Under the English Act of 1906 an employee may "take proceeding" against both parties, but is entitled to but one recovery. 6 EDW. VII. c. 58. Under this act an agreement to refund compensation on subsequent recovery from the tortfeasor was not such "recovery" as to bar action. *Wright v. Lindsay and Others*, [1912] S. C. 189, 49 Scot. L. R. 210. The Rhode Island statute has similar provision to the later English act, and ex-

explicitly provides that the employer who pays compensation shall be indemnified and "subrogated to the rights of the employee to recover damages therefor." This shows an action by an employee cannot be barred by filing a compensation agreement, for, if so, an employer who is subrogated to the right of the employee could never sue after such agreement. In view of English precedents and the evident intent of the act the decision is sound.

**MUNICIPAL CORPORATIONS — REDELEGATION OF DELEGATED POWERS — DISCRETION — STATUTE.** — By statute the city council of Springfield was given authority to license and regulate the transportation of passengers for hire by motor vehicle. (1916, MASS. STAT. c. 293.) Another statute provided that the city council might delegate the granting of licenses to other officials and might regulate the granting. (1913, MASS. STAT. c. 429.) The city council passed an ordinance regulating the fee and requirements and delegated to the police commission authority to grant licenses where the applicants were found to be "suitable to conduct such business" and the vehicles, after inspection, "safe and proper." The defendant was convicted for operating without a license. *Held*, conviction sustained. *Commonwealth v. Slocum*, 119 N. E. 687 (Mass.).

It is settled that the legislature may delegate powers concerning municipal affairs to municipal corporations. *Welch v. Swasey*, 193 Mass. 364, 79 N. E. 745; *State v. Carpenter*, 60 Conn. 97, 22 Atl. 497. When the method of exercising the power is not prescribed by the legislature, the local body may use reasonable discretion. *City of Lake View v. Tate*, 130 Ill. 247, 22 N. E. 791; *Halsey v. Rapid Transit Co.*, 47 N. J. Eq. 380, 20 Atl. 859. See 1 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 242 *et seq.* This discretion as to method of exercising the power cannot be delegated to any other body. *Johnson v. The Mayor and Council of City of Macon*, 62 Ga. 645; *Conn. v. Glavin*, 67 Conn. 29; *Commonwealth v. Maletsky*, 203 Mass. 241, 89 N. E. 245; *State v. Garibaldi*, 44 La. Ann. 809, 11 So. 36; *Day v. Green and Another*, 4 Cush. (Mass.) 433. However, ministerial or administrative functions may be delegated. *Los Angeles, etc. Corp. v. Los Angeles*, 163 Cal. 621, 126 Pac. 594; *Harcourt v. Asbury Park*, 62 N. J. L. 158, 40 Atl. 690. The police commission has been allowed to decide whether moving pictures were immoral. *Block v. City of Chicago*, 239 Ill. 251, 87 N. E. 1011. An official has been allowed to decide the number and position of saloons. *People v. Gregier*, 138 Ill. 401, 28 N. E. 812. And it has been held that discretion in an administrative function may be used whether the ordinance gives it or not. *Harrison v. People*, 222 Ill. 150, 78 N. E. 52. The ordinance in the principal case does not set a fixed standard. This is immaterial, for it is impossible to set one, and public policy demands protection of the public. See *Block v. City of Chicago*, *supra*, 262, 3. And so the statute in the principal case which allows the above rule of common law is merely affirming the common law and should be construed in accordance with it. *Hewey v. Nourse*, 54 Me. 256; *Baker v. Baker*, 13 Cal. 87.

**PROXIMATE CAUSE — WHAT CONSTITUTES IN INSURANCE CONTRACTS.** — The plaintiff's vessel lying at anchor 1000 feet off shore was damaged by a concussion of the air caused by an explosion due to fire on shore. Plaintiff's ship was insured in defendant company. The policy covered loss by fire without expressly excepting explosions. *Held*, insurance company is not liable. *Bird v. St. Paul Fire & Marine Ins. Co.*, 120 N. E. 86 (N. Y.).

A policy of fire insurance covers all damage which, within the meaning of the policy, is the proximate consequence of the fire. *Lynn Gas, etc. Co. v. Meriden Fire Ins. Co.*, 158 Mass. 570, 33 N. E. 690. Logically, damage by concussion from a distant explosion of powder caused by fire is a proximate consequence of the fire, since no independent cause intervenes, but the few cases

deciding the point have denied recovery. *Everett v. London, etc. Ins. Co.*, 19 C. B. (N. S.) 126; *Laballero v. Home Mutual Ins. Co.*, 15 La. Ann. 217. See *Taunton v. Royal Ins. Co.*, 2 H. & M. 135, 138, 10 L. T. (N. S.) 156, 157. In New York, if a fire on the insured's premises causes an explosion, the insured can recover, though loss from explosion was excepted from the policy; but if the fire and explosion are on another's premises, recovery is denied. *Hustace v. Phenix Ins. Co.*, 175 N. Y. 292, 67 N. E. 592. Proximate causation does not explain these cases, as property lines and mere distance are not intervening causes. However, insurance policies are construed in accordance with the laws of insurance which cannot follow the chain of causation beyond business usage and the intention of the parties. The premium is fixed by certain fairly calculable elements of fire insurance. See ZARTMAN & PRICE, YALE READINGS IN INSURANCE — PROPERTY INSURANCE, ch. 8. Such a highly speculative risk as distant air concussion cannot enter into business calculations.

PUBLIC SERVICE COMPANIES — RATE REGULATION — RIGHT OF COMPANY TO INCREASE RATES FIXED BY CONTRACT. — Plaintiff brought suit in equity for specific performance of a ten-year, low-rate contract made by it with the predecessor of the defendant natural gas company in October, 1913, and for an injunction restraining defendant from cutting off its service in violation thereof, as it had done and threatened to continue to do, unless the plaintiff, a manufacturing corporation wholly dependent on this service for the operation of its plant, paid the greatly increased rates filed by defendant with the state public service commission. Defendant denied the binding force of said contract, alleging that it was discriminatory, and therefore illegal under the Public Service Company Law which took effect Jan. 1, 1914. Previous to filing the increased rates complained of, defendant had twice filed schedules at said contract rate for that class of service. *Held*, suit dismissed, and legal right of the utility company to discontinue said contract and increase rates for that service without first applying to the public service commission for permission sustained. *V. & S. Bottle Co. v. Mountain Gas Co.*, Pa. Sup. Ct. (June 3, 1918), 13 Rate Research, 335.

For discussion of the principles involved, see NOTES, p. 74.

TAXATION — PARTICULAR FORMS OF TAXATION — INHERITANCE TAXES — TAX ON THE TRANSFER OF POSSESSION OR ENJOYMENT. — A statute provided that an inheritance tax be imposed on all transfers of property made by a deed intended to take effect in possession or enjoyment at or after the death of the grantor. Lineal descendants were exempt. In 1911 C executed a deed to T in trust to pay the income to C during his life, then to distribute among lineal descendants of C. In 1914 an amendment to the statute abolished the exemption of lineal descendants; and in 1917 C died. *Held*, the gifts to the lineal descendants are subject to the tax. *Carter v. Bugbee*, 103 Atl. 818 (N. J.).

A voluntary trust completely established cannot be revoked by the settlor. *Lovett v. Farnham*, 169 Mass. 1, 47 N. E. 246; *Sands v. Old Colony Trust Co.*, 195 Mass. 575, 81 N. E. 300. The principal case follows what appears to be the settled authority that a statute taxing the receipt or transmission of possession or enjoyment is imposing a transfer tax as distinguished from a property tax imposed on ownership. *In re Green's Estate*, 153 N. Y. 223, 47 N. E. 292; *Crocker v. Shaw*, 174 Mass. 266, 54 N. E. 549. See 28 HARV. L. REV. 437. Cf. 20 HARV. L. REV. 655. However, if, as the courts admit, the execution of the deed by C gives the descendants a vested equitable interest, it is arguable that a statute passed afterward, which taxes the already vested right to a later possession or enjoyment, goes as far towards imposing a property tax as it would if taxing the receipt of possession by any remainderman or if taxing the reversion of possession to a bailor. The principal case is materially



different from those involving a tax imposed on transfers to take effect in possession after the grantor's death made by a deed executed subsequent to the statute. *In re Keeney's Estate*, 194 N. Y. 281, 87 N. E. 428; *In re Brandelh*, 169 N. Y. 437, 62 N. E. 563. In these cases no interest at all becomes vested before the enactment of the statute.

**TORTS — NEGLIGENCE — LIABILITY OF A MANUFACTURER.** — In a suit against a manufacturer and distributor of chewing tobacco by a consumer who contracted ptomaine poisoning therefrom, owing to a foreign substance concealed in the plug of tobacco, *held*, that the manufacturer was liable. *Pillars v. R. J. Reynolds Tobacco Co.*, 78 So. 365 (Miss.).

The principle that a manufacturer is not liable for negligence to a subvendee is based upon an erroneous interpretation of *Winterbottom v. Wright*, 10 M. & W. 109. That case was decided upon a question of pleading and stands for no such proposition. 29 HARV. L. REV. 867. So numerous are the exceptions to the general rule in favor of foods, drugs and articles imminently dangerous to human life, and so varied are the opinions as to what is imminently dangerous, that the exceptions might be said to be the rule itself. *Tomlinson v. Armour & Co.* 75 N. J. L. 748, 65 Atl. 883; *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154; *Johnson v. Cadillac Motor Co.*, 137 C. C. A. 279, 221 Fed. 801; *Loose v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Shubert v. R. J. Clark & Co.*, 49 Minn. 331, 51 N. W. 1103. That the duty of due care should be imposed only on manufacturers of foods, drugs and articles imminently dangerous to human life is illogical. If the duty exists, it ought to apply equally to all manufacturers. See CLERK & LINDSELL, TORTS, 6 ed., 513. Such was the view taken in *McPherson v. The Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050. The principal case in adopting the same view as to the manufacturer and in dismissing the case as to the distributor is well decided. There was no negligence on the distributor's part in failing to discover a foreign substance concealed in the plug or sealed package of tobacco. *Julian v. Launbenberger*, 16 Misc. (N. Y.) 646, 38 N. Y. Supp. 1052; *Bigelow v. Maine Cent. R. Co.*, 110 Me. 105, 85 Atl. 396.

**TRUSTS — CREATION AND VALIDITY — PRECATORY WORDS — GIFT TO EXECUTORS FOR SECRET PURPOSES.** — A testator gave the residue of his estate to his executors and trustees, "in whose honesty and discretion I have reposed special trust and confidence, for certain purposes which I have made known to them, and I hereby authorize and empower my said executors to make such distribution and division of my estate as I have indicated to them, and as they shall deem proper for the fulfillment of my wishes so well known to them, relying entirely upon their judgment in the premises." *Held*, that a trust was created, and that the property resulted to the heirs at law and next of kin of the testator. *Blunt v. Taylor*, 119 N. E. 954 (Mass.).

Where there is a gift by will to a person, followed by precatory words in favor of other persons, modern courts tend against imposing a trust. *In re Diggles*, 39 Ch. D. 253; *Lemp v. Lemp*, 264 Mo. 533, 175 S. W. 618. See UNDERHILL, TRUSTS AND TRUSTEES, 7 ed., 16. But in the principal case the gift is to the executors and trustees, not beneficially, but "for certain purposes which I have made known to them." The phrase, "relying upon their judgment in the premises" defines the manner of executing the trust and leaves the executors no option to refuse performance. The existence of a trust, therefore, appears on the face of the will, and, by the weight of authority, extrinsic evidence is admissible to prove the terms thereof. *In re Hustable*, [1902] 2 Ch. 793, 71 L. J. Ch. 876, 87 L. T. 415; *Morrison v. M'Ferran*, [1901] 1 I. R. 360, 35 I. L. T. R. 81. See COSTIGAN, CONSTRUCTIVE TRUSTS, 28 HARV. L. REV. 383, n. Even where the existence of a trust does not appear on the face of the will such extrinsic evidence is admissible. *Russell v. Jackson*, 10

Hare, 204; *Caldwell v. Caldwell*, 7 Bush (Ky.) 515. See 1 JARMAN, WILLS, 6 ed., 910. The authorities thus violate the purpose of the Wills Act and Statute of Frauds by opening the door to perjured testimony. In Massachusetts, however, if the existence of a trust appears on the face of the will the terms of the trust must appear thereon. *Olliffe v. Wells*, 130 Mass. 221; *Wilcox v. Attorney-General*, 207 Mass. 198, 93 N. E. 599. This condition was not complied with in the principal case, and so the property resulted to the heirs at law and next of kin.

## BOOK REVIEWS

AMERICAN CITY PROGRESS AND THE LAW. By Howard Lee McBain, Dorman B. Eaton Professor of Municipal Science and Administration in Columbia University. The Hewitt Lectures for 1917. New York: Columbia University Press. 1918. pp. viii, 269.

An interesting and suggestive book for a lawyer, because it is the result of long thought and investigation of problems of municipal government. The city is doing so many things now-a-days that it is pretty hard to convince oneself that it should not do everything worth doing. But then, the same thing might be said about the state and the nation; the college and the public-school system; the rich man and the endowed charity. Our appreciation of all that may be done to make life fuller, and happier, and better, has come upon us so suddenly that we have not yet had time to study our means of action, to co-ordinate, to discriminate, to set the bounds of action for the various agencies to which we look for improvement.

As the need is more insistent in our cities, it is natural to look to our city governments for first aid. Is the city ugly? Let the city council, with its high appreciation of æsthetics, beautify it. Is the housing inadequate? Let the public treasury build model tenements. Do the grocers overcharge? Let the Committee on Water Supply take over their business. Do we need a big theatre, that won't pay, in the business section? Let the city exercise its power of eminent domain, take a site, and subsidize a picture show; the public needs amusement. Is the Board of Trade slow about getting in factories and big business? Let the Mayor advertise factory sites, bargain for inducements, and open an employment office.

This is human nature. We all like to hand these problems over to the city; and our cities solve them surprisingly well, considering. But as a result difficult legal questions of the power to deal with them set a new generation to revolving problems of strict and of liberal construction, and again the solution becomes a question of temperament with courts and lawyers. The progressives are again liberal and the conservatives, narrow constructionists. And again the progressives are bound to succeed.

Professor McBain is a progressive. His creed appears to be that the burden of proof is upon those who deny a city's legal power to do a useful thing. In these lectures he discusses in successive chapters the new occasions for municipal activity: Home Rule, Smoke and Billboards, City Planning, Municipal Ownership, Regulation of Prices, Public Recreation, Promotion of Commerce and Industry. His knowledge of the problem is adequate, his collection of authorities is full, his arguments are interesting; a student of municipal law finds occasion for gratitude in every page. Though narrow in scope and simple in treatment, the book is a contribution to legal as well as to governmental science.

If Professor McBain's point of view had been that of a lawyer, he might have

made his case a little stronger. The expansion of municipal powers is perhaps as likely to come through the doctrine of common-law powers inherent in corporate personality as through a fictitiously broad interpretation of a written instrument. The currency which Dillon gave to Shaw's early dictum, that a municipal corporation can exercise only express powers, and those "necessarily or fairly implied in or incident to" express powers is responsible for much bad reasoning and some bad law; only by recognizing that a city, in its capacity as legal person, can do what any legal person may do except when restrained by law, can we get a clue to the cases, and lay down a principle consistent with modern requirements.

J. H. BEALE.

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THE REPORTS OF THE HAGUE CONFERENCES OF 1899 AND 1907, edited with an introduction by James Brown Scott. Carnegie Endowment for International Peace, Division of International Law: Oxford, at the Clarendon Press, London. 1917.

The various translations and reprints which the Carnegie Endowment for International Peace has been publishing during the last few years have proved very convenient to students of international law. None will be more so than the present work. Much of the most valuable work of the First and Second Hague Peace Conferences did not appear in the finished conventions. The proposals submitted by different states and the discussion upon them, have heretofore been concealed in the ponderous, unindexed, French tomes, known for the 1899 Conference as the *Procès Verbaux*, and for the 1907 Conference as *Actes et Documents*. The present work contains in a single volume translations of the more valuable of this material, arranged and indexed both by persons and by topics, so as to be readily available. Footnote references give the position of the material in the official publications mentioned above.

The editor states in the introduction that the official English translations of the texts have not been followed where a more literal translation seemed possible, and where an inconsistency in the translation of an identical French phraseology in the conventions of the First and Second Conferences existed.

The volume includes the opening and closing addresses, the final act and M. Renault's report upon it, for both conferences. Each convention is given in its final form in heavy type, with tables of signatures and ratifications, followed by the report of the commission which presented the convention to the full conferences, and which according to the European custom is regarded as an official commentary. The draft proposals on the topic, submitted by the various national delegates, are appended, and more important statements contained in the discussions either in commission or in plenary session have been selected for insertion.

In the discussion of many topics, especially those connected with naval warfare, the diversity of opinion is striking. The suggestions relating to automatic mines are especially interesting in this connection, and also as relating to a subject which will require further discussion in future conferences.

It is interesting to note that Germany proposed in 1907 that a belligerent power be responsible for all acts of its armed forces in violation of the laws and customs of war on land (p. 528), a provision inserted in the convention on this topic (art. 3), and that the same country thought consideration of the subject of obligatory arbitration "premature" (p. 388). It is also interesting to read the declaration of Great Britain in 1907 favoring the abandonment of the principle of contraband in maritime warfare (p. 622).

The merit of such a work as this is to be judged by its accuracy of translation, its adequacy and compactness in selection and exclusion of material,

and its convenience of arrangement and indexing. It is believed that the student can rapidly find here a reliable translation of the important work of the Hague Conferences on any of the various topics of international law there considered.

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THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817-1917, written and compiled by the Faculty, published by the Harvard Law School Association. 1918. 420 pp. 55 illustrations. \$1.50 post-paid. Chapter I. History of the School; II. Instruction; III. The Library; IV. Portraits and Prints; V. The Students; VI. The Harvard Law School Association; VII. The Future. The Appendix includes lives of teachers at the School, with bibliographies of their writings, of the School, and of the case system and other topics in American legal education; and a list of distinguished alumni of the School.

The book can be obtained from the Plimpton Press, Norwood, Mass., and from Amee Bros. and the Harvard Coöperative Society in Cambridge. Arrangements have been made to send a copy without charge to each member of the Harvard Law School Association.

# HARVARD LAW REVIEW

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VOL. XXXII

DECEMBER, 1918

No. 2

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## JENS IVERSON WESTENGARD

LOVABLE and trustworthy, clean-thinking and clean-living, a beautiful soul in a beautiful body; those are one's first thoughts about Jens Westengard. Then one remembers that here was a man equally at home and equally honored in a New England farmhouse, a Harvard faculty-room, and a Siamese palace; a man who held noble rank in an Oriental kingdom, who was received on friendly terms by an English queen, who was to have occupied a distinguished position in the most august assembly ever held on earth; yet as modest and unassuming, as simple-hearted and unspoiled as when he earned his living as a stenographer in a Chicago office. The rapidly changing circumstances of his outward life, the sweet unclouded serenity of his soul, give to his life a touch of romance unusual in this prosaic age of science.

Jens Iverson Westengard was born in Chicago, September 15, 1871. His father was a Dane of an old family, who gave his son a good common-school education, but was unable to send him through college. The son made himself an expert stenographer; but it was his ambition to graduate from the Harvard Law School and become a lawyer. To that end he began to lay up money, and to fit himself to pass the admission examinations required from all who were not college graduates. He expected to be ready in 1896; but the faculty having decreed that no one without a college education should enter the school as a regular student after 1895, he cut his preparations short by a year. He came to Cambridge in the fall of 1895, with a little money, an adequate acquaintance with Blackstone's Com-

mentaries, and a sufficient knowledge of Latin and German to pass the admission examinations.

The unknown young man made his way in the Law School and in Cambridge as easily as he did everywhere through his life. He was soon acting as secretary for several professors, was popular in his class, and was gaining high rank in his studies. He became much sought as a private tutor, but was not too busy earning his way to serve on the board of the *LAW REVIEW* with distinction. At graduation he stood second in a class of 129.

Just at this time the faculty voted to try the experiment of dividing the first-year class into small sections, in order to give the students at the beginning of their course the advantages of a small class, with more frequent opportunity for discussion and more intimate contact with the teacher. The plan as adopted provided for the division of the class in criminal law into two sections, each of which in turn the professor in charge of the subject would teach, while an assistant taught the other. For success in this plan it was necessary to find a young teacher whose instruction should compare so favorably with that of his older colleague that the students assigned to his section would willingly stay there, and not defeat the object of the division by following the professor and swelling the size of his section. To fill this difficult position the faculty unanimously chose Westengard. His legal ability, his character and personality, and his experience as a tutor, marked him out as the one man among the recent graduates of the school best fitted for the appointment. The experiment was a complete success. If there was any observable drift among the class it was not away from the younger man. The next year (March 13, 1899), he was appointed Assistant Professor of Law for five years. He proved to have a winning manner and excellent method as a teacher and at once established his place in the school. His future as a successful professor of law seemed clear and secure.

About the time that Westengard was appointed Assistant Professor of Law, Edward H. Strobel was elected to the chair of Bemis Professor of International Law. Strobel was a bachelor. Westengard, just married, was setting up a home of his own, and the two joined forces. For two years they formed one household. The intimacy thus arising made it natural for Strobel, on his appointment, in 1903, to the important and difficult office of

General Adviser to the Siamese government, to offer the position of Assistant Adviser to Westengard.

The question whether to accept or to refuse this offer was a difficult one. On the one hand, Westengard loved his work, and was successful in it. If he left it he would be giving up an honorable and congenial career for an uncertainty; and he would be leaving his wife and his young son behind him. On the other hand, the romance of the Orient, as well as the greatness of the work, attracted him. The fiat of his physician, that he must leave Cambridge for a time, turned the scale. He accepted the appointment, and, before the opening of the school in September, 1903, set out with Strobel for Siam.

The work that was ready to the hand of these two teachers of law was indeed a wonderful one. The ancient kingdom of Siam, country of a peaceful folk, ruled by a king and government of cultivated gentlemen, was being squeezed between the upper and the nether millstone of British Burma and French Tonquin. The Advisers must obtain from Britain and France a just settlement of boundaries; they must foster a native government that could sustain the position thus acquired; and they must perfect and bring up to the Western standard the Siamese administrative system, already good for the Orient. Strobel was a skilled diplomat, and he was able to obtain favorable treaties almost at once. In suggesting governmental reforms they had the sympathetic and powerful support of King Chulalongkorn, a very able and enlightened monarch. A criminal code was adopted, and other necessary legislation obtained.

After about five years of service, Strobel died of a lingering tropical disease contracted in Egypt during a short leave home, and Westengard became the General Adviser. His place had already been made among the Siamese. No one ever knew Westengard without loving him. The king he served was no exception, nor could one hear Westengard speak of the king without realizing that their affection was mutual. On Westengard's return to Siam after his first leave, the king was absent on a hunting trip, and his first word on reaching his capital was, "Is Westengard come?"; and as soon as he saw his adviser he kissed him on both cheeks. The favorite of a king is proverbially hated most cordially by the court, but no one ever hated or disliked Westengard.

The great work which he did for the foreign relations of Siam

during his advisership was the abolition of extraterritoriality. Like all Oriental nations, Siam had been marked in its international relations with a certain badge of inferiority. The native courts were not allowed to take jurisdiction over European or American subjects, who were entitled to have their suits, civil or criminal, tried in the consular courts. Even Japan had only recently thrown off this condition. Siam, having adopted civilized codes and having occidentalized her administration, had grounds for requesting the same privilege; but it was hard for a small nation to secure the ear of indifferent foreign offices, and to persuade diplomats, for whom inaction was safe, to change the beloved "*status quo*." Westengard proved to be an extraordinarily able advocate of a small state. He could offer no good bargain; he could threaten no bad alternative; justice was his only plea. But justice, in the mouth of a charming, sincere, and enlightened advocate, prevailed amazingly. Treaties abolishing extraterritoriality were rapidly obtained.

Westengard was showered with honors by the kings he served. Rank, orders, and decorations were his reward for devoted service. The old king died, but his successor's esteem for his adviser was as high as his father's had been. Westengard's position was one of almost unbounded power for good to a people he had learned to respect and love. He might spend his life in a rank little less than royal, and occupy an imperishable place in the history of the Orient. But, after all, he was an American; and, as he said, the time had come when he must decide whether to remain one, or to put off his native character and become Siamese. The position of Bemis Professor of International Law at Harvard was waiting for him; and he returned to Cambridge, a private citizen again, to undertake anew the laborious and obscure life of a teacher.

He came back to a very different school from the one he left. In the twelve years of his absence all the older teachers who had been his colleagues had gone from the school; Langdell had died in 1906, and Ames in 1910; Gray had retired in 1913 and died in 1915; and Judge Smith had retired in 1912. The younger Thayer had just died, tragically, and the school was again in a time of stress. It was a painful moment at the best to begin anew; and the new beginning meant for him a change of climate, of position, of work, and of thought.

Many a time during that first year Westengard must have wished



himself back in Siam. He had to adjust himself to a different style of life; he had to make himself master of three difficult subjects, only one of which he had ever taught before; and, above all, he had to reacquire the art of teaching law. The last was hardest. Seventeen years before, young and fresh from the school, teaching had been easy for him; but in the twelve years of his absence he had grown to middle life in a very different occupation. A good teacher must be quick of thought, if not of speech; he must be ready, forceful, graphic. The diplomat must be patient and sure rather than quick, unhurried, considering carefully every word and act. As a diplomat Westengard had to unlearn his teacher's art; and now, a teacher again, he had to change once more. He set himself loyally to the task, and, at the end of three years, had become a power in the school, and one of those on whom it chiefly relied for service and counsel in the future. Then, almost without warning, peacefully, courteously, serenely, he sank to rest.

Westengard's early style as a teacher was assured, incisive, suggestive. He was clever, helpful, inspiring. After his experience in Siam, without losing his clearness of presentation, he became a teacher of force and power, in whom strength of character and sincerity of soul, thoroughness of research and matured judgment supplied the place of youthful zest. He was one of the masters. If he lacked Ames's splendid sweep of thought, Gray's deftness of touch, Keener's wonderful dialectic, and the younger Thayer's keen analysis, he was worthy to stand with them by virtue of his shining courage and sincerity. He taught comparatively few men; but those happy few know that they were taught by a man of light and leading.

Of the loss to the school it is hard for one to speak whose personal grief is paramount. It is impossible to overrate Westengard's ability. The time will come when his force of character, his calmness of judgment, his trained statesmanship, will be sadly needed. It will be hard to find these qualities in another. And his service to the school was nothing short of devotion. For it he left an almost vice-regal position; to it he devoted days and nights of hard study; and almost his last words were of regret at the difficulty he was causing the school by his sudden withdrawal. His was no divided loyalty; having no college ties, his whole love was given to the school. And loyalty was the bed-rock of his character.

*Joseph H. Beale.*

WESTENGARD'S life work was in Siam. There opportunity was afforded to bring out his true greatness. Whatever influence he may have exerted as a teacher in the Law School was limited to two periods of five and three years. Twelve years of his life were devoted continuously and exclusively to the service of Siam, and even after his final departure he kept in close touch with that country's administrative affairs.

As the representative of the Siamese government he was to have sat at the coming Peace Conference. His intimate knowledge of European politics, his thorough understanding of the working of the foreign departments of the Great Powers, the respect with which he was regarded in the chancelleries of Europe, his lack of prejudice, clear vision and sure judgment, would have proved of the highest value, not to Siam alone but to all the twenty-four allied and associated countries which have been sacrificing and fighting these four years long to make a better world.

Death intervened at a time when opportunity was opening for his truly great qualities; when international tasks for which his training and experience had so admirably equipped him awaited his sure hand. Whatever impress he may have made on the Law School, no appreciation of his greatness and no proper estimate of his capacities for the future can be arrived at without a thorough understanding of the magnitude and difficulty of the work he accomplished during twelve years of service in Asia.

Westengard's devotion to his work in Siam was such that for the first seven years he took no leave except for a seven months' tour of Europe, in the company of the late king. For ten years of the twelve he was separated from his family. His one long period of leave in 1912 he improved to visit the foreign offices of the European powers. In the fall of 1913 Mrs. Westengard and his son Aubrey joined him in Siam for the first time. The next June, 1914, he and his family came to America on leave, but he returned again to Siam late in the year and there remained until his final resignation in June, 1915.

At first he bore the title of Assistant General Adviser, but during

Strobel's long absence and illness, from December, 1905, to February, 1907, he was the Acting General Adviser, and after Strobel's death he was appointed General Adviser with the rank of Minister Plenipotentiary. As his years of service increased, offices and honors were heaped upon him. He was appointed a member of the Hague Permanent Arbitration Court. France made him an officer of the Legion of Honor, and Denmark conferred upon him the Grand Cross of the Order of Dannebrog. The Siamese royal government bestowed upon him the highest honors. Successively he was decorated with the Grand Cordon of the Order of White Elephant, Grand Cross of the Crown of Siam, Order of Chula Chom Klao, and Order of Ratanaphorn. These orders were accepted and worn gracefully, but not too seriously, for he wrote home: "I consider them of value because of the kindly spirit which is manifested by their disposal."

As he came to exert an influence in the government second only to the King, every problem of internal administration and foreign diplomacy passed through his office. He drafted laws, made treaties, arranged foreign loans, built railroads, improved agriculture, revised the kingdom's system of finance, rearranged and classified the revenues, and practically did away with the opium traffic and with gambling, both of which had been a large source of revenue to the government.

The Siamese, even to the common people, came to have a great respect, veneration and affection for "Phya Kalyana Maitri," as he was uniformly known. To American friends who visited Siam, however slight their claim upon him, he dispensed a royal hospitality, not only in Bangkok, but wherever they went in the kingdom. I am sure that we who have enjoyed the pleasures and royal conveniences bestowed upon us have all felt profoundly that the Siamese officials and people who served and fêted us did so only because of the affection and admiration in which they held our fellow alumnus and countryman. To all this I believe Sinclair Kennedy, '97, and other visitors to Siam have borne testimony.

When "Phya Kalyana Maitri" himself traveled into the remoter provinces of the kingdom he was shown royal honors. In fact it was said that on his trip to Chieng-Mai, in the extreme north, the festivities and the welcoming pavilions prepared in his honor

by the people of the province almost equaled those that the following year greeted the Crown Prince.

During the fall of 1903 Strobel and Westengard were in Paris negotiating with the French government for a new Siamese treaty. Strobel remained behind to complete it, while Westengard preceded him to Siam by some weeks.

During the first summer the king sent Westengard as his personal representative to investigate the vexatious questions of the eastern frontier bordering on the French Protectorate of Cambodia. For months he traveled through a region where few Europeans have been. As royal commissioner he was shown every consideration by the local governors, and won the confidence of the officials with whom he dealt.

His letters present a vivid picture of the country, the wild life, its interesting people, and reflect an earnest man skillfully handling with success the most intricate problems of human psychology and attaining a consummate grasp of obscure human affairs. They show, too, keen zest for life, appreciation for beauty in nature and Asiatic art, — in short, a great depth of human understanding. From Battabong he writes in September, 1904:

"Most of our work is done, and we have considerable leisure on our hands. We have had a very delicate and difficult work to do. I wonder if we have accomplished anything. Time will show, and very quickly — whether we have erected a house of stone or only a palace of cards. The country and people — the political situation — the problems of internal administration are all very interesting and very difficult. I have seen a great deal of a state government and law such as our ancestors must have lived under a thousand years ago. Curious institutions, whose parallels in Europe are faintly outlined in old, old books, are in full vigor here, but must fall swiftly before the approach of the white man armed, as he is, with powerful political weapons obtained through the treaties with Siam. I see a province, which is in reality a little kingdom. At its head is a man who is certainly the Lord of his people. His rule has been almost absolute. Law? Yes, there is law — his word. But as for the law of the printed page, you can hardly find a line of it. Until the white men actually settled down here — two or three of them — even the treaties hardly ran here. In fact, I found one important treaty was not to be found here!

'Debt Slavery,' not the repulsive form of servitude we had before the war, but yet a servitude that usually lasts for life, was abolished in Bangkok thirty-six years ago. I have told the governor it can no longer exist here, but must go, and he has agreed it shall. The framing of a proper law on this point will be my first care on returning to Bangkok. The old rule has been absolute, but I am inclined to think that after all it was probably the best rule for the people; however, it is useless to philosophize on this point. The old order must change. All that can be done is to make the change in the least painful way."

Here speaks the born administrator, thirty-three years of age and six months on the job. His work with the local Siamese officials completed, his mission took him to Saigon, the capital of French Cochin China, where he had "a long and serious conversation with the Governor General covering the relations of Siam with France." The understanding there arrived at led to better relations between the two countries, and eventually to the treaty of 1907, which settled all questions of dispute.

Strobel left Siam on leave in December, 1904. On the homeward journey he contracted the infection which so hampered his later activities and eventually caused his death in 1908. From that time on the administrative burden was carried chiefly by Westengard. In the second treaty with France, concluded in 1907, he relinquished to the French all territory on the eastern boundary that was not inhabited by Siamese, and in exchange secured the return to Siam of more vital districts nearer the capital, thus placing the boundary on a secure geographical and ethnical basis, which insured stability and permanence. Moreover, Siam obtained important modifications in the extraterritoriality of French subjects in Siam, and from an attitude of stimulated nationalism and antagonism he brought the Siamese people and government into cordial relations with their French neighbors, thus paving the way for Siam's support to France in the Great War.

But perhaps his greatest triumph in foreign diplomacy was the treaty concluded with Great Britain in 1909. By its terms Siam relinquished to Great Britain all claims over three petty states in the Malay peninsula over which Siam had exerted only a nominal sovereignty. In return the British government gave up their extraterritorial rights and granted a loan of six million pounds at

four and one-half per cent, which Westengard proposed to use in building a railway from Bangkok through the Malay Peninsula. This treaty was strongly opposed by the whole cabinet and even by the King, holding that such a railroad paralleling steamer transportation could be of no advantage. The King finally yielded because of his confidence in Westengard, which was soon justified, for the railroad paid from the first, and since its completion in 1917, when shipping was practically unavailable, it provided the one outlet for Siam's tin and other valuable products. Moreover, the money borrowed at four and one-half per cent was so well invested in public utilities that a few years later Siam was loaning the same money back to the Federated Malay States at six per cent.

After the ratification of the British treaty, which involved a long period of delicate diplomacy and incident strain, Westengard with some pride in his achievement wrote to one who regretted his long absence from the Law School, maintaining that the work he was doing was at least "equal to that of a moderately successful law teacher. I do think it is more than that — though perhaps I am not competent to judge. Only, I think I may safely say that the average law teacher could n't do it. Siam has rid herself of ex-territoriality as far as concerns the two most important powers. Lord Cromer, with the whole power of the British Empire and the British Army of Occupation, has hardly moved one inch along that path for Egypt.

"I remember well that I dined one night with President Eliot, when, pointing out the happiness of the law teacher's lot, he said that the practicing lawyer was a man 'whose name was writ in water.' No man should boast till he has safely finished his task; but, come what may, in Siam my name is writ more substantially on the land than that."

Westengard early won the confidence of the late King Chulalongkorn who was always reasonable, with a profound sense of the right, and later ready to yield his own inclination to what he considered his adviser's better judgment. Gradually he won the confidence of all the king's ministers, the respect of the foreign ministers and other foreign advisers of the government. Administrative circles in the East with their intricate diplomacy, delicate problems, conflicting claims are notoriously a hotbed of jealousies. Westengard's intellectual calm, his smoothly accurate-working

mind, his profound sense of right, his capacity to see the other point of view, his masterly analysis of intricate problems, his capacity for multitudinous detail, won for him an influence in the kingdom second only to that of the king, and a standing with the representatives of foreign governments such that a distinguished traveler visiting Siam once remarked that Mr. Westengard was the only European administrative he had encountered in the East of whom he had heard no unkind criticism.

With the new king his influence was not less than with his father. If the relation was less intimate and affectionate, it was perhaps because the younger man regarded his adviser with the respect due an elder who had already arrived before he had come to take up the reins of power.

Of an important change in the policy of the kingdom put in effect the first month of the new reign he writes, December 13, 1910: "Naturally I am not in a position to say whether my remarks have had anything to do with accomplishing the most desirable result. I shall never know, nor do I care to inquire, for if that be the case it is the highest good I have yet done here. However, as I suppose is most often the case with the really great things that are accomplished, the world does not know who really brought them about. . . . Do not be surprised if, when I leave Siam, no great praise is given to my work. The best things I have done are not known — sometimes not even to myself. But this is the lot of most public men. It is particularly so here, because I honestly feel that I can do most good by retiring as far as possible from the appearance of driving the machine."

Success and the government's increased confidence brought new tasks. From this time on every measure that did not originate there was referred to Westengard's office for revision. We find him negotiating treaties with Denmark and Italy, proposing ministers and ambassadors, bringing together for the coronation the greatest assemblage of European royal personages that had ever met in Asia, planning new water works, building and operating railroads, revising the kingdom's finances and system of internal revenues. He drafted a vast body of law, modified existing laws, and as judge of the San Dika, the Supreme Court of Appeal, interpreted statutes. He wrote thus of his work September 29, 1910:

"But you know the nature of the tenure on which (in my own

mind) I hold the post. It is only as long as I can see that I am able to do effective work. But I also think that this is one of the great reasons why I have been able to do some effective work.

"It is true that an enormous amount still remains to be accomplished. But of course the art of government is one which must be pursued incessantly; and in a place like this, where so much has to be built up — where so many bricks must be made without the requisite straw — the task is even larger than at home, where the machinery and establishment of government is already so old. The problems that we now face here are becoming more and more like the ones that confront the governments of Europe and America. In so doing the face of affairs changes. I feel as if, with the signing of the British treaty, the 'heroic age' closed. No more can we negotiate for the surrender of territories as large as a small kingdom in Europe. No more alien races populate sections of what was once called the 'Empire of Siam.' Many treaties are still to be negotiated, but they are of a different character. Apart from these, the most interesting questions are those of legislation. As you know, we must make our codes. This work is not only necessary for the internal administration, but it is of great political importance."

When in June, 1915, he took his final departure, the Siamese government, the press and the people were outspoken in their expressions of regret and gratitude. Mr. Hornibrook, then the American minister at Bangkok, wrote the State department: "The great progress made along educational, political, commercial and sanitary lines in this country has been largely due to the influence of the General Adviser."

An article published in a Bangkok vernacular newspaper, from the pen of the King himself, states: "During the twelve years in which Phya Kalyan filled first the post of Acting General Adviser and later was promoted to General Adviser, he has served in these posts with great faithfulness, dignity and conscientiousness rarely rivalled. His friendliness and social intercourse with the Siamese have been such that those who come in contact with him in business sometimes forget that he is not a Siamese.

"In all matters which he has had to examine and carry through he has always been actuated with the desire to further the interests of Siam. He labored without any discouragement in spite of the difficulties or laboriousness of the task, and continued trying with



patience until all difficulties have been overcome. Phya Kalyan ought to be held up as an example of a man true to his post."

Westengard's years of devoted service to Siam were in part due to his love for the people, a love in no way touched by the slightest color of false sentimentality. He knew the East, to respect it. Thus he writes:

"I suppose I have seen the East under some of its most attractive aspects, for I have gained the confidence of one of its peoples, those

'Sullen silent peoples  
Who weigh your God and you,'

though the Siamese, like the Burmese, are probably the most cheerful and open of the races of Asia. For me, Asia will always have the attractions that come from its antiquity, and the fact that it is the birthplace of most of the peoples and of all the great religions of the world."

To his task he brought humility, sympathy, clear judgment, unlimited patience and indomitable perseverance. The spirit of his work through the twelve years is set forth in a letter written in September, 1904, after eight months in Siam:—

"It has been a busy and trying time. The situation here is extremely difficult and delicate. I am trying to do the best I can to adjust the ancient régime to the rules of a modern civilization which is at the door, which has one foot over the threshold and will not be denied complete entrance. . . . I can understand and sympathize with the views of both sides. I must confess to a very serious doubt that the white man's régime, with all its just laws and administration, is really better for the native than the rule under which he has lived. But whatever I may think on the matter, I must deal with an actual situation and do the best I can."

Entering on great administrative tasks at the age of thirty-three, he bore every burden with equanimity, solved every problem that presented itself, won the love and affection of the people and the confidence of her rulers, and universal respect in the chancelleries of Europe. Whereas England's empire builders and colonial administrators have worked as part of the great imperialistic nation with the active participation and assistance of permanent colonial under-secretaries of state, who have devoted their lives to the understanding of the problems of a particular people, Westengard,

after Strobel's death, worked absolutely alone. Our own state department had little knowledge of or direct interest in his work and gave it no backing. Because of his modesty and reticence, his own countrymen knew little of the great work he was accomplishing.

He brought to his work the most engaging personal qualities of an impersonal man, — one who thought not of himself but always in terms of the people, of the problem before him. The principle, the aim, was always the propulsion, never just what *he*, the man, was trying to do.

*Porter E. Sargent, '96.*

<sup>1</sup> A GOOD many of my American friends who attended Professor Westengard's funeral last September have expressed to me their surprise at the large number of students Siam has sent to Harvard University. I had to explain that not all of them were Harvard men; in fact only a few were living in Cambridge, but that the majority of them have come from other colleges and schools to pay their last respects to the man who through his notable achievement in their country has become so well known to all of them, and whose death meant so great a loss not only to their government and people but especially to themselves too. For although with his retirement Mr. Westengard indeed severed his official relations with Siam in the capacity of one of her high government officials, he nevertheless preserved that great interest for the future welfare of the country that he for many years so faithfully served.

An instance of his friendship to Siam is well shown by his relation to the officials of the Siamese Legation in Washington, to whom he was the best adviser on the internal affairs of Siam herself, as well as on her relations with foreign powers. Just as lively was, however, his interest in the progress and development of the Siamese students, whether sent to this country by the Government or private persons, for as he himself has said, in the hands of these young men lies the future of Siam.

None appreciates his remark better than the Siamese students themselves.

Although Mr. Westengard's relations to the Siamese students in the United States would only form a very small chapter of the history of his great work for the good of Siam, it is none the less of some interest, as it illustrates in a small scale how his sympathetic attitude towards the Siamese people has earned him such a splendid position of love and respect deep in their hearts.

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<sup>1</sup> There are a considerable number of Siamese students in this country, some sent by the Siamese government, some by unofficial enterprise, and some by their own families. An official of the Legation supervises all the educational work of these students. This article was prepared on their behalf as an expression of their appreciation of the memory of Professor Westengard. — Ed.

Professor Westengard, on being consulted about the sending of students to be educated in foreign countries, never exercised his personal influence upon the officials who had the choice in their hands in favor of sending them to his own country in particular. Yet many of the officials as well as the parents of other students were persuaded to send them to this country; in the first place, of course, by the desire to avoid the war conditions of Europe, but not to a small degree by attraction to the personality of the former American adviser.

People in Siam, knowing America only from what was left in their memory of the geography lessons and the atlas in school, hardly realize the enormous expansion of this country; so that we often find, among students coming to study at the University of California, for instance, a man who prides himself on having a letter of introduction to Professor Westengard, and was told to drop around on Sunday afternoon to visit him when the Professor is not so busy.

All his friends in Siam, whether connected with him in their official capacities or only socially, are anxious that their sons should not miss the opportunity to pay a visit to the General Adviser in his home country, and thus enjoy even only just a little of the privilege of being his friend's friend.

None of the students who ever have reached him were disappointed, for each and all of them he would greet with the same characteristic gentleness that so much pleased the Siamese at home. He asked them of their parents and relatives, often remembering and pronouncing correctly names most unpronounceable to other Westerners. His memory for faces and names set us in astonishment; he would recall every kindness he received from the Siamese people with touching appreciation.

The Professor's intimate knowledge of the persons and their good and bad characteristics is well illustrated by this little anecdote, which perhaps, with some apology, can be quoted here:

A certain Siamese student, S——, came to Cambridge and asked to be taken to be introduced to Chow Koon Kalyan, as we called him by the title given to him by the King of Siam. As soon as I introduced the young man as the son of Admiral S—— (who was, by the way, as many sailors, inclined to profanity in his expressions), "Ah yes," exclaimed our Professor, "I am very glad

to meet you here." Then turning to me he asked in a low voice, "Does he swear like his old father?" I denied it.

Professor Westengard's interest for the Siamese students of this country began with the sending of the first few while he was in Siam. He followed their career closely and visited them sometimes when on leave in this country. Thus Mr. Nai Aab, then a Siamese student at Harvard and for one year president of the Cosmopolitan Club of this University, received through this kind recommendation a very beautiful portrait of the late King of Siam as a gift of His Majesty to the Cosmopolitan Club of Harvard.

Last year the Siamese government was able to establish scholarships to enable successful students of Siamese law schools to come and perfect their training in American universities. Mr. Westengard, who always manifested sympathetic interest in the study of law by the Siamese students, was asked by the Minister of Justice to act as an adviser to the students sent by this scholarship. He gladly complied with the request of the Minister, and took up most carefully and individually the problems and needs of each of the young men. He corresponded with them and enjoyed the progress of even their English letter-writing.

In view of the admiration the Siamese have for his knowledge of law it is not surprising that all our law students should have a great ambition to become one of his pupils, for this qualification would be better than other recommendations they could bring back home to Siam.

The other students who do not specialize in law also receive their full share of his kind attention; they were free to come and consult him on all kinds of problems. In spite of his pressing work Mr. Westengard had time enough left to help everybody.

The greatest benefit and at the same time the greatest pleasure derived from intercourse with the Professor was to discuss with him Siamese affairs. We could not find a better opportunity to learn the history of our country than from the statement of such an eminent authority. Professor Westengard has occupied one of the highest and most confidential positions in the Siamese government. He had access to all the archives of the kingdom, and was one of the best informed about her recent history, in the latter thirteen years of which he was one of the most prominent of its makers.

With his glorious gift of clear and concise expression he rendered the tangled chains of events intelligible and simple to remember; again avoiding the monotony of one thing following another chronologically, he added much fascination to his story by making a panorama-like sketch of a vast situation; and again he would paint in the minutest details an important action in which perhaps he himself took part as the driving impulse or as a silent witness.

His comments on the situations and the people therewith connected or responsible for them were sometimes favorable, sometimes not, but always frank and fair and above all most logical.

His criticism of the Siamese government, however severe, was given in such a delicate expression that none of us could have felt hurt, although it always had the full effect upon everybody.

His judgment deserves to our mind the greatest confidence by the one fact that he was a citizen of the United States, a country politically disinterested in Siam but very friendly to her. His personal integrity and fairmindedness would exclude any kind of prejudice or misrepresentation of facts.

Mr. Westengard, keen observer as he was, understood human nature, which, he used to say, "is governed by more or less the same kinds of passions, whether Eastern or Western . . . composed of strength and weakness, greatness and selfishness." If all the people of the West had understood as well as Mr. Westengard did the nature of Oriental peoples, many grievous hours would have been avoided.

Although he shared with us the love and veneration for those who so wisely have guided our little nation through the period of adolescence, yet he was not blinded by the glory of their achievements, like the rest of us, but could give us a fairer estimate of their real worth, their human weakness and errors, but also their praiseworthy qualities. We do not feel deprived of that mysterious respect and confidence of Easterners for their great ones; on the contrary, our admiration grows with his words, because he has added a touch of the purely human to their other almost divine qualities. He showed us that those men did not do miracles, but did more: they were possessed of wonderful human resourcefulness.

The fact that Mr. Westengard did so much and so well for the happiness of Siam we could learn from everybody out there, but to hear him give account in such a modest and unassuming way

of some of the most important events of our history, shaped by his own hands, was a priceless privilege that, alas! was granted to an unworthy few, and only for such a short time.

Talking with Professor Westengard, I often felt like having discovered the quiet and crystal-clear source of the stream that made our dearly beloved soil of Siam ever so fertile, and the people who live on its banks one of the happiest in the world.

Having received all these valuable informations from his own mouth, we feel that we shall now better appreciate the great good we possess in that independent and free land of ours.

It is curious and touching, though, that we should have to travel ten thousand miles across the ocean to find through this brilliant son of America the faith and hope in our country again.

For the sake of his noble and serviceable work in Siam, as well as what he has been to us, students far from home, we venture to appeal to Professor Westengard's American friends to be persuaded not to feel so keenly the regret for his long absence during his best years; but rather to rejoice in being able to give, through this one of your most brilliant countrymen, so much strength and happiness to a small and friendly people.

*A Siamese Student,  
On behalf of all the Siamese students.*

IT was singular that Mr. Westengard should have returned to the Law School to become Bemis Professor of International Law, in the fall of the year 1915, at the precise time when events were beginning both to disclose and to increase the practical importance of the law of nations. The world had suddenly found that the regulation of international conduct was, for the time being, a great deal more exigent than the regulation of individual relations; and, accordingly, the study of international law was greatly developing everywhere, even in that most utilitarian of educational institutions, the Law School. A relatively large number of men took Mr. Westengard's course, and when he came, in 1916, to teach Admiralty, a number elected that course also.

It was in the work of these courses, and of the graduate course in war problems, that Mr. Westengard's heart really lay, I think. He taught property and torts well, and he was interested in them both; but I am sure that he had not, for either of them, the keen enthusiasm that a delicate question of international law, or a vivid, picturesque, and frequently intricate question of admiralty would promptly arouse in him. He was a master of the technical reasoning required for the problems (often such dry ones) of the common law; but he preferred those fascinating questions whose solution sometimes took one back to the laws of Oléron, the "Black Book of the Admiralty," or the "*De Jure Belli et Pacis*" of Hugo de Groot; upon the answer to which might rest the action of a nation; and in whose determination heavy and inextricable cords of policy so often pulled one way and another. The law governing the rights and duties of neutrals, for instance, was to Mr. Westengard peculiarly vital: he once said (speaking of the Netherlands and the Scandinavian countries), "My heart bleeds for the poor neutrals!"

As has been said, Mr. Westengard returned to the Law School, after a most honorable and successful career in Siam (during the course of which that country had achieved the fullest measure of independent sovereignty), at a fortunate time. He brought to his new duties not only much experience in diplomatic practice and in the administration of international law, but also wide learning,



sound judgment, and a certain quality of intellectual candor and courage which contrasted oddly with his habitual caution. He could neither be forced nor manoeuvred into taking a position, however safe and sound it might seem, until he had convinced himself that it was, not probably, but surely, so. But once he had convinced himself of this, he did not hesitate to express an opinion which others, and those the greatest of authorities, might not share. Thus, when the Supreme Court affirmed the District Court's decision in the celebrated case of *The Appam*, Mr. Westengard, after giving the opinion of the court more consideration than the writer of the opinion appeared to have given to the case, did not hesitate to say (without going into other serious questions presented by the decision), that he wished the court could have felt free to explain, at a little more length, its reasons for making so distinct an addition to what had been, for more than a century, the settled jurisdiction of neutral courts of admiralty.

Mr. Westengard came back to the Law School at a fortunate time, but he had only a short period in which to make a record of his presence. He must have wished, when he began to teach international law, to turn out, as the finished product of his courses, men whose diligence would make the library of the Marquis de Olivart an asset to the nation, men who, by reason of the intensive training of the case system, would become, not publicists who wrote upon international law, but real international lawyers. This, in a small measure only, he may have been permitted to do. But he did succeed in imbuing his pupils with a realization of the inherent fallacy of *inter arma leges silent*, with a belief that the highest national service is the establishment of international law, and with a deep personal affection for himself.

*John Raeburn Green.*

DEPARTMENT OF STATE,  
WASHINGTON, D. C.  
November 4, 1918.

## NAPOLEON AND HIS CODE<sup>1</sup>

*"I will go down to history with the code in my hand."* — BONAPARTE.

AS we pass the centennial of the great tragedy of Waterloo it may seem surprising to find the fame of its principal victim more secure than ever. Napoleon Bonaparte has unquestionably become the most striking figure in modern history. Others may have been more conspicuous in a single country, as Washington in America, or in some particular line of human activity, as Shakespeare in literature, or Darwin in science; but no modern character has so completely riveted the attention of the entire world for so long a time, and become so distinguished in so many different lines as Napoleon.

We know him best as a strategist. But he was also distinguished as a diplomatist; not less so as a statesman and an administrator, and finally, and most successfully of all, as a lawgiver.

It is with the last-named rôle that we are concerned here. Napoleon's military achievements have largely vanished; they were spectacular and highly successful from a temporary standpoint, but as he himself predicted, they have become "lost in the vortex of revolutions" and yielded no permanent results except to mili-

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<sup>1</sup> BIBLIOGRAPHICAL NOTE. — The literature of the Code Napoléon is voluminous and constantly increasing. The CAMBRIDGE MODERN HISTORY alone (Vol. IX, 808, 809) contains a bibliography of about fifty titles, mostly French. The discussions accompanying the Code at its publication filled no less than eight volumes, while the memorial papers published in connection with the observance of its centennial (at which the American government was officially represented) number forty and are contained in two portly tomes.

In English the most complete discussion of the origin and history of the Code appears to be that from the pen of Prof. H. A. L. Fisher, of Oxford University. The translation in the CONTINENTAL LEGAL HISTORY SERIES of Brissaud's Manual has opened a wealth of material to English readers and, with the suggestive, though all too scant, articles of Esmein (Professor of Law in the University of Paris) in the new ENCYCLOPEDIA BRITANNICA (Vols. VI, X), clarify the subject from the French viewpoint. The centenary of the Code is the subject of an article by Sir Courtenay Ilbert in the JOURNAL FOR THE SOCIETY OF COMPARATIVE LEGISLATION (N. S.), Vol. VI, 218. In 1906, Mr. U. M. Rose delivered an address on the Code before the bar associations of Arkansas and Texas, which was afterward published in 40 AM. L. REV. 833-54, and there are other magazine articles in English on the subject. See, e. g., "The Code Napoléon," by W. W. Smithers, 40 AM. L. REV. (N. S.) 127.

tary science. His diplomacy brought little to France that remains. His statesmanship and administration benefited that country and their results continue there. But his greatest achievement, that which endures to-day, the one feature of Napoleon's career which now influences the world beyond France and which is growing in recognition as the years pass, was his work as a lawgiver and a codifier.

#### EARLIER SCHEMES OF CODIFICATION

The legal chaos that prevailed in France before the Revolution had engaged the attention of eminent Frenchmen for centuries. A single code for the whole country was the dream of King Louis XI in the fifteenth century, of Dumoulin (1500-66) and Brisson in the sixteenth, of Colbert and Lamoignon in the seventeenth, and of D'Aguesseau in the eighteenth. The four last named made substantial contributions toward such a project — Brisson,<sup>2</sup> by his compilation of the Ordinances in force under Henry III, Colbert and Lamoignon, through the more celebrated Ordinances<sup>3</sup> bearing the name of Louis XIV, and D'Aguesseau, whose Ordinances on wills, gifts, and entails appeared between 1731 and 1747, and "were thorough codifications."<sup>4</sup>

The States-General of 1560 voted for a code, and those of 1576 and 1614 again recommended one, and when, on June 17, 1789, that body became the National Assembly and seized the sovereign power, these juridical evils of the old régime were among the first to be denounced. Everyone recognized their enormity, but prac-

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<sup>2</sup> "About 1580, a celebrated juriconsult, BARNABY BRISSON (Brissonius), Advocate-General of the Parliament of Paris, and author of a widely used dictionary of law ('De verborum significatione'), compiled a systematic collection of the principal provisions contained in the Ordinances in force under Henry III. This prince, ambitious, it was said, to rival the glory of such men as Theodosius and Justinian, was about to give it royal sanction; but his death in 1589 prevented this. Brisson's work was published after his death under the title of 'Code Henri III, Basilica.'" Brissaud, *MANUEL D'HISTOIRE DU DROIT FRANÇAIS*, § 3, 346 *et seq.*, translation in 1 *CONTINENTAL LEGAL HISTORY SERIES*, 264.

<sup>3</sup> These included the *Civil Procedure Ordinance* of 1667, intended to expedite and cheapen litigation but which also limited judicial discretion; the *Criminal Ordinance* of 1670, really restricted to procedure and antiquated in many of its provisions though possessing "much merit"; the *Ordinance of Commerce* (1673), mainly the work of Jacques Savary, a Paris merchant; and the *Ordinance of the Marine* (1681), a careful codification of maritime law. *Id.*, 264-65, 279.

<sup>4</sup> *Id.*, 279. Cf. 269.

tical remedies were wanting. The deputies all said: "We must have a code," and after more than a year they adopted a resolution calling for "a general code of clear and simple laws."

But, notwithstanding the fact that nearly one half the membership of the *Assemblée Constituante* was composed of lawyers, nothing further in that direction seems to have been accomplished by that body. The Constitution of 1791, framed by the same Assembly, embodied the promise of a code and the short-lived Legislative Assembly of the same year dealt with the problem in a feeble way. Its successor, the National Convention, which contained very few lawyers, took up the subject in 1793, impelled, it is thought, by the accumulating mass of new legislation, and in July of that year, appointed a committee "to replace the chaos of old laws and customs" and ordered it to report a draft within one month. The Committee consisted of Cambacérès, probably the most learned lawyer in the Convention, Treilhard, Berlier, Merlin de Douai, and Thibaudeau, and its draft, mainly the work of the first named, as chairman, was presented,<sup>5</sup> pursuant to order on August 9.

"This plan was remarkable for its excessive brevity; there was only one article for certificates of civil status, only one for domicile, and the rest in proportion; the whole consisted of six hundred and ninety-five articles. Such a Code would have been very dangerous, for many important points were not touched upon, and judges would have found themselves without guidance and without control. This feature of it, however, was deliberately adopted by its drafters. The Convention professed a profound contempt for the Roman law and the Customary law, which they looked upon as barbarian and degenerate systems. They aimed (says Barrère) to realize the dream of philosophers — to make the laws simple, democratic, and accessible to every citizen. Besides this defect in form, Cambacérès' draft was too much inspired by the revolutionary ideas of the day."<sup>6</sup>

Mr. Rose<sup>7</sup> refers to it as "hardly anything more than a collection of moral maxims and in fact no code at all." On the other hand Mr. Smithers<sup>8</sup> thinks that "the ensemble . . . embraced a

<sup>5</sup> "In the bombastic language suited to the time and the occasion." Rose, "The Code Napoléon," 40 AM. L. REV. 833, 845.

<sup>6</sup> PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL*, 5 ed., 1908, translation in 1 CONTINENTAL LEGAL HISTORY SERIES, 280.

<sup>7</sup> *Supra*.

<sup>8</sup> "The Code Napoléon," 40 AM. L. REG. (N. S.) 127, 139.

set of positive laws well suited to the whole of France." Be that as it may, the Convention considered the work "too complex" and on November third referred it back to the Committee to be "simplified." Nothing more came of it, however, nor of a subsequent draft of two hundred and ninety-seven brief articles which Cambacérès later presented to the Convention;<sup>9</sup> and after a vain effort by him to interest the Council of Five Hundred in the project, it was allowed to languish for the remainder of the eighteenth century.

#### NAPOLEON'S CODE COMMISSION

Bonaparte was now first consul, and the victory of Marengo gave him leisure for the pursuits of peace. More than any man in France he saw that its greatest need was a thorough overhauling and unification of its laws. But still more he alone discerned the means by which reform was to be brought about. Napoleon discarded the old committee of the Assembly. He considered that it had demonstrated its incapacity, and on August 13, 1800, he proceeded to appoint a new commission to draft a real code. This was eleven years after the outbreak of the Revolution, one of the purposes of which was to reform the laws. Little had been accomplished in this direction in all that time, though startling changes had been taking place along other lines. Napoleon proceeded to look for the ablest and most competent men in the whole country; he disregarded all other considerations; he appointed no man as a codifier because of political affiliations; and he omitted none because of personal dislike. Of the four who were selected everyone was past middle age and a conservative, at heart attached to the old régime, and Napoleon knew it. He recognized perfectly well that their natural sympathies were with the past.

At the head of the commission he appointed Tronchet, aged seventy-three, and president of the *Cour de Cassation*. And what were Tronchet's antecedents? He was one of the counsel who had defended Louis XVI when prosecuted and finally executed by the revolutionists. In fact, he was called "The Nestor of the Aristocracy." Can one imagine a more remarkable appointment than that of a man who was practically the legal representative of the

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<sup>9</sup> PLANIOL, *supra*.

old régime, and who was thus placed at the head of a commission to codify the laws of new France? Yet Napoleon said of him later that he had been "the soul of the debates in the Council of State."<sup>10</sup>

Next in importance was Portalis, a Provençal, who had suffered imprisonment during the Revolution. He has been called<sup>11</sup> "the philosopher of the commission," for he "was specially distinguished in the art of legal and philosophical exposition."<sup>12</sup>

Then came Bigot de Préameneu, a native of Rennes and a mild supporter of the Revolution, but obliged to hide during the Terror. At the time of his appointment he was "government commissioner" in the *Cour de Cassation*.<sup>13</sup> It has been said that his "adroitness and pliancy were destined to be proved in more fields than one."

Finally there was Malleville, who had been a practitioner at Bordeaux and later a judge of the *Cour de Cassation*. He is said to have been "profoundly versed in the Roman Law" and became "the first of a long line of commentators on the Code," which he assisted in drafting.<sup>14</sup>

And not only was this commission distinguished in its personnel from the individual standpoint; it was also collectively a representative one. For Tronchet and Malleville came from the bench, bringing to the work of the commission the benefits of judicial experience; Portalis and Bigot, *per contra*, represented the bar with a training no less valuable. Again Tronchet and Bigot came from "*le pays du droit coutumier*" and were schooled "in the *Parlement* and the custom of Paris." On the other hand, "Portalis and Malleville represented the legal traditions of the land of written law." This combination of elements and experience was ideal, and it is easy to understand how the outcome was a "compromise between northern Teutonism and the Latin inheritance of the south."<sup>15</sup>

<sup>10</sup> 1 CONTINENTAL LEGAL HISTORY SERIES, 287.

<sup>11</sup> *Id.* The same author adds: "Possibly he has been too highly praised. As a philosopher, he certainly did not possess an original mind; he attained only the heights of mediocrity; and his style, filled with the phraseology of the period, was soon antiquated. But he was not a mere jurist; he was an enlightened man, with an open mind, and a marked moderation; and it is for this that we should especially thank him."

<sup>12</sup> 9 CAMBRIDGE MODERN HISTORY, 150.

<sup>13</sup> 1 CONTINENTAL LEGAL HISTORY SERIES, 281.

<sup>14</sup> 9 CAMBRIDGE MODERN HISTORY, 150.

<sup>15</sup> *Id.*, 151.

MODELS AND SOURCES<sup>16</sup>

The idea of a civil code, *i. e.*, one devoted exclusively to private, substantive law seems to have originated here. Certainly the Roman prototypes furnished no model. The nearest approach to one was probably the Institutes of Justinian with its four books, the first three of which treated respectively of Persons, Property and Obligations — the Gaian<sup>17</sup> order followed in the main by the French draftsmen. But the fourth book of the Institutes treated of actions, which the French now relegated to a separate code, that of *Procédure Civile*. Similarly the other special codes eventually evolved in France — Penal, Commercial, and Criminal Procedure (*Instruction Criminelle*) — were all departures from Roman prototypes. Justinian's Code, indeed, contained more public and criminal law than did the Digest, but neither was devoted exclusively to any particular branch, and no clear distinction was made between remedial and substantive law.

But if the scope and arrangement of the draft code were original its contents were not. Even the finished instrument contained little new law, and that seems to have been largely added by Napoleon himself. The original draft, as it came from the hands of the Commission, was mainly a purged reproduction in codified form of the existing French law.

"Little is known of the special training through which the true authors of this work had passed; but in the form which it ultimately assumed, when published as the Code Napoléon, it may be described, without great inaccuracy, as a compendium of the rules of Roman law then practised in France, cleared of all feudal admixture — such rules, however, being in all cases taken with the extensions given to them, and the interpretations put upon them by one or two eminent French jurists, and particularly by Pothier."<sup>18</sup>

COMMENTATORS. — The last-named author's *Traité des Obligations* had appeared in 1761, about a generation before these draftsmen began their work, and one writer goes so far as to say

<sup>16</sup> On this topic see generally DUFOUR, *CODE CIVIL AVEC LES SOURCES OÙ TOUTES SES DISPOSITIONS ONT ÉTÉ PUISÉES* (Paris, 1806), four volumes; DARD, *CONFÉRENCE DU CODE CIVIL AVEC LES LOIS ANCIENNES*, 4 ed., 1827.

<sup>17</sup> "It is, *mutatis mutandis*, practically the same division as that of Blackstone's Commentaries." Esmein, 6 *ENCYCLOPÆDIA BRITANNICA*, 11 ed., 634, 635.

<sup>18</sup> MAINE, *VILLAGE COMMUNITIES*, 7 ed., 356-58.

that "three-fourths of the Code were extracted"<sup>19</sup> therefrom, and that "the law of contract is taken almost bodily from Domat and Pothier."<sup>20</sup> Domat, whose work on *Lois Civiles* had been first published in 1694, was one of the few French counterparts of the English institutional writers like Coke, Hale, and Blackstone, all of whose works were then current in England. In fact, French legal literature then, as compared with English, or even Spanish, was meager. It has even been characterized as "pitiable,"<sup>21</sup> though this hardly seems appropriate in view of other equally authoritative estimates of the preceding French jurists,<sup>22</sup> to say nothing of the encyclopedists who so profoundly influenced the legal as well as political philosophy of the Revolution. Their themes, however, were mostly remote from the paths followed by the framers of the Civil Code, who seem to have confined their study of commentaries to a few well-known ones which they, nevertheless, utilized thoroughly.

GRANDES ORDONNANCES. — "Certain parts (of the Roman law current in France) had already been codified," observes Esmein,<sup>23</sup> "in the *Grandes Ordonnances* which were the work of D'Aguesseau." Three of these, framed by that eminent chancellor during the years 1731-47, were especially important sources. "Upon the topics which they covered," it has been said, "— wills, gifts, and entails — he virtually wrote in advance entire chapters of the future Civil Code of Napoleon."<sup>24</sup> Other Royal Ordinances were utilized like that of April, 1667, relating to certificate of civil status, and to evidence; that of Moulins (1566) on the last-named subject, and the Edict of 1771 concerning mortgage redemption.<sup>25</sup>

<sup>19</sup> Professor Fisher in 9 CAMBRIDGE MODERN HISTORY, 161. Of Pothier's works as a whole it has been said: "They extraordinarily simplified the work to be done by the framers of the Civil Code; it has been said of them that they were an advance Commentary upon the Code." 1 CONTINENTAL LEGAL HISTORY SERIES, 270.

<sup>20</sup> 9 CAMBRIDGE MODERN HISTORY, 162.

<sup>21</sup> *Id.*, 161.

<sup>22</sup> "Their juridical tact, their ease of expression, their fine sense of analogy and harmony, and (if they may be judged by the highest names among them) their passionate devotion to their conceptions of justice, were as remarkable as the singular variety of talent which they included, a variety covering the whole ground between the opposite poles of Cujas and Montesquieu, of D'Aguesseau and Dumoulin." MAINE, ANCIENT LAW, 80.

<sup>23</sup> 6 ENCYCLOPÆDIA BRITANNICA, 11 ed., 634.

<sup>24</sup> 1 CONTINENTAL LEGAL HISTORY SERIES, 269.

<sup>25</sup> *Id.*, 286.



CUSTOM.—Then there were the *Livres de Coutumes* and other sources of customary law. For just as in England there was a Custom of London,<sup>26</sup> so in France there arose the Custom of Paris—the legal system of the capital and the surrounding country which gradually acquired a predominance<sup>27</sup> over the other legal systems or “customs” of the realm. The Custom of Paris, *e. g.*, became the form of the French law that found its way to America when France first became a colonial power, and even acquired some foothold in territory subsequently formed into states of the Union.<sup>28</sup> At first these customs, like similar systems elsewhere, were unwritten, but “for at least two centuries before the Revolution, the French *Droit Coutumier*, though still conventionally opposed to the *Droit Ecrit*, or Roman law, had itself become *written* law; nobody pretended to look for it elsewhere than in Royal Ordinances, or in the *Livres de Coutumes*, or in the tomes of the Feudists.”<sup>29</sup> Thus the Custom of Paris had been reduced to writing before 1580, for the revised text of that year was used by the framers of the draft code and was especially familiar to Tronchet and Bigot. From this customary law was largely derived the material relating to the conjugal partnership, the disabilities of married women, and certain provisions as to succession.<sup>30</sup>

OTHER SOURCES.—The decisions of the *parlements* were resorted to for subjects like “absence,” which bore likewise upon the marriage portion and the conjugal partnership.<sup>31</sup> Rules of the canon law governing legitimation and marriage were retained,<sup>32</sup> though the last named, as well as legal age and mortgages, had been the subject of revolutionary legislation.<sup>33</sup>

<sup>26</sup> 1 BLACKSTONE'S COMMENTARIES, 75, 76; 3 *Id.*, 334.

<sup>27</sup> “The Code was drafted in Paris, in the very centre of the countries of Customs; most of the Councillors of State came from the provinces of the North; the Parliament of Paris had played a preponderating part in the old law. There is therefore nothing astonishing in the predominance of the spirit of the Customs; the opposite would have been an historical anomaly.” 1 CONTINENTAL LEGAL HISTORY SERIES, 286.

<sup>28</sup> As Michigan, *Lorman v. Benson*, 8 Mich. 18, 25 (1860), and Wisconsin, *Coburn v. Harvey*, 18 Wis. 147 (1864).

<sup>29</sup> MAINE, *VILLAGE COMMUNITIES*, 7 ed., 363–64. The least use appears to have been made of the latter. 40 AM. L. REV. 851.

<sup>30</sup> 1 CONTINENTAL LEGAL HISTORY SERIES, 286.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> This was partly embodied in the BULLETIN DES LOIS DE LA RÉPUBLIQUE FRANÇAISE compiled by order of the convention after 1794 and containing not only the recom-

## THE DRAFT CODE

Mr. Rose in his Bar Association address observes:

"The draft of the code was finished in four months. It is perfectly plain that such an expeditious result could not have been accomplished if it had not been for the previously accumulated materials and arduous labors of Cambacérès and his committees."<sup>34</sup>

The present writer has been unable to find confirmation of this view. "An expeditious result" was one of the conditions upon which the commission was set to work. It was appointed on August 12, 1800, "with instructions to bring the work to a conclusion in the following November."<sup>35</sup> And it seems clear that obedience to these instructions, rather than a feeling that the task was "finished," caused the draft to be reported when it was.

The Code has been called "a hasty piece of work,"<sup>36</sup> and this was certainly the view taken in the Tribunate when the draft was before it.<sup>37</sup> At any rate the "materials" were limited and were quite as accessible to the draftsmen as to their predecessors. Besides, it was Napoleon's experience with the old committee and his belief that in six years it had accomplished practically nothing which appears to have led him to insist now upon prompt action. Here, as always, he was looking for results. And just as the Austrian generals, whom he had vanquished — sometimes with half their force — had complained, "This man violates the principles of strategy," so now the reactionary defenders of the old legal régime saw in expedition only innovation. But Napoleon was equally at home whether opposing an armed force or an outworn jurisprudence, and the outcome in either case usually vindicated his methods.

## REFERENCE AND REVISION

The draft was never intended by its promoter to be anything more than what the French call a *projet* — a mere step toward the final result. Napoleon wanted these men of learning in the old law

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mendations of the Cambacérès committee but other legislation. See Smithers, "The Code Napoléon," 40 AM. L. REG. (N. S.) 127, 139, 140.

<sup>34</sup> 40 AM. L. REV. 833, 849.

<sup>35</sup> 9 CAMBRIDGE MODERN HISTORY, 150.

<sup>36</sup> *Id.*, 162.

<sup>37</sup> *Id.*, 153.

to construct a framework upon which he and others could labor by dissecting, discussing, testing and remodelling so as to fit modern conditions. Following the same policy he directed the draft to be sent next to the judiciary for comment and criticism to be submitted *within three months*. This done, the instrument was submitted for examination and revision to the legislative section of the Council of State, and then to the whole Council, where Napoleon's direct participation commenced.

### NAPOLÉON'S PART

In the opinion of Professor Esmein<sup>38</sup> "the part that Napoleon took in framing it [the Code] was not very important" and "interesting as his observations occasionally are, he cannot be considered as a serious collaborator in this great work." But the same author states that, "in the discussions of the general assembly of the council of state that Napoleon took part, in 97 cases out of 102 in the capacity of chairman"<sup>39</sup> and it seems clear from this that his share in the process of codification was by no means formal or perfunctory — much less a nominal one like Justinian's. Moreover other critics, even if unfriendly to Napoleon, are disposed to place a higher estimate upon the value of his labors in this connection. One<sup>40</sup> of them summarizes Napoleon's direct contributions to the subject matter of the Code as including the articles governing the civil status of soldiers (Arts. 93-98) and aliens (Arts. 11, 726, 912), the latter being discriminatory, and the systems of adoption and divorce by mutual consent. But his influence extended much farther.

A none too friendly critic<sup>41</sup> observes:

"... his contributions to the discussion were a series of splendid surprises, occasionally appropriate and decisive, occasionally involved in the gleaming tissues of a dream, but always stamped with the mark of genius and glowing with the impulses of a fresh and impetuous temperament.

<sup>38</sup> 6 ENCYCLOPÆDIA BRITANNICA, 11 ed., 634.

<sup>39</sup> *Id.* Mr. Rose (40 AM. L. REV. 832, 850) speaks of "102 sessions, over 57 of which he presided," while the CAMBRIDGE MODERN HISTORY (Vol. IX, 151) mentions 35 out of 87.

<sup>40</sup> 1 CONTINENTAL LEGAL HISTORY SERIES, 288.

<sup>41</sup> H. A. L. Fisher in 9 CAMBRIDGE MODERN HISTORY, 151, 164.

"... to Bonaparte's presence we may ascribe the fact that the civil law of France was codified, not only with more scrupulosity than other portions of French law, but also with a livelier sense of the general interests of the State. What those interests were, Bonaparte knew. They were civil equality, healthy family life, secure bulwarks to property, religious toleration, a government raised above the howls of faction. This is the policy which he stamped upon the Civil Code."

We have, too, the testimony of an eye-witness, Thibaudeau, as to the ease with which he maintained his positions in debates with men who had made law a lifelong study. Another has said:

"On some points his influence may seem to have been unfortunate. But how small a price for the rest? His all-powerful will was the lever removing all obstacles. His energy and (why ignore it?) his ambition were the instruments to which we owe the achievement of the great task, — a task which had been unfulfilled for centuries, and, but for him, might still in our own day have remained undone."<sup>42</sup>

Yet Napoleon, though the son of a lawyer, never took a law course; his training was only at a military school; and he had a hearty dislike for the *noblesse de la robe*, as the bar is called in France, though he never allowed this feeling to deprive the country of needed professional talent. How did he learn his law? Simply by utilizing all his odd moments. Once, while a lieutenant, he committed some trivial offense and was confined for several days in the guardhouse. The room contained a Latin copy of Justinian's Digest, which Napoleon's intensely active mind seized upon, and, through his prodigious memory, absorbed.<sup>43</sup> When presiding over the deliberations of the Council upon the draft code he was always quoting the Digest, and the members were asking each other: Where did the First Consul get his knowledge of Roman law? They might have found the answer in the poet's words:

"The heights by great men reached and kept  
Were not attained by sudden flight;  
But they, while their companions slept,  
Were toiling upward through the night."

How applicable this to one who did a giant's work, sleeping only four or five hours out of twenty-four.

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<sup>42</sup> 1 CONTINENTAL LEGAL HISTORY SERIES, 289.

<sup>43</sup> WELLS, THINGS NOT GENERALLY KNOWN, 105.

Napoleon had also studied <sup>44</sup> Montesquieu, and although he did not accept all of the latter's political philosophy he could hardly have escaped (and evidently did not) the influence of writings of whose author it has been said:

"He is the first to conceive of the law as a true science, to identify its method with that of the natural sciences, to discover the laws of the growth of law, and to subsume all its facts within the boundaries of general formulæ. His scheme may have since been perfected as to detail; but the conception has remained the same; it has never been improved upon. And besides propounding this broad truth, in his '*Esprit des lois*' (1748) he touched upon the essential points, and suggested the concrete solutions of the future. No more entails (for they hamper economic progress); no more mortmains (for the clergy is a family which should not multiply); fewer rent-charges and more money-loans, — such was his program for property-law. For the law of persons, no more serfdom (for agriculture depends less on fertility of soil than on liberty of its occupants). For family law, no more indissoluble marriages. The law of successions should be preserved, on grounds of political welfare. For procedure, he advocates less of formality, more of conciseness and simplicity. Such was his enlightened forecast." <sup>45</sup>

Finally it was one of the secrets of Napoleon's greatness that he constantly utilized his time in some valuable direction. He was always a busy man. From his earliest youth until he went to St. Helena he lacked leisure, but he had a way of getting the most out of his associates. He was fond, in his campaigns, of taking specialists, jurists included, with him, and when on the march or in camp, while not actually engaged in battle, he had these men around him, questioning them, discussing their specialties with them and thus replenishing his own store directly from the best minds of his day. It was by utilizing the unusual situations and by making the most of his odd moments that Napoleon gathered legal knowledge. And this process continued even during these deliberations. As he debated he learned from those about him and he was not like one convinced against his will. Upon one occasion he acknowledged:

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<sup>44</sup> 3 CORRESPONDANCE, 313 (No. 2223), letter of September 19, 1797; 2 CONTINENTAL LEGAL HISTORY SERIES, 438.

<sup>45</sup> 1 *Id.*

"I first thought that it would be possible to reduce laws to simple geometrical demonstrations, so that whoever could read and tie two ideas together would be capable of pronouncing on them; but I almost immediately convinced myself that this was an absurd idea."

#### COMPLETION

From the Council the draft went successively to the Tribunalate and the National Legislature, in each of which it encountered opposition. But the First Consul was undaunted and resourceful. He devised a plan that met all difficulties, and on March 21, 1804, the *projet* was approved by the legislature and promulgated.<sup>46</sup>

And so out of all this effort and discussion came the Code Napoléon,<sup>47</sup> as the instrument was to be known — the earliest practical realization of a dream five centuries old in France. But it was only the first fruits of the codification movement. The Code of Civil Procedure followed in 1806, the Code of Commerce in 1807, the Code of Criminal Procedure (*Instruction Criminelle*) in 1808, and finally the Code Penal in 1810.

Brissaud<sup>48</sup> says of them:

"These four Codes are very inferior to the Civil Code. Of the two Criminal Codes, one is as faulty as the other. Our criminal trial system, much out of date, is open to many criticisms; and there is some question of recasting it from top to bottom. Pending this vast undertaking, it has already been amended in important respects. The system of penalties established under the Empire was far too severe and inflexible, and has been improved on several occasions, especially in 1832 and 1863. The Code of Civil Procedure also calls for numerous reforms; the practice is too costly, the delays are too long, the forms are out of date; only the lawyers are satisfied with it. As to the Commercial Code, it was entirely inadequate. On most points the legislators had limited themselves to a reproduction of the Ordinance of 1673 (on commerce) and that of 1681 (on maritime commerce). Only its provisions upon bankruptcy

<sup>46</sup> VIOLLET, *HISTOIRE DU DROIT CIVIL FRANÇAIS*, 2 ed., 236.

<sup>47</sup> This title does not appear until 1807. "The Charters of 1814 and 1830 restored its original name. A Decree of March 27, 1852, reestablished the title of 'Code Napoléon,' 'in order to defer to the historic truth,' said the framer of the Decree. However, since the year 1870, universal usage (following that of the government) terms it merely 'Code civil.' Today the term 'Code Napoléon' is more suitably used to designate the original form of the Code, in contrast with its existing form, which is appreciably different." 1 *CONTINENTAL LEGAL HISTORY SERIES*, 285.

<sup>48</sup> *Id.*, 292-93.

were new; but these were poorly drafted, and had to be recast in 1838. Many important laws have since been enacted on commerce, independently of the Code, on topics such as commercial partnerships, checks, warehouses, maritime mortgage, collisions, etc. In spite of these, our commercial law is very much behind the times. Colbert's laws, more than two centuries old, still form its basis, and yet since then commercial methods have made rapid strides and have altered to an extent as complete as it was unforeseen."

Esmein's <sup>49</sup> estimate is somewhat more favorable. He says:

"The *Code de Commerce* was scarcely more than a revised and emended edition of the *ordonnances* of 1673 and 1681; while the *Code de Procédure Civile* borrowed its chief elements from the *ordonnance* of 1667. In the case of the *Code d'Instruction Criminelle* a distinctly new departure was made; the procedure introduced by the Revolution into courts where judgment was given remained public and oral, with full liberty of defence; the preliminary procedure, however, before the examining court (*juge d'instruction* or *chambre des mises en accusation*) was borrowed from the *ordonnance* of 1670; it was the procedure of the old law, without its cruelty, but secret and written, and generally not in the presence of both parties. The *Code Pénal* maintained the principles of the Revolution, but increased the penalties. It substituted for the system of fixed penalties, in cases of temporary punishment, a maximum and a minimum, between the limits of which judges could assess the amount. Even in the case of misdemeanours, it admitted the system of extenuating circumstances, which allowed them still further to decrease and alter the penalty in so far as the offence was mitigated by such circumstances."

#### INFLUENCE ABROAD

Had the Napoleonic codification movement never spread beyond France it would have been one of the most remarkable in modern times, because of the difficulties overcome and the abuses remedied. But the movement did not stop with the French frontier, for other countries were soon to discover the merits of that legislation.

"The influence of the *Code Civil*," observes Professor Esmein, "has been very great, not only in France but also abroad. Belgium has preserved it, and the Rhine provinces only ceased to be subject to it on the promulgation of the civil code of the German empire."<sup>50</sup>

<sup>49</sup> 10 *ENCYCLOPÆDIA BRITANNICA*, 11 ed., 906, 923.

<sup>50</sup> 6 *Id.*, 11 ed., 634, 635.

Professor Walton <sup>51</sup> adds, "It has, indeed, made itself, to a great extent, the code of all the Latin races."

The progressive extension of the Code Napoléon's influence throughout the world will appear from the following table showing the date of promulgation of the codes of those numerous countries which have made the French code their model:

Belgium . . . . .	1804	Portugal . . . . .	1867
Louisiana <sup>52</sup> . . . . .	1808	Uruguay . . . . .	1868
Austria . . . . .	1811	Argentina . . . . .	1869
Hayti . . . . .	1825	Mexico . . . . .	1870
Greece . . . . .	1827	Nicaragua . . . . .	1871
Holland . . . . .	1838	Guatemala . . . . .	1877
Bolivia . . . . .	1843	Honduras . . . . .	1880
Peru . . . . .	1852	Spain <sup>54</sup> . . . . .	1889
Chili . . . . .	1855	Salvador . . . . .	1889
Italy . . . . .	1865	Venezuela . . . . .	1896
Lower Canada (Quebec) <sup>53</sup> .	1866		

#### ESTIMATES OF THE CODE

Aside from the great achievement of unifying French law the chief merits which Napoleon himself would probably have claimed for his code are clearness, conciseness,<sup>55</sup> and simplicity. To the Anglo-Saxon lawyer, indeed, the first impression of this and similar codes is that simplicity has been carried to the point of superfi-

<sup>51</sup> "The New German Civil Code," 16 JURIDICAL REV. 148, 149.

<sup>52</sup> "It was modeled on the draft of the Code Napoléon (for a complete copy of the latter was not at that time accessible), and the whole body of French legal learning was thus introduced into the arguments and decisions of the courts of Louisiana." Dean Wigmore, "Louisiana, The Story of its Legal System," 1 SO. L. QUART. 12. Cf. *City of New Orleans v. Camp*, 105 La. 288, 29 So. 340 (1901).

<sup>53</sup> See 13 COL. L. REV. 213, 215.

<sup>54</sup> See the present writer's "A Spanish Object Lesson in Code Making," 16 YALE L. J. 411. The Spanish movement for codification in the nineteenth century received its inspiration from France, and the Civil Code of Spain, which is still in force, for the most part, in the Philippines, and Porto Rico follows the Code Napoléon so closely that article after article will be found practically a translation from the latter.

So the Spanish Penal Code, of which the present edition dates from 1870 and is still largely in force in the Philippines, is modeled closely on the French Penal Code, particularly in the subject of penalties.

<sup>55</sup> "The *precision* and the *clearness* of detail, in the phraseology of the articles, reached a grade which has never been surpassed and very rarely equalled. Certainly the laws passed in France since 1804 cannot bear comparison with the Code from this point of view; in contrast, the limpidity of the Code Napoléon becomes striking." 1 CONTINENTAL LEGAL HISTORY SERIES, 290.



ality. They purport to embrace within the compass of a single, small volume the law of a variety of subjects, each of which is treated under our legal system, in one or more portly tomes (not to mention statutes), such as Citizenship, Domestic Relations, Contracts, Torts, Real and Personal Property, Bailments, Liens, Wills, Intestate Succession, and many minor topics. Austin, the English analytical jurist, said:

"The code must not be regarded as a body of law forming a substantive whole, but as an index to an immense body of jurisprudence existing outside itself."

But the dangers lurking in this method did not escape the penetrating vision of Napoleon. Toward the close of the Council's deliberations on the Code he said:

"I often perceived that over-simplicity in legislation was the enemy of precision. It is impossible to make laws extremely simple without cutting the knot oftener than you untie it, and without leaving much to incertitude and arbitrariness."

It must be remembered, moreover, that the Latin theory of legislative expression is directly opposed to the Anglo-Saxon. According to the former a code or statute should express only general principles and rules applicable to a group of cases, leaving the details to be worked out as they arise in specific instances. The Anglo-Saxon lawmaker too often essays the task (impossible of attainment) of providing for every contingency and including every case that might arise, meanwhile failing to express the general principle at all. The difference is analogous to that existing between the early American state constitution, with its brief bill of rights and frame-work of government, and the latter-day instrument which often goes far into the field of general legislation. There is much to be said in favor of each theory, but the difference must be clearly understood before the French codes and their imitators can be appreciated.

The Code has never lacked critics, however, though they are far less conspicuous than formerly. When under discussion before the Tribunal, as we have seen, it encountered serious and, some still think, well-grounded opposition, including, *inter alia*, two distinguished jurists, Andrieux and Simeon, the latter a brother-in-law of Portalis, one of the four draftsmen.

"The Code Napoléon," says Brissaud,<sup>56</sup> "was attacked with fury, even in France, by certain political parties blinded by hatred of the Empire. Those whose ideals were the Decrees of the Convention could not help looking upon this Code with disdain . . ."

Outside of France it was criticized by some eminent authorities including Savigny who characterized its framers as "dilettanti"<sup>57</sup> and their work as "only a mechanical mixture of the Revolution and pre-Revolution laws . . . not even a logical whole, a formal unity that might be logically developed to meet new cases."<sup>58</sup> His main point of attack, however, was political and there, as Brissaud well says,<sup>59</sup> "his patriotism carried him too far."

Moreover this contemporary criticism was levelled chiefly at provisions which, it was charged, were not adapted to France, and this the lapse of time has largely silenced. Surely the French people have had opportunity to judge whether this code is suited to them. And surely also no piece of legislation has ever acquired such permanence in France. The sentiment toward it there is comparable only to the American reverence for the Federal Constitution.

Certain important omissions, indeed, are now recognized by French writers,<sup>60</sup> such as a satisfactory mortgage system, and adequate treatment of the law of movables (personalty), and especially literary or artistic property, of artificial persons, insurance, and bankruptcy, and any attempt to cover the subject of industrial relations. But as Esmein observes:

" . . . this only proves that it could not foretell the future, for most of these questions are concerned with economic phenomena and social relations which did not exist at the time when it was framed." <sup>61</sup>

#### SUBSEQUENT CHANGES

After more than a century the number of articles (2281) in the Code remains the same — a not insignificant mark of permanence.

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<sup>56</sup> 1 CONTINENTAL LEGAL HISTORY SERIES, 290-91, note.

<sup>57</sup> *Id.*

<sup>58</sup> 2 CONTINENTAL LEGAL HISTORY SERIES, 577.

<sup>59</sup> *Supra.*

<sup>60</sup> 1 CONTINENTAL LEGAL HISTORY SERIES, 290, 291; Esmein, 6 ENCYCLOPAEDIA BRITANNICA, 11 ed., 634, 635.

<sup>61</sup> *Id.*

There have been amendments and modifications averaging about one for each year<sup>62</sup> but their importance is not generally recognized.<sup>63</sup> At times a general revision has been mooted<sup>64</sup> but as Brissaud<sup>65</sup> says "up to the present time the idea of a general revision seems to find but a cool reception in the world of business. We must hope that the method of partial amendments will suffice for a long time to come."

Thus the identity of the Code as a whole is preserved intact. It has outlived all the dynasties and régimes that waxed and waned in France during the nineteenth century. Not even the restored Bourbons attempted to touch its contents; they merely sought to dim the fame of its chief promoter by omitting his name and calling it simply the Civil Code — an attempt as vain as it was petty.

#### A PEOPLE'S LAW

It was surely a great achievement to have brought order out of the legal chaos that marked pre-revolutionary France. But to the Code Napoléon belongs an even greater distinction. As one critic observes:

"... it has diffused the knowledge of law, and made it comparatively easy for the ordinary Frenchman to become acquainted with the leading principles which govern the law of his own country."<sup>66</sup>

Nor has this result been confined to France. If Savigny, founder of the historical school of jurisprudence, thought he saw failure for the Code because it had been "drafted at an unfavorable epoch,"

<sup>62</sup> Walton, "The New German Code," 16 *JURIDICAL REV.* 148, note. Among them was the repeal of the divorce provisions in 1816. These were mainly restored, however, in 1884, the ground of incompatibility by mutual consent being omitted. See Smithers, "The Code Napoléon," 40 *AM. L. REG. (N. S.)* 127, 147.

<sup>63</sup> 1 *COUR DE DROIT CIVIL FRANÇAIS*, 5 ed., 13. Esmein, 6 *ENCYCLOPAEDIA BRITANNICA*, 11 ed., 634, 635, however, says: "The Code needed revising and completing and this was carried out by degrees by means of numerous important laws."

<sup>64</sup> "Its entire revision was demanded at an early period; but this movement found little response until, in 1904, at the celebration of the centennial of the Civil Code, the Minister of Justice appointed a special commission to prepare a first draft of a revision." 1 *CONTINENTAL LEGAL HISTORY SERIES*, 298.

<sup>65</sup> *Id.*, 298-99.

<sup>66</sup> FISHER, 9 *CAMBRIDGE MODERN HISTORY*, 161. "The Code has been thumbed and discussed till it has become extremely familiar, with the result that there are few countries in which some knowledge of law is so widely diffused as in France." Walton, "The New German Code," 16 *JURIDICAL REV.* 148.

a successor, and perhaps greater than Savigny, in the same school, testifies to its phenomenal success:

"The highest tribute to the French Codes is their great and lasting popularity with the people, the lay-public, of the countries into which they have been introduced. How much weight ought to be attached to this symptom our own experience should teach us, which surely shows us how thoroughly indifferent in general is the mass of the public to the particular rules of civil life by which it may be governed, and how extremely superficial are even the most energetic movements in favour of the amendment of the law. At the fall of the Bonapartist Empire in 1815, most of the restored Governments had the strongest desire to expel the intrusive jurisprudence which had substituted itself for the ancient customs of the land. It was found, however, that the people prized it as the most precious of possessions: the attempt to subvert it was persevered in in very few instances, and in most of them the French Codes were restored after a brief abeyance. And not only has the observance of these laws been confirmed in almost all the countries which ever enjoyed them, but they have made their way into numerous other communities, and occasionally in the teeth of the most formidable political obstacles. So steady, indeed, and so resistless has been the diffusion of this Romanized jurisprudence, either in its original or in a slightly modified form, that the civil law of the whole Continent is clearly destined to be absorbed and lost in it. It is, too, we should add, a very vulgar error to suppose that the civil part of the Codes has only been found suited to a society so peculiarly constituted as that of France. With alterations and additions, mostly directed to the enlargement of the testamentary power on one side, and to the conservation of entails and primogeniture on the other, they have been admitted into countries whose social condition is as unlike that of France as is possible to conceive. A written jurisprudence, identical through five-sixths of its tenor, regulates at the present moment a community monarchical, and in some parts deeply feudalized, like Austria, and a community dependent for its existence on commerce, like Holland — a society so near the pinnacle of civilization as France, and one as primitive and as little cultivated as that of Sicily and Southern Italy."<sup>67</sup>

And as Esmein<sup>68</sup> observes with evident and just national pride,

"Its ascendancy has been due chiefly to the clearness of its provisions and to the spirit of equity and equality which inspires them."

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<sup>67</sup> MAINE, *VILLAGE COMMUNITIES*, 7 ed., 357-59.

<sup>68</sup> 6 *ENCYCLOPEDIA BRITANNICA*, 11 ed., 634, 635.

And after comparing it with the German Civil Code "which, having been drawn up at the end of the 19th century, naturally does not show the same lacunae or omissions" he significantly adds:

"It is inspired, however, by a very different spirit, and the French code does not suffer altogether by comparison with it either in substance or in form."

No greater tribute could be paid the ill-fated Corsican than the fact that now, more than a century after its promulgation, his code stands higher in the world's judgment than ever before. Napoleon himself realized that this branch of his work was to be the most enduring. At St. Helena he wrote:

"My true glory is not in having won forty battles; Waterloo will blot out the memory of those victories. But nothing can blot out my Civil Code. That will live eternally."<sup>66</sup>

And that prophecy is being literally fulfilled. Men no longer read much about his battles; they have lost interest in his diplomatic triumphs; they give little heed to his display of administrative genius; but they are hearing more and more about his legislation. He is going down to history with the Code in his hand.

It was the writer's privilege once to visit Napoleon's tomb in the *Hôtel des Invalides* at Paris. It is probably the most magnificent of the world's mausoleums, not excepting the beautiful Taj Mahal at Agra, India — doubtless more delicate in construction, but not so imposing as that which lies beneath the dome of the *Invalides*. The historic associations, the superb embellishments, the "dim religious light" that falls through the shaded dome directly upon the sarcophagus of the hero — all unite to inspire the visitor with a feeling of awe. But to the writer the most impressive features of that entire structure were the bas-relief representing the Code and the inscription that encircles the great rotunda consisting of this sentence from Napoleon's will: "I desire that my ashes repose on the banks of the Seine, in the midst of the French people whom I have so loved."

Historians who have considered only his wars, the countless lives lost in his campaigns, the misfortunes that befell France after

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<sup>66</sup> 1 DE MONTHELON, *RÉCIT DE LA CAPTIVITÉ DE L'EMPEREUR NAPOLÉON*, 401.

his death, — have denied that Napoleon had the welfare of the country at heart and considered these words as lacking sincerity. But the work which he accomplished in the reformation and re-statement of the laws of France furnishes ample argument to the contrary. These codes which brought order out of chaos and furnished a model for the whole world, remain not merely a monument to him, but a proof of his attachment to what he was fondly wont to call "*la grande nation*." It is this code that chiefly justifies now the tribute of our American poet, Leonard Heath:

"Spirit immortal, the tomb cannot bind thee,  
But like thine own eagle that soars to the sun,  
Thou springest from bondage and leavest behind thee  
A name which before thee no mortal hath won."

*Charles Sumner Lobingier.*

UNITED STATES COURT,  
SHANGHAI, CHINA.

## TITLE BY ADVERSE POSSESSION

## I

## POLICY AND OPERATION OF THE STATUTES OF LIMITATION

**T**ITLE by adverse possession sounds, at first blush, like title by theft or robbery, a primitive method of acquiring land without paying for it. When the novice is told that by the weight of authority not even good faith is a requisite, the doctrine apparently affords an anomalous instance of maturing a wrong into a right contrary to one of the most fundamental axioms of the law.

"For true it is, that neither fraud nor might  
Can make a title where there wanteth right."<sup>1</sup>

The policy of statutes of limitation is something not always clearly appreciated. Dean Ames, in contrasting prescription in the civil law with adverse possession in our law, remarks: "English lawyers regard not the merit of the possessor, but the demerit of the one out of possession."<sup>2</sup> It has been suggested, on the other hand, that the policy is to reward those using the land in a way beneficial to the community.<sup>3</sup> This takes too much account of the individual case. The statute has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.<sup>4</sup>

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<sup>1</sup> Quoted in *Altham's case*, 8 Coke Rep. 153, 77 Engl. reprint, 707.

<sup>2</sup> LECTURES, LEGAL HIST. 197.

<sup>3</sup> Axel Teisen III, AM. BAR ASS'N JOURNAL, 127, April, 1917.

<sup>4</sup> That the policy of the statutes of limitation is the quieting of titles evidenced by possession for the sake of the stability of meritorious titles, see *M'Iver v. Ragan*, 2 Wheat. (U. S.) 25 (1817); *Turpin v. Brannon*, 3 McCord, L. 261 (1825); *North Pac. R. Co. v. Ely*, 25 Wash. 384, 65 Pac. 555 (1901); *Louisville & N. R. R. Co. v. Smith* (Ky.) 125 Ky. 336, 101 S. W. 317 (1907); *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587, 609 (1840); *Cholmondeley v. Clinton*, 2 J. & W. 139, 155, 189 (1820); *Lampman v. Van Alstyne*, 94 Wis. 417, 69 N. W. 171 (1896); *McCann v. Welch*, 106 Wis. 142, 148, 81 N. W. 996 (1900); 1 HAYES, CONVEYANCING, 223, 269; *Dalton v. Angus*, 6 App. Cas. 740, 818 (1881); J. S. MILL, POL. ECON., Book 2, ch. 2, § 2; 3 SO. L. QUART. 224.

"The thing to be looked at is the possession of the defendant,—not the want of possession in the plaintiff. A possession which has continued for a long time without interruption, and which has been accompanied by an uninterrupted claim of ownership, ought to prevail against all the world."<sup>5</sup>

Although in general a tortious act can never be the foundation of a legal or equitable title, yet if the exercise of apparent ownership is made conclusive evidence of title, this wholesale method necessarily establishes and quiets the bad along with the good. The trespasser benefits, the true owner suffers, for the repose of meritorious titles generally. As Sir Frederick Pollock puts it, "It is better to favor some unjust than to vex many just occupiers."

It is one thing to have the rightful ownership and just title to land; it is another thing to have the proof of that right which can be laid before a purchaser or before a jury. Suppose a landowner is ejected from his land and seeks to be reinstated. The deed under which plaintiff acquired title, without evidence of possession by the grantor of the premises conveyed, is not even *prima facie* proof of title such as to warrant recovery in ejectment. Nor is a connected chain of deeds, which does not reach back to the Government or to some grantor in possession, sufficient, unless it reaches back to some common source of title, or to some source acknowledged to be genuine and valid, or unless there is some estoppel to deny title.<sup>6</sup> The proof of a paper title sufficient to make out a *prima facie* right to possession of land may, therefore, be exceedingly difficult. It involves proving the signature and delivery of every deed; the corporate existence of every corporation in the chain of title; the execution of all powers of attorney; all the statutory notices and formalities in execution, tax and probate sales; all the descents and probate proceedings; in short, every legal step of the transfer of the title, voluntary and involuntary, simple and complex, from a recognized source down must be shown by proper evidence. In order to give adequate protection to other titles, it has been found necessary to recognize possession as title.<sup>7</sup> It is therefore enough that a plaintiff in ejectment, or that his ancestor

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<sup>5</sup> LANGDELL, EQUITY PL., § 121.

<sup>6</sup> Terhune v. Porter, 212 Ill. 595, 72 N. E. 820 (1904); Krause v. Nolte, 217 Ill. 298, 75 N. E. 362 (1905); Cottrell v. Pickering, 32 Utah, 62, 88 Pac. 696 (1907).

<sup>7</sup> People v. Inman, 197 N. Y. 200, 206, 90 N. E. 438 (1910).



or one of his grantors, was in possession and that this prior possession is vested in the plaintiff by a regular devolution of title. A mere trespasser cannot set up an outstanding title in a third person as a defense where he does not claim under it.<sup>8</sup>

Upon every sale or mortgage of land it is necessary that the evidence of the title be critically examined. For what period and from what source should the title be deduced? The conveyancer in the United States usually looks for a record title going back to a patent from the United States, the state, or some other government for a clear root of title. In England, evidence of the original royal feoffments or gifts of former centuries was long since lost. The proprietor must go back to the earliest possessor or occupant who can be proved to have held seisin in fee. Except for government grant, possession is thus the ultimate root of all titles. Title deeds are nothing but the history or evidence of the transfer of rights arising from possession, reaching back perhaps to "that mailed marauder, that royal robber," that great adverse possessor, — William the Conqueror. "Every title to land has its root in seisin; the title which has its root in the oldest seisin is the best title."<sup>9</sup> With the help of statutes of limitation, however, it is now ordinarily sufficient for the English conveyancer to go back forty years for a root of title.

It may be instructive to sketch the history of the statutes by which limitations were placed on ancient seisin as a source of title. The only limitation on a writ of right to recover seisin at common law was lack of evidence. Several early statutes of limitation were passed, of which the Statute of Westminster I, 3 Edward I, c. 39 (1275), is typical. This statute did not purport expressly to bar any remedy or pass any title but merely placed a fixed limit back of which a suitor in a real action could not go for a source of title. It provided that in conveying (tracing) a descent in a writ of right, none shall presume to declare of the seisin of his ancestor further or beyond the beginning of the reign of King Richard I (1189). In other real actions the demandant could not go back so far. The effect, therefore, was that a more recent seisin, though tortious, became a paramount source of title.

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<sup>8</sup> *Casey v. Kimmel*, 181 Ill. 154, 54 N. E. 905 (1899); *Burns v. Curran*, 275 Ill. 448, 451, 114 N. E. 166 (1916).

<sup>9</sup> 2 POLLOCK & MATTLAND, *HIST. ENGL. LAW*, 46. See Pollock's ed., *MAINE, ANCIENT LAW*, ch. 8, 267, 295, 314.

The Statute of 32 Henry VIII, c. 2, § 3, limited real actions by providing that if the claimant rested his title on the ground of former seisin by himself, he was limited to a seisin within thirty years before the *teste* or date of the original writ, as regards both droitural and possessory actions; if on the ground of a seisin by his ancestor, to a seisin within fifty years as regards possessory actions, and within sixty years as regards droitural actions.<sup>10</sup> The demandant in a writ of right must allege and prove seisin in his ancestor within sixty years. Hence seisin that could be traced back sixty years became a good root of title.<sup>11</sup> This was for the reason that no older seisin which had been lost could be resorted to.<sup>12</sup>

Coke says, in his note to Littleton,<sup>13</sup>

"Limitation, as it is taken in law, is a certaine time prescribed by statute, within which the demandant in the action must prove himselfe or some of his ancestors to be seised."

The limitation of 32 Henry VIII is wholly referable to seisin, the statute requiring a seisin within a certain time according to the nature of the writ. The limitation is dated from the seisin, not from the disseisin. The operation of the older statutes is thus not to bar the action, but to bar the source of title or right to which the more recent tortious seisin could be made to yield.

The Statute 21 Jac. I, c. 16 (1623), adopts the modern method of limiting the right of entry, and so the action of ejectment, to within twenty years next after the right of entry accrues. The right of entry does not accrue until some one initiates an adverse possession.<sup>14</sup> The effect of limiting all right of action to recover possession is much the same as that of expressly limiting seisin as a source of title; possession exercised continuously and adversely for a certain time becomes a source of title superior in ejectment to any title derived from an older possession. The Statute of 21 James I, c. 16 (1623), however, did no more than bar or take away the right of entry and ejectment after twenty years, but left open

<sup>10</sup> 1 SPENCE, EQ. JUR. 255; 2 P. & M. HIST. ENG. LAW, 81.

<sup>11</sup> 3 BLACK. COMM., 189, 196, 197; *Dumday v. Hughes*, 3 Bing. N. C. 439, 452 (1837).

<sup>12</sup> 1 HAYES, CONVEYANCING, 232.

<sup>13</sup> COKE ON LITT., § 170, note 115 a.

<sup>14</sup> *Agency Co. v. Short*, 13 A. C. 793 (1888); *Norton v. Frederick*, 107 Minn. 36, 119 N. W. 492 (1909).

the real action by writ of right for forty years more. Consequently it was held in England that the right of entry and the remedy by ejectment, might be barred, but that the "mere right" itself was left outstanding.<sup>15</sup> To remedy this the Statute 3 & 4 William IV, c. 27 (1833), was enacted, which not only bars the remedy of ejectment but expressly abolishes real actions and extinguishes the former title after twenty years.<sup>16</sup> By the Real Property Limitation Act of 1874<sup>17</sup> the period of limitation is reduced to twelve years from the time the right of action first accrued.

American statutes quite commonly follow the parent statute of James I. Illinois, for example, enacts:<sup>18</sup>

"That no person shall commence an action for the recovery of lands, nor make an entry thereon, unless within twenty years (1) after the right to bring such action or make such entry first accrued, or (2) within twenty years after he or those from, by, or under whom he claims, have been seized or possessed of the premises."

Since the owner is deemed to be seised or possessed unless there is another in adverse possession, actual or constructive, clauses one (1) and two (2) apparently come to exactly the same thing. The owner's mere absence from the land does not disable him from bringing an action against an intruder. The second clause as to seisin or possession is apparently an interesting relic of the provisions of the older type of statutes.<sup>19</sup>

The form of statutes of limitation varies; in some of them there are provisions expressly extinguishing the right or title of the former owner; most of them in terms merely bar the remedy by ejectment; but it is the almost invariable rule that the effect of the statute is not only to bar the remedy of ejectment, but also to take away all other remedy, right, and title of the former owner.<sup>20</sup> It is well to

<sup>15</sup> *Trustees of Dundee Harbor v. Dougall*, 1 MacQueen, H. L. Cas. 317 (1852); 3 CRUISE, DIGEST REAL PROP. 430, 436, 447.

<sup>16</sup> See 10 LAW MAGAZINE, or QUART. REV. OF JURISP. 357 (1833).

<sup>17</sup> 37 & 38 Vict. c. 57.

<sup>18</sup> HURD'S ILL. REV. STAT. (1917) ch. 83, § 1.

<sup>19</sup> *Agency Co. v. Short*, 13 A. C. 793 (1888). See 5 CAL. L. REV. 429; *People's Water Co. v. Boromeo*, 31 Cal. App. 270, 160 Pac. 574 (1916). See also MICH. REV. STAT. (1838) 573, 574, § 1. In *Riopelle v. Gilman*, 23 Mich. 33 (1871), it is held to produce a different result as to the necessity of privity between successive holders. See note 102, *infra*.

<sup>20</sup> *United States v. Chandler*, 209 U. S. 447, 450 (1908); *Campbell v. Holt*, 115 U. S. 620 (1885); *Baker v. Oakwood*, 123 N. Y. 16, 25, 25 N. E. 312 (1890).

notice that this result does not follow necessarily from the statute alone, but arises from the joint operation of the statute and the common law. If a person has a right and several remedies, the bar of one remedy is not the discharge of all the others.<sup>21</sup>

Under American statutes, as under the Statute of James I, there may be some remedies which are not expressly affected by the terms of the statute. But when the statute extinguishes the remedy in ejectment to recover possession, the common law and also equity say that the possession shall not be questioned by the former owner in any other manner, either by self-help, by action of trespass, or by a bill in equity. The earlier statutes of limitation did not mention bills in equity as subject to the bar; but nevertheless they were followed in equity as well as at law on the principle of analogy, and on the principle that where a thing is forbidden by law in one form it shall not be done in another.<sup>22</sup> The judicature by its own rulings has thus imposed limitations, guiding itself by the policy of the statute to quiet the possessory title.

As the Wisconsin Supreme Court has pointed out,<sup>23</sup> it would be a strange anomaly to hold that the law which bars the owner from recovering possession or the use of the land itself, after he has acquiesced in a usurped ownership by another for twenty years, should yet leave him at liberty to assert title in other ways as by action of trespass for mesne profits, by extra-judicial re-entry or by suit in equity to quiet title, for partition or for an accounting. It seems a necessary consequence of the policy underlying the limitation acts that one should be considered to have no right or title when the most essential incident or legal consequence of title, the right to recover possession, is barred. Hopeless confusion would result from the recognition of any such anomalous titles, without right of possession, surviving the statute. The maxim that where there is a right there is a remedy may be turned about *e converso*, so that where there is no remedy there is no right. The only cloud on the possessor's title is the true owner's right to recover possession

<sup>21</sup> *Hunt v. Burn*, 2 Salk. 421, 422 (1702).

<sup>22</sup> *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587 (1840); *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152, 174 (1825); *Chapin v. Freeland*, 142 Mass. 383, 8 N. E. 128 (1886); *Smith v. Clark*, 248 Ill. 255, 258, 93 N. E. 727 (1911); *Wood v. Mich.*, etc. R. Co., 90 Mich. 212, 51 N. W. 363 (1892); *Cholmondeley v. Clinton*, 2 J. & W. 139, 155 (1820); *Re Jolly*, [1900] 2 Ch. 616.

<sup>23</sup> *Steinberg v. Salzman*, 139 Wis. 118, 124, 120 N. W. 1008 (1909).

by entry or ejectment, or by some other remedy, and when these remedies are all taken away by the statute or by analogy thereto, the defect in the possessory title becomes cured.

It has indeed been said by some eminent judges that the effect of the statute is "to make a parliamentary conveyance of the land to the person in possession at the last moment when the period has elapsed."<sup>24</sup> As Gibson, C. J., puts it, "The instant of conception is the instant of birth," without any period of gestation or maturing of an inchoate title. The idea seems to be that the statute of limitations is a conveyancer like the Statute of Uses, which, when there is a deed by Doe to the use of Roe and his heirs, "executes the use," and, —

"Like flash of electricity,  
The land's transferr'd in fee to Roe,  
Nothing at all remains in Doe."<sup>25</sup>

But there is, in truth, no such transfer of title by the statute of limitations. The direct effect of the statute is negative, to extinguish the right of entry of the ousted owner. The indirect effect is to quiet the title of the possessor. Title is thus established by the joint operation of the statute and the common law. The possession of the adverse holder, although gained by manifest wrong, and although liable to be defeated by entry of the rightful owner, is *per se* a title good as shield or sword, either to hold or to recover possession, as against all others. Even the title of the original owner is affected *ab initio*, by disseisin, although not so much to-day as formerly. His "*right of entry*" should hardly be regarded, as Dean Ames regarded it, as being reduced to a mere *chose in action*. His remedy is limited, however, by the common law to asserting his rights by a direct proceeding to recover possession.<sup>26</sup> The statute operates to relieve the adverse holder from this sole danger of eviction, and, being thus quieted, the once precarious possession

<sup>24</sup> Per Parke, B., in *Doe v. Sumner*, 14 M. & W. 39 (1845). See also *Scott v. Nixon*, 3 Dr. & War. 388, 405, 407 (1843); *Rankin v. McMurtry*, 24 L. R. Irish, 270, 297, 303 (1889); *Graffius v. Tottenham*, 1 Watts & S. (Pa.) 488, 494; *Jordan v. Chambers*, 226 Pa. 573, 75 Atl. 956 (1910). A paradox of Sugden's, 34 L. QUART. REV. 253 (July, 1918).

<sup>25</sup> CRISP, CONVEYANCER, 3 ed., 107.

<sup>26</sup> But, see Jos. Bingham, "Legal Possession," 13 MICH. L. REV. 535, 561, 623, 624, 629; *Betha v. Jeffres*, 126 Ark. 194, 189 S. W. 666 (1916); *Anderson v. Hapler*, 34 Ill. 436 (1864). See 69 L. R. A. 762, note.

becomes a firm and indefeasible title even against the former owner as of the date when the disseisin or adverse possession commenced.<sup>27</sup>

Accordingly we must not confound the negative operation of the statute with the positive effect of a conveyance of the title from the true owner to the adverse possessor at the moment the statute has fully run. In *Tichborne v. Weir*<sup>28</sup> it is held that when one holds adversely to a lessee for ninety-nine years, the adverse possessor cannot be treated as an assignee so as to render him liable on the covenants of the lease. It is sometimes said, indeed, that the law presumes a conveyance by the true owner on the grounds of public policy when the right of entry is gone.<sup>29</sup> But it is unnecessary to resort to the presumption or fiction of a conveyance.<sup>30</sup> Adverse possession vests the possessor with the complete title as effectually as if there had been a conveyance by the former owner.<sup>31</sup> But the title is independent, not derivative, and "relates back" to the inception of the adverse possession.<sup>32</sup> The adverse possessor does not derive his title from the former owner, but from a new source of title, his own possession. The "investitive fact" is the disseisin and exercise of possession.<sup>33</sup>

It is only in case of incorporeal rights that title is acquired by length of adverse user. Title is not gained by length of adverse possession under the statute, except as against the true owner. In case of rights of way and other easements when acquired by prescription, the adverse user under claim of title is also the "investi-

<sup>27</sup> *Re Atkinson & Horsell*, [1912] 2 Ch. 1; *Tichborne v. Weir*, 67 L. T. 735 (1892); *Perry v. Clissold* [1907] A. C. 73; 1 COM. L. REP. 363. Cf. *La Salle v. Sanitary District*, 260 Ill. 423, 429, 430, 103 N. E. 175 (1913). See *Bryan v. Weems*, 29 Ala. 423 (1856); AMES, LECTURES ON LEGAL HIST. 197-205; 3 ANGLO-AMERICAN ESSAYS, 567; LIGHTWOOD, TIME LIMIT ON ACTIONS, 117, 156; BANNING, LIMITATION OF ACTIONS, 84; 1 DART, VENDORS & PURCH. 473; 1 HAYES, INTROD. TO CONV. 268.

<sup>28</sup> 67 L. T. 735 (1892).

<sup>29</sup> *Cadwalader v. Price*, 111 Md. 310, 73 Atl. 694 (1909); *Scottish Am. M. Co. v. Butler*, 99 Miss. 56, 57, 71, 54 So. 666 (1910); *Earnest v. Little River L. & L. Co.*, 109 Tenn. 427, 75 S. W. 1122, 1127 (1902).

<sup>30</sup> *East Jellico Coal Co. v. Hays*, 133 Ky. 4, 117 S. W. 307 (1909); *Armijo v. Armijo*, 4 N. Mex. 133, 13 Pac. 92 (1883).

<sup>31</sup> *Toltec Ranch Co. v. Cook*, 191 U. S. 532, 542 (1903).

<sup>32</sup> *Field v. Peoples*, 180 Ill. 376, 383, 54 N. E. 304 (1899); *Bellefontaine Co. v. Niedringhaus*, 181 Ill. 426, 55 N. E. 184 (1899). Cf. *La Salle v. Sanitary District*, 260 Ill. 423, 429, 103 N. E. 175 (1913); AMES, LECTURES ON LEGAL HIST. 197; 3 ANGLO-AMERICAN ESSAYS, 567.

<sup>33</sup> *Camp v. Camp*, 5 Conn. 291 (1824); *Price v. Lyon*, 14 Conn. 279, 290 (1841); *Coal Creek, etc. Co. v. East Tenn. I. & C. Co.*, 105 Tenn. 563; 59 S. W. 634, 636 (1900).

tive fact." The important difference is that apparently here there is no possessory title to the way either as against the servient owner or against the world, until the right has been asserted for the full prescriptive period; there is no "legally protected possession of an incorporeal thing."<sup>34</sup> Take the case of a way used by A for four years on B's land. Would the claimant and possessor of the quasi-dominant be protected in his use against third persons? Mr. Justice Holmes doubts it.<sup>35</sup>

The inchoate title by prescription, the potentiality of acquiring an easement within less than twenty years, is, however, something which can be transmitted with the quasi-dominant tenement so that the successive periods of user may be tacked where there is privity between the successive claimants.<sup>36</sup> The legislative policy of prescription and adverse possession is the same, — that titles to property should not remain uncertain and in dispute, but that continued *de facto* exercise and assertion of a right should be conclusive evidence of the *de jure* existence of the right.

"The earliest act of user proved, tends to prove a right then existing. . . . Such light evidence gains force by continued repetition, until at the end of twenty years it becomes, unexplained, conclusive evidence of right."<sup>37</sup>

Prescription, therefore, like adverse possession, operates to quiet titles which have been consistently asserted, and the requisites are in general the same.

If we had a scientific system for the registration of titles, adverse possession would be of far less importance. Accordingly we find that title by adverse possession is not recognized under some of the Torrens Acts, although it is under others.<sup>38</sup> But under our crude conveyancing and recording systems this doctrine is indispensable as a protection to just titles. Every title in the country may easily

<sup>34</sup> 2 P. & M. HIST. ENG. LAW, 142; POLLOCK, FIRST BOOK OF JURISPRUDENCE, 184.

<sup>35</sup> COMMON LAW, 241. Cf., however, TERRY, ANGLO-AMERICAN LAW, § 311, 297. See also *Greenhalgh v. Brindley*, [1901] 2 Ch. 324; *Lord Battersea v. Commissioners*, [1895] 2 Ch. 708.

<sup>36</sup> *McLean v. McRae*, 50 N. S. R. 536, 33 D. L. R. 128, 132 (1917).

<sup>37</sup> *Wallace v. Fletcher*, 30 N. H. 434 (1855).

<sup>38</sup> But see "Statute of Limitations and The Land Titles Act," 47 CAN. L. J. 5; J. E. HOGG, AUSTRALIAN TORRENS SYSTEM, 85, 806; LIGHTWOOD, TIME LIMIT ON ACTIONS, 133; HURD'S ILL. REV. STAT. (1917) ch. 30, § 84. J. E. Hogg, "Registration of Title to Land," 28 YALE L. J. 54 (November, 1918).

come to depend for its establishment to a greater or less extent on adverse possession. In spite of our elaborate books of record, possession remains the great source, muniment, and quieter of titles to land.

The extent of title and estate thus acquired, whether for years, for life, or in fee, is measured by the claim of title. "If the party claim only a limited estate and not a fee, the law will not, contrary to his intentions, enlarge it to a fee." Where a title depends upon possession, the estate evidenced by his possession depends upon the claim of title which he makes by his declarations or his acts.<sup>39</sup>

Certain qualifications of the title acquired by adverse possession follow from the fact that it arises from possession. There is an important limitation on the rule that bare possession is title good against all the world except the true owner. American courts hold that a bare possessor of land cannot recover full damages for a permanent injury. In *Winchester v. City of Stevens Point*<sup>40</sup> the defendant constructed a high embankment which caused the flooding of plaintiff's lot. The plaintiff recovered in the trial court for the permanent depreciation of her property. She had to rely upon possessory title, as she failed to prove a good paper title owing to the fact that two deeds had only one subscribing witness. It was held that, as in condemnation proceedings, plaintiff must show absolute or complete title and that title will not be presumed for this purpose from evidence of possession under claim of title. Apparently plaintiff must show either (1) a complete chain of title from the Government, or (2) title by adverse possession.<sup>41</sup>

In a recent Illinois case it is held that where title by adverse possession becomes complete after a cause of action for permanent injury to the land from flooding accrues, the plaintiff corporation

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<sup>39</sup> *Ricard v. Williams*, 7 Wheat. (U. S.) 59 (1822); *Bond v. O'Gara*, 177 Mass. 139, 58 N. E. 275 (1900). See *Jasperson v. Scharnikow*, 150 Fed. 571 (1907), 15 L. R. A. (N. S.) 1178 n.

<sup>40</sup> *Winchester v. City of Stevens Point*, 58 Wis. 350, 17 N. W. 3, 547 (1883).

<sup>41</sup> See also the following cases: *Waltemeyer v. Wisconsin Ry. Co.*, 71 Iowa, 626, 33 N. W. 140 (1887); *Kelly v. New York Ry. Co.*, 81 N. Y. 233 (1880); *Frisbee v. Marshall*, 122 N. C. 760, 765; 30 S. E. 21 (1898); *International Ry. Co. v. Ragsdale*, 67 Texas, 24, 28, 2 S. W. 515 (1886). Compare the case of the bailee suing for the full value of property lost or destroyed. *The Winkfield*, [1902] P. 42. *U. S. Fidelity, etc. Co. v. United States* 246 Fed. 433 (1917); 31 HARV. L. REV. 1028, 1029.



cannot recover, as it did not have (absolute) title to the land by adverse possession or otherwise at the time the right of action accrued.

"That its title became complete by prescription after the cause of action accrued places it in no different position from what it would have been if it had not been in possession but had acquired title by conveyance after the right of action accrued." <sup>43</sup>

This case may be explained on the theory that the statute of limitations simply quiets that title which the adverse possessor already has by virtue of his possession, and the doctrine of relation does not cure any defects in the possessory title except the former owner's right to recover possession.

The statutory extinguishment of the title of the dispossessed owner of land does not destroy easements or restrictive covenants, and it has been held that persons entitled to the benefit of restrictive covenants may enforce them against the new owner by adverse possession.<sup>44</sup> These burdens and privileges with reference to the land are not incident to the estate of the dispossessed owner, and adverse possession of the land does not destroy them, if there is no adverse user.

The efficiency of the doctrine of adverse possession in quieting title is greatly impaired by reason of two exceptions to the operation of the statute, *viz.*, that of disabilities and that of future estates. It has been proposed by the American Association of Title Men (1913), in order to render land titles simpler and more secure, to reduce the period of limitation on actions to recover land to ten years, and to abolish the saving clauses for persons under disability. If titles were quieted by possession regardless of disabilities, such as absence from the state, infancy, insanity, coverture, or imprisonment, this would add greatly to the security of all titles, and we should then be able to rely on mere lapse of time, coupled with proof of continuity of possession and claim of title, to cure all defects and automatically to quiet titles. Friends or relatives or guardians will ordinarily protect the rights of owners under dis-

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<sup>43</sup> *La Salle Coal Co. v. Sanitary District*, 260 Ill. 423, 430, 103 N. E. 175 (1913). See also 27 HARV. L. REV. 496; 20 HARV. L. REV. 563; 13 MICH. L. REV. 562; *Perry v. Clissold*, [1907] A. C. 73.

<sup>44</sup> *In re Nisbet & Potts' Contract*, [1905] 1 Ch. 391; [1906] 1 Ch. 386, 2 B. R. C. 844, 860.

ability, and individual cases of hardship would be more than balanced by the greater security of all titles.

By the general rule, the statute of limitations on ejectment does not begin to run against a remainderman, or the holder of any other future interest until the preceding estate terminates, and he becomes entitled to immediate possession. This is based on the proposition that the right of action does not accrue until that time, as he has no right of action until he is entitled to possession. It follows that while a life estate is outstanding, no one can initiate a holding adverse to the remainderman.<sup>44</sup>

The consequence is that, although one may hold possession of land for twenty years, claiming to own it absolutely against all the world, and may have color of title and pay taxes thereon, yet this possession will not be adverse to the holder of any future interest, although the claim may be brought home to the remainderman.<sup>45</sup>

By a somewhat daring piece of judicial legislation it has been held in Iowa and Nebraska that, where the statutes give a person out of possession an equitable remedy to quiet title, a remainderman may be barred by adverse possession where he has notice of the adverse holding.<sup>46</sup> It is urged that the purpose of the statute is to provide a way to settle disputed questions of title between those in possession of land and those who claim a future interest. Where an adverse claim of ownership is brought home to the holder of such future interest, his welfare, as well as that of the public in general, is best subserved by requiring that questions of title be settled within the statutory period. Accordingly, ejectment and all other remedies will be barred if the remainderman allows ten years to elapse after his right of action to quiet title accrues and thereafter the adverse possessor can quiet title in himself.<sup>47</sup>

It may be argued that the barring of one remedy, *viz.*, an action to quiet title, should not affect other remedies which have not yet

<sup>44</sup> *Mixer v. Woodcock*, 154 Mass. 535, 28 N. E. 907 (1891); *Bohrer v. Davis*, 94 Neb. 367, 143 N. W. 209, 148 N. W. 320 (1913); *Wakefield v. Yates*, [1916] 1 Ch. 452.

<sup>45</sup> *Com. v. Clark*, 119 Ky. 85, 83 S. W. 100 (1904); *Gindrat v. W. Ry. Co. (Ala.)* 19 L. R. A. 839 (1893), note; *Barrett v. Stradl*, 73 Wis. 385, 395; 41 N. W. 439 (1889); *Dawson v. Edwards*, 189 Ill. 60, 59 N. E. 590 (1901); *Cassem v. Prindle*, 258 Ill. 11, 101 N. E. 241 (1913); but cf. *Nelson v. Davidson*, 160 Ill. 254, 43 N. E. 361 (1896).

<sup>46</sup> *Criswell v. Criswell*, 101 Neb. 349, 163 N. W. 302 (1917). See also *Murray v. Quigley*, 119 Iowa, 6, 92 N. W. 869 (1902); *Crawford v. Meis*, 123 Iowa, 610, 99 N. W. 186 (1904).

<sup>47</sup> *Holmes v. Mason*, 80 Neb. 448, 114 N. W. 606 (1908).

accrued.<sup>48</sup> But this is something that the courts have done in limiting equitable actions by analogy to the statute of limitations on ejectment; and if policy demands it, a reciprocal limitation of legal actions by analogy would seem equally justifiable. Opinions may differ as to the justice of such extension of the doctrine of adverse possession, but it would have the beneficial effect of bringing up for settlement disputed questions of title before they become stale, and would obviate one of the most serious defects in this automatic method of quieting titles against possible adverse claims which now arises from our undue tenderness towards the holders of future interests.

## II

### PRIVITY AND TACKING BETWEEN SUCCESSIVE HOLDERS

It is the almost universal rule of law as laid down by decisions in this country that "privity of estate" is necessary between successive adverse holders to authorize "tacking" their several possessions together.<sup>49</sup> The several occupancies must be so connected that each occupant can go back to the original entry or holding as a source of title. The successive occupants must claim through and under their predecessors and not independently to make a continuous holding united into one ground of action. It is generally held that this connection may be established by any of the usual methods of transferring title, voluntary or involuntary, and also by the mere informal delivery of possession by mutual consent. There is privity between ancestor and heir, testator and devisee, vendor and vendee, lessor and lessee, judgment debtor and execution purchaser.<sup>50</sup> Privity is not presumed. The burden of proving privity is on the one claiming by adverse possession.<sup>51</sup>

In the absence of formal transfer of title, some difficulty may

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<sup>48</sup> 2 MINN. L. REV. 137.

<sup>49</sup> 2 CORPUS JURIS, 84-90; BUSWELL, LIMITATION AND ADVERSE POSSESSION, § 239; WOOD ON LIM., 4 ed., § 271; *Ely v. Brown*, 183 Ill. 575, 597, 56 N. E. 181 (1900); *Davock v. Nealon*, 58 N. J. L. 21, 32 Atl. 675 (1893).

<sup>50</sup> *Overfield v. Christie*, 7 S. & R. (Pa.) 173 (1821); 2 CORPUS JURIS, 85-90; AMES, LECTURES ON LEGAL HIST., 203, 204. In South Carolina tacking is allowed only between ancestor and heir. *Lewis v. Pope*, 86 S. C. 285, 68 S. E. 680 (1910); *Mazyck v. Wight*, 2 Brev. (S. C.) 151, 153 (1807).

<sup>51</sup> *Doe v. Brown*, 4 Ind. 143 (1853); *Ryan v. Schwartz*, 94 Wis. 403, 69 N. W. 178 (1896).

arise in showing any recognized connection to permit tacking possessions. Thus where a widow continues in the possession of land held adversely by her deceased husband, it has been held that the widow is not entitled to tack her husband's possession to her own. It is argued that, since the widow has no right in the land before her dower is assigned, her entry is a new disseisin.<sup>52</sup> Privity is, however, worked out between husband and wife in numerous cases, which hold that the widow's holding, if in subordination to the heirs at law, may be tacked to that of her husband.<sup>53</sup> Although the widow is neither heir, devisee, nor grantee and does not succeed to her deceased husband's inchoate title, yet if she occupies under her dower, quarantine or homestead right, or as guardian of her children, her possession may be tacked to that of her husband so that it will enure to the benefit of the heirs.<sup>54</sup>

The holding of a decedent and his personal representative cannot be tacked unless there is a legal right of possession to administer the decedent's lands.<sup>55</sup> It is, however, held that the possession of real estate by an executor with power of sale may be tacked to that of his testator in establishing title by adverse possession.<sup>56</sup> The possession of the executor or administrator may be deemed a continuance of that of the deceased, where by statute he has the right to take possession of the real estate and actually does so for the benefit of the estate. The continuity of adverse possession is not interrupted by the ordinary lapse of time between the deceased's death and the appointment of an administrator and the taking of possession by him.

It is submitted that there cannot be tacking between testator and devisee under a void will, as there would be no transfer or delivery of possession, and the inchoate possessory title would devolve upon the heir, who would be the only one who could continue the same claim of title, and take advantage of the ancestor's

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<sup>52</sup> *Doe v. Barnard*, 13 Q. B. 945 (1849); *Sawyer v. Kendall*, 10 Cush. (Mass.) 241 (1852); *Robinson v. Allison*, 124 Ala. 325, 27 So. 461 (1899).

<sup>53</sup> *Mielke v. Dodge*, 135 Wis. 388, 393, 115 N. W. 1099 (1908); 14 HARV. L. REV. 149; 17 HARV. L. REV. 277.

<sup>54</sup> *Atwell v. Shook*, 133 N. C. 387, 45 S. E. 777 (1903); *Johnson v. Johnson*, 106 Ark. 9, 152 S. W. 1017 (1912); *Jacobs v. Williams*, 173 N. C. 276, 91 S. E. 951 (1917).

<sup>55</sup> *Tennessee Iron Co. v. Ferguson*, 35 S. W. 900 (Tenn. Chan. App. 1895).

<sup>56</sup> *Cannon v. Prude*, 181 Ala. 629, 62 So. 24 (1913); *Vanderbilt v. Chapman*, 172 N. C. 809, 90 S. E. 993 (1916).

possession.<sup>57</sup> A few courts apparently require continuous formal transfers to make privity, and hold that successive possessions cannot be connected by delivery of more than the tract actually described in deeds between the parties, although more is intended to pass and possession may be actually taken by the grantee.<sup>58</sup> According to the great weight of authority, however, if possession is transferred as to all, including the land outside the limits described, tacking is allowed.<sup>59</sup>

"If each grantee succeeds to the possession of his grantor, there is such privity between the occupants that their several possessions are referred to and regarded as continuous."

It is said that

"the privity required is a continuous possession by mutual consent, so that the possession of the true owner shall not constructively intervene."<sup>60</sup>

The courts have been somewhat put to it for an explanation of the doctrine that an oral agreement and delivery of possession, ordinarily not sufficient to transfer title to land, are sufficient to make "privity of estate." The theory advanced by the Wisconsin court is that privity is purely a question of continuity of physical possession, and has no relation to the transfer of title or claim of title. In *Illinois Steel Co. v. Paczocha*<sup>61</sup> the court remarks,

"It is said that there must be privity between the successive occupants, but this does not at all mean that there must be a privity of title. . . . The privity between successive occupants required for the statute of limitations is privity merely of that physical possession, and is not dependent upon any claim, or attempted transfer, of any other interest or title in the land."

<sup>57</sup> *Peoples Water Co. v. Anderson*, 170 Cal. 683, 151 Pac. 127 (1915); *Tuggle v. Southern Ry. Co.*, 204 S. W. 857 (Tenn. 1918).

<sup>58</sup> *Evans v. Welch*, 29 Colo. 355, 68 Pac. 776, 779 (1902); *Vicksburg, etc. Ry. Co. v. Le Rosen*, 52 La. Ann. 192, 203, 26 So. 854 (1899); *Messer v. Hibernia, etc. Soc.*, 149 Cal. 122, 124, 84 Pac. 835, 837 (1906); 29 HARV. L. REV. 790.

<sup>59</sup> *Rich v. Naffziger*, 255 Ill. 98, 99 N. E. 341 (1912); *Gildea v. Warren*, 173 Mich. 28, 138 N. W. 232, 233 (1912); *Wishart v. McKnight*, 178 Mass. 356, 59 N. E. 1028 (1901); *Bugner v. Chicago T. & T. Co.*, 280 Ill. 620, 637, 117 N. E. 711 (1917); *Crawford v. Viking Co.*, 84 Kan. 203, 114 Pac. 240 (1911); 35 L. R. A. (N. S.) 498, note.

<sup>60</sup> *Shedd v. Alexander*, 270 Ill. 117, 126, 110 N. E. 327 (1915); *Illinois Steel Co. v. Budzisz*, 106 Wis. 499, 82 N. W. 534 (1900).

<sup>61</sup> 139 Wis. 23, 28, 35, 119 N. W. 550 (1909).

This theory is believed to be erroneous. Privity of estate means succession to the possessory title. Suppose the adverse possessor, A, has previously sold and conveyed his possessory title to B, who fails to enter, and then delivers possession to C by oral agreement. C enters and holds for the balance of the period. There is privity of physical possession, but not privity of estate between A and C, except as to a new adverse possession which A may have initiated since his grant to B.

Oral tacking is allowed because the inchoate prescriptive title may be transferred by the possessor by mere delivery. If he abandons or conveys to B he has nothing to transfer. But the grantor can hardly set up the possession, which he has abandoned by delivery, as a title in an action of ejectment against his grantee.<sup>62</sup> An oral agreement of transfer would be valid as against third parties at least, even if questionable under the statute of frauds as between the immediate parties to the grant.<sup>63</sup>

In tacking constructive adverse possessions under color of title, it has been held in New York that there must be a regular deed or formal conveyance from holder to holder. It is argued that a void deed will not place the successor in the predecessor's shoes as to such claim of title. "Every adverse possession is a wrong amounting to an inchoate right." To make continuity of estate with the prior constructive adverse possession, it is essential that this inchoate title pass along the line by conveyance, as there is no corporeal seisin which can be transferred by livery.<sup>64</sup> It has, however, been held by certain other courts, that a formal deed under seal is not necessary to tack constructive possessions. If there is some written instrument, and a colorable transfer, so that the latter claimant shall apparently hold by right of the former, this will be sufficient.<sup>65</sup> It is the legislative and judicial policy to favor those claims of title that are evidenced by written instruments of transfer, both as to the period within which they will be quieted and as

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<sup>62</sup> *Clithero v. Fenner*, 122 Wis. 356, 99 N. W. 1027 (1904); 18 HARV. L. REV. 62; *Innis v. Miller*, 10 Mart. (La.) 289 (1821).

<sup>63</sup> *McNeely v. Langan*, 22 Ohio St. 32 (1871); *Cunningham v. Patton*, 6 Pa. St. 355, 357 (1847).

<sup>64</sup> *Simpson v. Downing*, 23 Wend. (N. Y.) 315, 316 (1840).

<sup>65</sup> *Kendrick v. Latham*, 25 Fla. 819, 6 So. 871, 875 (1889); *Crispen v. Hannavan*, 50 Mo. 536, 549 (1872); *Watts v. Parker*, 27 Ill. 224 (1862); *Barger v. Hobbs*, 67 Ill. 592, 597 (1873).

to the tangible acts of ownership which will amount to adverse possession. Delivery of actual possession of part of the land held under color of title may well be considered constructive delivery of possession of the entire tract described, even though the deed of conveyance be without a seal or scroll or be otherwise defective. It is the very purpose of the doctrine of adverse possession to cure technical defects in the evidence of title.

The underlying theory of title by adverse possession is put to the acid test by the problem presented when one disseisor or converter, B, has been, in turn, dispossessed by another wrongdoer, C. The question is whether the successive adverse holdings have a different effect on the right of the original owner, A, than where the holdings connect by means of a transfer. A few courts and writers looking at the owner's continuous laches rather than at the possessor's consistent claim of title, have discarded or condemned the requirement of privity for acquiring title by adverse possession. For them it should be enough to show that the owner has been continuously kept out of possession for the statutory period.

Thus Dean Ames, in his well-known essay on the nature of ownership,<sup>66</sup> says,

"C, although a disseisor, and therefore not in privity with B, may tack the time of B's adverse possession to his own to make out the statutory period against A. This tacking is allowed in England, Canada, and in several of our States."<sup>67</sup>

Dean Ames argues that the widespread opinion to the contrary must be deemed erroneous.

"The laches of the original owner who remains continuously dispossessed throughout the statutory period, is the same, and should be

<sup>66</sup> LECTURES ON LEGAL HIST. 204; 3 HARV. L. REV. 318, 321.

<sup>67</sup> He cites the following cases: *Doe v. Carter*, 9 Q. B. 863 (1847); *Willis v. Howe*, [1893] 2 Ch. 545, 553; *Kipp v. Synod*, 33 Up. Can. Q. B. 220 (1873); *Fanning v. Wilcox*, 3 Day (Conn.) 258 (1808); *Smith v. Chapin*, 31 Conn. 530 (1863), (*semble*); *Shannon v. Kinny*, 1 A. K. Marsh. (Ky.) 3 (1817); *Hord v. Walton*, 2 A. K. Marsh. (Ky.) 620 (1820); *Wishart v. McKnight*, 178 Mass. 356, 59 N. E. 1028 (1901); *Fitzrandolph v. Norman*, 2 Tayl. (N. C.) 131 (1817). (Presumption of grant from state though no privity.) *Candler v. Lunsford*, 4 Dev. & B. (N. C.), 407 (1839). (Presumption of grant, though no connection proved.) *Davis v. McArthur*, 78 N. C. 357 (1877); *Cowles v. Hall*, 90 N. C. 330 (1883); 1 DART, VENDOR AND PURCHASER, 6 ed., 464; POLLOCK AND WRIGHT, POSSESSION, 23. See also *Salter v. Clarke* 4 S. R. (N. S. W.) 280, 21 W. N. (N. S. W.) 71 (1904).

attended with the same consequences to him, whether the adverse possession be held continuously by one or several persons, and whether subsequent possessors do or do not stand in privity with their predecessors."

In *Illinois Steel Co. v. Budzisz*,<sup>68</sup> Marshall, J., discusses with his usual elaboration the requisites of adverse possession, and declares that the letter of the statute only calls for the disseisin or exclusion of the true owner for twenty years, but by judicial construction the requirement that successive possessions be connected by privity has been super-added. It is commonly said to be the reason for the requirement of privity that the possession of the disseised owner revives between successive disseisins, and the continuity of possession between the adverse claimants is thereby broken.<sup>69</sup> This reason, however, seems unsound and fictitious.<sup>70</sup> The real reason for the requirement, if any, would seem to be that the new entry gives rise to a new right of action against each occupant, rather than that when the first disseisor is interrupted, the interruption, though but for a moment, permits the seisin of the true owner to revest by operation of law.<sup>71</sup> The vital question would seem to be not how long has the owner been out of possession and failed to sue, but, on the other hand, how long has the defendant by himself and his predecessors asserted a consistent claim of title. Privity of estate might, then, be explained as one aspect of the requirement of claim of title, *vis.*, that the holding must be under the same claim of title. In order to be regarded as the same cause of action, it must be connected, consistent, and continuous.

If there is a series of independent holdings, one is no evidence in support of the rightfulness of the others. Each is a different claim of title, and new ground of action. The trespasser cannot go further back for the origin of his title than the day of his entry into possession. It is believed that there is very little authority for dispensing with the requirement of privity, and that the cases cited for this by Dean Ames do not go to the full extent supposed.

In *Doe v. Barnard*<sup>72</sup> it is apparently held that you can tack under

<sup>68</sup> 106 Wis. 499, 507, 514, 82 N. W. 534 (1900).

<sup>69</sup> 10 COL. L. REV. 761; 3 VA. L. REV. 637; 2 CORPUS JURIS, 85; *Vermont Marble Co. v. Eastman*, 101 Atl. 151, 164 (Vt.) (1917).

<sup>70</sup> *Wishart v. McKnight*, 178 Mass. 356, 59 N. E. 757 (1901).

<sup>71</sup> *Sherin v. Brackett*, 36 Minn. 152, 13 N. W. 551 (1886); AIGLER'S CASES ON TITLES, 35, note.

<sup>72</sup> 13 Q. B. 945 (1849).



the English statute, 3 & 4 William IV, without privity, so as to use the prior possession as a shield, but not to use it as a sword. The result of that case, and the companion one of *Doe v. Carter*,<sup>73</sup> would seem to be that the widow, while in possession, could bring trespass against, or resist ejectment by, the true owner, but being ousted could not sue in ejectment against a stranger, because she was not in privity with the prior possession of her husband, but showed title to his possession to be in her son. Apparently under this theory the rightful owner may be barred, although the last holder has neither acquired the statutory title nor possession good against third parties. The true owner cannot eject the last trespasser in possession, but if the tables are turned the last trespasser cannot eject former owner if put out by him.

In *Groom v. Blake*<sup>74</sup> the case of *Doe v. Carter* is stated and criticized and the anomaly is pointed out in this doctrine that property should become *quasi-derelict* without a rightful owner under the operation of the statute. If the statute does run against the true owner, it will enure to the benefit of the first rather than of the last or the intermediate trespasser. *Doe v. Barnard* is overruled by *Asher v. Whitlock* in so far as it holds that a defendant may justify interference with the possession of another by evidence of an outstanding title under which he does not claim.

In *Willis v. Earl Howe*<sup>75</sup> Kay, L. J., expressed the opinion that "a continuous adverse possession for the statutory period, though by a succession of persons not claiming under another, does, in my opinion, bar the true owner."

But in *Dixon v. Gayfere*,<sup>76</sup> Romilly, M. R., held that as between successive trespassers the law could not ascribe a title to any one of them, neither to the first nor to the last nor to any intermediate holder, and that the trespassers could not tack possessions which were not continuous.<sup>77</sup> If the statute does run against the true

<sup>73</sup> 9 Q. B. 863 (1847).

<sup>74</sup> 6 Ir. Com. L. Rep. 400, 410 (1857).

<sup>75</sup> [1893] 2 Ch. 545, 553.

<sup>76</sup> 17 Beav. 421, 430 (1853).

<sup>77</sup> See *Johnson v. Brock*, [1907] 2 Ch. 533, 535, 538; LIGHTWOOD, *TIME LIMIT ON ACTIONS*, 120, 124; BANNING, *LIMITATION OF ACTIONS*, 3 ed., 87, 88; 1 DART. V. & P., 7 ed., 473, 474; 19 HALSBURY'S LAWS OF ENGLAND, "Limitations on Actions," 158, § 322.

owner without privity, it will enure to the benefit of the first as against the last or the intermediate trespasser.

In some Canadian cases it is said that the occupation of successive trespassers, following each other without interruption, will be sufficient to bar the true owner, although they are not in privity with each other.<sup>78</sup> These cases are probably decided on what is supposed to be the English rule, but there are other Canadian cases holding the other way.

Among the American cases most frequently cited as dispensing with privity are the Kentucky decisions of *Shannon v. Kinny*<sup>79</sup> and *Hord v. Walton*.<sup>80</sup> In both of these Kentucky cases the first holder yielded possession to the second by virtue of a judgment or decree, so that the second holder had all the title of the first, and more too. These cases are explained on that ground in the case of *Winn v. Wilhite*,<sup>81</sup> which recognizes the rule that privity must exist between adverse possessors, for one to acquire the benefit of the occupation of the other, and to prevent a new cause of action from arising.<sup>82</sup>

A Connecticut case frequently cited on this point is that of *Fanning v. Wilcox*.<sup>83</sup> That case, also, is a case of recovery of possession in an action of law, which is hardly equivalent to a new disseisin. In *Smith v. Chapin*<sup>84</sup> it is said:

"Such continuity and connection may be effected by any conveyance, agreement, or understanding, which has for its object a transfer of the rights of the possessor, or of his possession, and is accompanied by a transfer of possession in fact. Such an agreement to sell and transfer of possession as were set up in this case, if proved, were sufficient."

It is accordingly the law of Connecticut that it is essential that there be privity by conveyance, descent, recovery or delivery of

<sup>78</sup> *Robinson v. Osborn*, per Riddell, J., *obiter*, 27 Ont. L. Rep. 248 (1912); 8 D. L. Rep. 1014, 1021 (1912), learned note by E. D. Armour; *Kipp v. Synod of Toronto*, 33 Up. Can. Rep. 220 (1873); *cf. contra*, *Simmons v. Shipman*, 15 Ont. Rep. 301 (1888); *Ryerse v. Teeter*, 44 Up. Can. Q. B. 8 (1878); *Hamel v. Ross*, 3 D. L. Rep. 860 (1912); (Quebec) *Butler v. Legaré*, 7 Q. L. Rep. 307 (1881). But see *Salter v. Clarke*, 4 S. R. (N. S. W.) 280, (1904).

<sup>79</sup> 1 A. K. Marsh. (Ky.) 3 (1817).

<sup>80</sup> 2 A. K. Marsh. (Ky.) 620 (1820).

<sup>81</sup> 5 J. J. Marsh. (Ky.) 521, 524 (1831).

<sup>82</sup> See also *Miniard v. Napier*, 167 Ky. 208, 180 S. W. 363 (1915).

<sup>83</sup> 3 Day (Conn.) 258 (1808).

<sup>84</sup> 31 Conn. 530 (1863).

possession, in order that one may be the beneficiary of the prior possession of another; and one who does not claim through or under another may not rely on his possession.<sup>85</sup> *Wishart v. McKnight*<sup>86</sup> is a leading Massachusetts case holding there may be privity by delivery which would have warranted the finding that the possession of each holder had been really transferred to his grantee, although not included in the description of the deeds. It stands for the proposition that "where possession has been actually and in each instance, transferred by the one in possession to his successor, the owner of the record title is barred."

In North Carolina<sup>87</sup> it was formerly held that privity of estate was not required to be shown between different occupants in order to presume a grant from the state, where land had been in adverse use and occupation for thirty years. This rule has now been changed by statute.<sup>88</sup> In Tennessee the presumption that the state has parted with its title after the statutory period of twenty years' continuous possession is still made without a showing of privity.<sup>89</sup> But successive adverse possessions cannot aid each other under the statute of limitations against a private owner unless they are connected by contract or some form of legal privity. Each subsequent possession not so connected takes a new start unaided by the prior possession.<sup>90</sup>

A discussion of the requirement of privity on principle would seem necessarily to involve the inquiry whether the entry of each successive holder gives rise to a new right of action. For instance, A may have held possession for a few days or years, without a shadow of right, when B, another intruder, expels him and holds for the balance of the statutory period, but not claiming under him. When does the right of action against B, the second disseisor, accrue: at the time that A dispossessed the owner and began to withhold possession from him wrongfully and adversely, or at the time of the entry of B? Is the owner's right of entry against A and B the same cause of action?

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<sup>85</sup> *Ferriday v. Grosvenor*, 86 Conn. 698, 86 Atl. 569 (1913).

<sup>86</sup> 178 Mass. 356, 59 N. E. 757 (1901).

<sup>87</sup> See *Davis v. McArthur*, 78 N. C. 357 (1878); *Cowles v. Hall*, *supra*, 90 N. C. 330 (1884).

<sup>88</sup> *May v. Manufacturing Co.*, 164 N. C. 262; 80 S. E. 380 (1913).

<sup>89</sup> *Scales v. Cockerill*, 3 Head (40 Tenn.) 432 (1859).

<sup>90</sup> *Ferguson v. Prince*, 136 Tenn. 543, 190 S. W. 548 (1916).

It is assumed by Dean Ames in his classic article on Disseisin of Chattels, or The Nature of Ownership, as it is later called, that the right of recovery is the same right of action against each successive disseisor, and that B holds possession subject to the same defect as A, with the additional defect of a right of action in A. This is, however, to assume the main question in issue. Actions for the recovery of property are founded, (1) upon the plaintiff's title and consequent right of possession; and (2) upon the defendant's wrongful detention or withholding of possession.<sup>91</sup> In the case of successive trespassers, each entry is to be regarded a fresh and independent wrong. When the first trespasser makes his forced abandonment of the land the right of action against him is gone. A new and entirely distinct cause of action accrues to the owner against each new intruder for the new interference with his right of possession and the independent wrongful act of entry. As the Supreme Court of Michigan said in *Riopelle v. Gilman*,<sup>92</sup> "The right of action against any independent disseisor or intruder must date back only to the origin of his possession; while if one succeeds to another by transfer of title or claim, the right of action goes back to the first occupant in the chain of adverse possession."

As Parker, J., says in *Johnson & Sons v. Brock*,<sup>93</sup>

"the old right of action was gone when the first intruder went out, and that a new right of action arose when the fresh intrusion occurred."

When one purchases land from one exercising dominion over it, he buys a title in the process of being quieted and protected by the statute of limitations. A possessory title is thus a growing plant becoming more and more firmly rooted in the soil. No title can grow on this possession if the root is broken by ouster.

If there is privity between the successive occupants, the possession of each is rooted to or engrafted upon the original entry, and may be regarded as an outgrowth of the former possession.<sup>94</sup> On the other hand there seems no reason why B, a trespasser, a casual interloper, who drives A from possession, should get the benefit of

<sup>91</sup> See LANGDELL, EQUITY PLEADING, §§ 120, 123, 125; CRUISE, DIGEST REAL PROP. Tit. 31, ch. II, § 22.

<sup>92</sup> 23 Mich. 33, per Campbell, J.

<sup>93</sup> [1907] 2 Ch. 533, 535, 538.

<sup>94</sup> *Asher v. Whitlock*, L. R. 1 Q. B. 1 (1865).

the time which has run in favor of the possession held by A. He does not acquire the possessory title of his predecessor. It is not necessary to consider the true owner as restored to constructive possession, as his right of possession continues; and he may be regarded as acquiring a new right of action against B, who by an independent act invades his right, which he should be allowed a new period of twenty years to pursue. But if there is privity, there is a continuation of the disseisin, and the entry of the successor "relates back" to the entry of him whose possessory right he holds.<sup>96</sup> This is for the reason that he succeeds by transfer to a possessory title already partly established. This substitution does not make a new cause of action, and the successive possessions blend into one. So the periods of adverse user of a way may be tacked where there is privity between the successive claimants. The consistent continued adverse user becomes conclusive evidence of right.<sup>96</sup>

If the title of the true owner is extinguished by the possession of independent trespassers, then the last of the trespassers can defend his possession against the true owner, although he may still be ejected by the first trespasser.<sup>97</sup> The statute will thus quiet a title in favor of A, which is not being asserted or exercised by him against the true owner, who has no right of action against A to recover the possession. Why should the possession of a subsequent trespasser enure to the benefit of a prior trespasser who is no longer claiming title?

It may indeed be argued that, even where there is privity a new cause of action accrues against each successive wrongdoer and that the statute of limitations should always begin to run afresh. This would prevent tacking even cases in which there is privity, and it has been so held in England as to chattels, and in South Carolina as to both chattels and land except in case of descent.<sup>98</sup>

<sup>96</sup> *Davock v. Nealon*, 58 N. J. L. 21, 32 Atl. 675 (1895); *Sawyer v. Kendall*, 10 Cush. (Mass.) 241, 244 (1852); *Witt v. St. Paul & N. P. Ry. Co.*, 38 Minn. 122, 35 N. W. 862, 865 (1888); *Christy v. Alford*, 17 How. (U. S.), 601 (1854).

<sup>97</sup> *McLean v. McRae*, 50 N. S. R. 536, 33 Dom. L. Rep. 128, 132.

<sup>98</sup> E. D. Armour, "Statute of Limitations as a Conveyancer," 3 CAN. L. TIMES, 521; 1 HAYES, CONV. 268.

<sup>99</sup> *Miller v. Dell* (1891), 1 Q. B. 468 (chattels); *Beadle v. Hunter*, 3 Strob. (S. C.), 331 (1848); *King v. Smith*, Rice Law Rep. (S. C.) 10 (1838); *Garrett v. Weinberg*, 48 S. C. 28, 26 S. E. 3, 18 (1896). See *Potts v. Gilbert*, 3 Cruise Digest, R. P. 447; 3 Wash. C. C. 475 (1819).

It may be admitted that it does not necessarily follow, that because the legislature has said that no action shall be brought against A unless within twenty years after the cause of action accrues, that therefore B cannot be sued in respect to an entry or conversion made by him within twenty years. It may be difficult to show that there is not a new cause of action against B, even though his entry is by consent of A. In the case of chattels it would seem to be a new conversion.<sup>99</sup> Barring a right of action against B is not necessarily the result of a statute barring a right of action against A. But the statute ought to receive "such a construction as will effectuate the beneficent objects which it is intended to accomplish, — the security of titles and the quieting of possessions."<sup>100</sup> Tacking may, if necessary, be explained as a common-law doctrine, a limitation by analogy, because to hold otherwise would be contrary to the policy of the statute and would prevent an adverse holder from transmitting to another the benefit of his prior holding. Where the same claim of title has been consistently asserted for the statutory period by persons in privity with each other, there is the same reason to quiet and establish the title as where one person has held. The same flag has been kept flying for the whole period. It is the same ouster and disseisin. If the statute runs, it quiets a title which has been consistently asserted and exercised as against the true owner, and the possession of the prior holder justly enures to the benefit of the last.

If, on the other hand, the statute runs without privity, then the first holder will have the better title among the successive holders because of his prior possession, though he may have held only a day. The relative priority of the inchoate titles will remain unaffected by the extinguishment of the true owner's right. Title will thus vest successively in the different holders, and only when all the prior holders are barred will the last possessor gain an indefeasible title to the land.<sup>101</sup> It seems unreasonable that either the prior or subsequent independent holders should benefit by each others' adverse possession. As a broad question of legislative policy, however, it may perhaps be advisable to bar stale demands without requiring proof of privity of estate between successive holders.

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<sup>99</sup> *Miller v. Dell*, [1891] 1 Q. B. 468.

<sup>100</sup> *Willison v. Watkins*, 3 Pet. (U. S.) 43, 54 (1830).

<sup>101</sup> DART, *VENDOR AND PURCHASER*, 7 ed., 475; 2 PRESTON, *ABSTRACTS*, 293.

Where a statute of limitation requires action to be brought within twenty years, or some other period after the owner or his predecessor shall have been seised or possessed of the premises, a different result may possibly be reached than where the statute runs from the time when the right of action accrues. It was held in Michigan,<sup>102</sup> under such a statute, that a party must bring his action within twenty-five years after his disseisin, whether the persons in possession claimed through or from each other or not. The object of such a statute, it was said, is to compel every party disseised to use some diligence and to bar a right of entry after twenty-five years' practical abandonment of the possession to strangers. This distinction, however, has not been followed in other jurisdictions.

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<sup>102</sup> *Riopelle v. Gilman*, 23 Mich. 33 (1871). See also 5 CAL. L. REV. 429.

# HARVARD LAW REVIEW

Published monthly, during the Academic Year, by Harvard Law Students

SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER

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THE LAW SCHOOL. — The registration in the School for the last twelve years is shown in the following table:

	1907-08	1908-09	1909-10	1910-11	1911-12	1912-13
Res. Grad. . .	2	—	—	2	3	6
Third year . .	171	169	187	178	219	176
Second year . .	198	207	191	238	217	186
First year . .	280	244	311	296	289	287
Unclassified . .	—	—	—	82	76	84
Specials . . .	63	64	70	3	4	5
	714	684	759	799	808	744

  

	1913-14	1914-15	1915-16	1916-17	1917-18	1918-19
Res. Grad. . .	4	5	8	10	5	3
Third year . .	169	167	177	213	73	37
Second year . .	197	197	226	234	87	24
First year . .	260	288	308	335	96	36
Unclassified . .	64	68	66	64	31	13
Specials . . .	1	5	1	2	0	1
	695	730	786	858	292	114

NATURALIZATION OF ALIENS. — As Professor Valery has pointed out,<sup>1</sup> one effect of the war is quite certain to be a heightened interest in the question of each individual's nationality. Incidentally, it is worthy of note that the existence of war and the passage of certain legislation relating to it have raised old questions concerning naturalization in a rather novel way.

Naturalization of an alien in the United States involves two legal acts. First, the express and absolute renunciation by the applicant of his old

<sup>1</sup> 31 HARV. L. REV. 986-87.



allegiance. Second, his assumption of the new allegiance and this country's acceptance of him as a citizen.<sup>2</sup>

The proper performance of the first act necessarily involves a decision in favor of the applicant's right to expatriate himself, for the United States has never tolerated the notion that a naturalized citizen may retain even a shred of fealty to his former sovereign.<sup>3</sup> Now foreign countries have generally been unwilling to relinquish their subjects or citizens. At one time or another, practically every European nation has denied or clogged expatriation.<sup>4</sup> England, clinging to the feudal law, proclaimed and enforced until 1870 the doctrine of indelible allegiance.<sup>5</sup> The German States and Austria seem always to have asserted the power to retain their nationals. With them, as with other countries having enforced military service, such power has usually been manifested in the cases of men of military age, who are likely to be the most valuable emigrants.

The United States has had collision after collision with foreign powers over this matter. But its own attitude has not been free from uncertainty. There were, and possibly still are, sharp differences of opinion between the three branches of the government. The judiciary, following common-law precedent, early embraced indelible allegiance.<sup>6</sup> The executive, represented by the Department of State, pursued a wavering policy until 1859.<sup>7</sup> Since then it has quite consistently championed an unlimited or at least a very broad right of expatriation. It may fairly be argued that Congress, by passing naturalization acts which paid no attention to restrictions advanced by other countries, early implied its

<sup>2</sup> See the form of petition and oath. Act of June 29, 1906, 34 STAT. AT L., pt. I, 596, § 4, subdivisions First, Second, and Third.

<sup>3</sup> It might be argued that the subject could relinquish the sovereign without the sovereign's relinquishing the subject. This seems unworthy hair-splitting. Besides, it would permit the discarded sovereign to enforce unwilling obedience from the expatriate, if jurisdiction over the latter could be obtained. But our laws require the protection of naturalized citizens, even when abroad, as fully as if they were native born. U. S. REV. STAT., § 2000, Act July 27, 1868, c. 249, § 2, 15 STAT. 224; 14 Opinions Attorneys General, 298-99 (1873); H. R., Doc. 326, 59th Cong., 2d Session, 25; *In re Haas*, 242 Fed. 739, 740 (1917).

The British, however, under the Naturalization Act of 1870 conceded that their adopted subjects should not be deemed Britishers when within the limits of the foreign states of which they were subjects previously to obtaining their certificates of naturalization, unless they had ceased to be subjects of such states in pursuance of municipal law or treaty. *In re Bourgoise*, L. R. 41 Ch. D. 310 (1889). The Act of 4 & 5 Geo. V, c. 17, pt. II, § 3 (August 7, 1914), has revoked this concession.

<sup>4</sup> An outline of the state of law about 1869 is given by COCKBURN ON NATIONALITY, 50 *et seq.* The House Document referred to in the first paragraph of note 3 outlines the situation as of about 1906. This House Document is a mine of information, rather poorly arranged.

A sharp distinction must be drawn between laws which merely penalize illegal emigration or expatriation, and those which refuse to recognize expatriation without consent. COCKBURN, *supra*, 55, 134.

<sup>5</sup> COCKBURN, *supra*, 63-64. The allegiance is not really "indelible" and never was. The author admits that Parliament could have wiped it out. This doctrine of Great Britain's was one cause of the War of 1812. COCKBURN, *supra*, 70.

<sup>6</sup> *Shanks v. Dupont*, 3 Pet. (U. S.) 242 (1830). See, for a more discreet modern view under the statute, *Mackenzie v. Hare*, 239 U. S. 308 (1915).

<sup>7</sup> TAYLOR ON INTERNATIONAL PUBLIC LAW (1901), § 183. This is a good summary which can easily be elaborated by reference to the sources given.

belief in an unrestricted right to shake off foreign sovereignty.<sup>8</sup> Whatever doubt existed as to the legislative view in the middle of the nineteenth century was dispelled by the Act of July 27, 1868.<sup>9</sup> This somewhat flamboyant statute declares expatriation to be "a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness"; it further asserts that "any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions" the right, is "inconsistent with the fundamental principles of the Republic."

This act was sufficient to settle United States municipal law for the time being, but of course it could not of itself affect foreign municipal law. At this very time, however, the series of reciprocal naturalization agreements known as the Bancroft treaties was being negotiated.<sup>10</sup> It might be argued that this negotiation *per se* was a surrender of free expatriation, the more so as the treaties impose substantial conditions upon the exercise of the right. It seems fairer, though, to deem them discreet concessions to convenience. In diplomacy, half a loaf is far better than no bread at all. The United States has not been successful in making such conventions with all nations, France, Italy, Serbia, Turkey, and numerous others remaining outside the fold. By its own municipal law, Great Britain has adopted an extremely liberal policy with respect to foreign naturalization of its subjects.<sup>11</sup>

Divorced from the heat and prejudice of the times in which it was passed,<sup>12</sup> the Act of 1868 does not seem an entirely safe star by which to set one's course. The vigorous *caveat* against contesting its utter validity is somewhat repulsive to legal common sense, which prefers logic to bull-doing. Many of the better writers on public or international law deny flatly and with good reason that there is any such thing as an unrestrictable right of expatriation.<sup>13</sup> To those taking this point of view it is gratifying and significant to find Congress eating some of its own words by passing the Act of March 2, 1907,<sup>14</sup> which in laying down general rules as to what constitutes expatriation declares "That no American citizen shall be allowed to expatriate himself when this country is at war." The prohibition gains a more than municipal significance from the fact that its framers stated it to be "declaratory of a principle of public law which should be placed on the statute books, so that no

<sup>8</sup> VAN DYNE ON NATURALIZATION IN THE UNITED STATES (1907), 333 *et seq.*

<sup>9</sup> Now U. S. REV. STAT., § 1999.

<sup>10</sup> These are conveniently collected in MALLOY'S TREATIES, CONVENTIONS, ETC., BETWEEN THE UNITED STATES AND OTHER POWERS (1776-1909).

<sup>11</sup> 33 & 34 Vict. c. 14, § 6 (1870). And see 4 & 5 Geo. V, c. 17, pt. III, § 13.

<sup>12</sup> The days of the Fenian uprising. COCKBURN, *supra*, 86 *et seq.*, shows what the English thought of the American attitude. Oddly enough, Cockburn seems not to have known of the Act of 1868, although his book was published in 1869. See his acid comment on page 106.

<sup>13</sup> For example, BORCHARD ON DIPLOMATIC PROTECTION OF CITIZENS ABROAD, § 317, says: "... the conclusion is inevitable, both under international and municipal law, that there is no such thing as the inalienable and inherent right of a citizen to expatriate himself." See also Attorney General Cushing's very elaborate opinion, 8 OPINIONS ATTORNEYS GENERAL, 139, 152, 153, and 168 (1856). Compare Professor Valéry's remarks in the BULLETIN MENSUEL DE LA SOCIÉTÉ DE LÉGISLATION COMPARÉE, AVRIL-JUIN (1917), 161.

<sup>14</sup> 34 STAT. AT L., pt. I, 1228.

doubt can ever be raised on a point which may be vital to the United States."<sup>15</sup> Sound authority is cited for the proposition, and more might be adduced.<sup>16</sup>

Applying this modification of the Act of 1868 to a supposititious case will indicate the kind of complication which may result from naturalization in war time. During 1915 a German of military age, who has resided in the United States for more than five years but who has no discharge from his nationality of birth, applies for and receives his final naturalization papers. It may be assumed that he gets them as a matter of course, for there appears to be nothing questionable about the man and nothing unusual about the case. But if the judge had examined the new German Imperial and State Law of Nationality<sup>17</sup> he would have found that while a discharge from nationality "may not be refused *in time of peace*" except for certain specified reasons, "In time of war and danger of war the right is reserved to the Emperor to issue special regulations." Looking further, he would have discovered that on August 3, 1914, the Emperor did issue a special regulation to the effect that persons under obligation to serve in the army were not to be discharged from either State or direct Imperial allegiance until further notice.<sup>18</sup>

This puts our hypothetical naturalized citizen in an uncomfortable position. To take the least likely and perhaps the least hurtful possibility first, an active United States attorney may endeavor to have his certificate canceled.<sup>19</sup> The attorney would argue that the Act of 1907 read into our *corpus juris* and specifically into the naturalization act of the preceding year the "principle of public law" which forbids the desertion of one's country *flagrante bello* and that the German applicant obtained his papers fraudulently or illegally. If the attorney felt unkindly toward the respondent, he would point out to the court how unlikely it is that a German would disregard the law of his Fatherland; and he would suggest that possibly this German saved his skin by taking advantage of that wicked provision of the Delbrück Law which enabled him to retain his original nationality.<sup>20</sup> Numerous defenses to such a proceeding may

<sup>15</sup> H. R., Doc. 326, 59th Cong., 2d Session, 28. The opinions of the Secretary of the Treasury and the Secretary of State referred to therein may be found in 2 Foreign Relations (1873), 1187 and 1204.

<sup>16</sup> See note 13; also HALLECK ON INTERNATIONAL LAW (1908), § 29, 462.

<sup>17</sup> This law is commonly known as the Delbrück Law. "*Vor der Erteilung der Genehmigung ist der d. Konsul zu hören*," REICHS-GESETZBLATT (1913), 583, 589, quoted *In re Haas*, 242 Fed. 739 (1917). The translation quoted is that presented in 1914 to both Houses of Parliament.

<sup>18</sup> REICHS-GESETZBLATT (1914), 323. To avoid any chance of faulty translation, the original text is quoted: "*Wehrpflichtige sind bis auf weiteres nicht aus der Staatsangehörigkeit oder unmittelbaren Reichsangehörigkeit zu entlassen.*"

<sup>19</sup> In accordance with § 15 of the Naturalization Act of June 29, 1906, 34 STAT. 601.

<sup>20</sup> Paragraph second of § 25: "A person does not lose his nationality if, before acquiring a foreign nationality, he has applied for, and received, the written permission of the competent authorities of his home state to retain his nationality. Before the grant of such permission, the German consul is to be consulted." (*Die Staatsangehörigkeit verliert nicht, wer vor dem Erwerbe der ausländischen Staatsangehörigkeit auf seinen Antrag die schriftliche Genehmigung der zuständigen Behörde seines Heimatstaats zur Beibehaltung seiner Staatsangehörigkeit erhalten hat. Vor der Erteilung der Genehmigung ist der deutsche Konsul zu hören.*)

be suggested,<sup>21</sup> but it would be an unhappy ordeal and of uncertain outcome.<sup>22</sup>

Probably this attack would not have to be faced if our German behaved himself. But the United States declares war against Germany. He is drafted, goes to France, and is captured in battle; the stone wall and the firing squad may well be his fate. To Germany, under the "principle of public law," he is still a German and emphatically a traitor. He has no clever American lawyer to defend him before the military tribunal. He has not even the cold comfort of expecting to be revenged. How can the United States enter upon reprisals for an act which it would have done itself had the situation been reversed?

Or, to close the question with a less painful although serious possibility, imagine that our friend returns to Germany for a visit after peace is declared. Will he not taste of *durance vile*? And, again, can the United States effectively protest the application of its own "principle of public law" which was indeed "vital to the interests of Germany"?

It is now appropriate to turn from the first element of naturalization and consider briefly that aspect of the second which deals with the acceptance of the applicant by the new sovereign of his choice. When war was declared against Germany in April of 1917 alien enemies, and indeed every alien who was a "native citizen or subject, or a denizen" of the German Empire,<sup>23</sup> automatically became barred from naturalization. In December of the same year Austro-Hungarians were likewise barred. But on May 9, 1918, the naturalization law was radically amended.<sup>24</sup>

<sup>21</sup> As, for instance, that the United States naturalizes in entire disregard of foreign law, as it certainly has a right to do; that the Bancroft treaties cover the case, and § 36 of the Delbrück Law continues treaties in effect; that one needs no "discharge" to lose Germanic nationality by foreign naturalization, the questions of discharges and naturalization abroad being treated in entirely different sections of the Delbrück Law.

<sup>22</sup> It may be remarked that the powers arrayed against Germany, and even neutral nations, would probably have treated our friend as still a German. During the war between France and England at the end of the eighteenth century a Frenchman emigrated to the United States and became naturalized. While the war was still on, he shipped a cargo to some foreign port, warranting the goods neutral. The British captured and condemned them as belligerent. *Held*, that he cannot recover the insurance because there was a breach of warranty. The covenant of neutrality was drawn in contemplation of international law and it is a rule of international law that a man may not expatriate himself *flagrante bello*. *Duguet v. Rhinelander*, 1 Johns. Cas. (N. Y.) 360 (1800); *Jackson v. New York Insurance Co.*, 2 Johns. Cas. 191 (1801) acc. The former case was reversed and the latter overruled by a divided court. 2 Johns. Cas. 476; 1 Caines Cas. XXV gives the majority opinion only. The reasoning which ruled the upper court is not very persuasive. It appears to have been disapproved by contemporary jurists. 1 KENT COM., 3 ed., 76 (star paging); 1 PHILLIPS ON INSURANCE, 5 ed., § 166; 1 DUELL ON INSURANCE, 521; 1 ARNOULD ON MARINE INS., 9 ed., § 95. The lower court's rule seems also to be accepted by *The Dos Hermanos*, 2 Wheat. 98 (U. S.) (1817).

<sup>23</sup> U. S. REV. STAT., § 2171, Act April 14, 1802, c. 28, § 1, 2 Stat. 153. There seems to be a mistake in the punctuation of the first dozen words. The new act referred to in note 24 cured this mistake. "Alien enemy" may not sound rhetorically correct, but in our statute law it is a phrase of art and just now is particularly dear to those engaged in counter espionage activities. U. S. REV. STAT., § 4067; Act July 6, 1798, c. 66, § 1, 1 Stat. 577. The definition of the term was extended to women by an amendatory act of Congress, and the President by proclamation put this act into effective operation. The act is dated April 16, 1918, the proclamation, April 19, 1918.

<sup>24</sup> By Pub. No. 144, 65th Cong., H. R. 3132. The amendatory act is frequently referred to as "The Raker Act."

Two portions of the amendment, being its subdivisions numbered seventh and eleventh, are of interest. The latter provides that no alien enemy may become a citizen unless he can conform to certain conditions with respect to the date of his declaration of intention, etc.; or, failing that, unless the President by an act of special grace "upon investigation and report by the Department of Justice fully establishing the loyalty" of the applicant, excepts him from the classification of an alien enemy. From a purely practical, non-legal standpoint these are most remarkable provisions. The other opponents of the Central Powers have bent every effort toward squeezing Germans and Austro-Hungarians out of citizenship rather than toward admitting them into citizenship. Certain considerations of policy, particularly concerning the subject races of Austria-Hungary, may well overbalance this consideration and also the apparent inadvisability of casting the labor of thousands of new investigations upon a Department already bearing the brunt of the war work.

When one turns to the legal points, however, difficulties multiply. If a native of Germany naturalized here when the country was neutral might reasonably expect harsh treatment from his former compatriots, he will surely be doubly damned if he attempts to become an American while war is on between the two nations. Should he be captured in military operations, his fate is certain unless considerations of policy stay the execution. There is a British case squarely in point.<sup>25</sup> One would not expect more mercy of the Hun.

Subdivision seventh of the amendatory act is an overwhelmingly complex and ill-drawn paragraph dealing with everything from a Filipino to an alien seaman, but especially providing for the expeditious naturalization during the war of aliens in the military and naval service. This object is thoroughly laudable and it is a pleasure to know that a land-office naturalization business was done in the army camps.<sup>26</sup> The trouble is that a very substantial number of alien enemies have been admitted under this section. It was believed that their admission would save them from treatment as traitors if captured, a risk which they naturally did not care to face. The foregoing discussion leads to the conclusion that such a belief is thoroughly unsound. The grim possibilities of the mistake, if it is one, are obvious. Fortunately they appear not to have been realized in fact. But there is another difficulty. Subdivision seventh purports to cover "any alien serving in the military or naval service." It must be remembered, however, that for over a century the naturalization of alien enemies has been forbidden and that this restriction is continued with certain specified relaxations by a subsequent subdivision of this very act. It appears not unlikely that Germans and Austro-Hungarians dealt with under subdivision seventh have ac-

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<sup>25</sup> *Rex v. Lynch*, 1 K. B. (1903) 444. The court simply slashed its way through an absolutely unqualified expatriation statute, saying that naturalization itself under the circumstances was an act of treason. During the War of 1812 the same point came up, and executions of captives were avoided by a hair's breadth. COCKBURN, *supra*, 70.

<sup>26</sup> On the other hand, there appear to have been few if any naturalizations under subdivision eleventh as late as November 1, 1918.

quired naturalization which is a "scrap of paper" here, just as it is in their native countries.<sup>27</sup>

The reader will have remarked that all the lines of this brief discussion converge on a common point. Even if the arguments advanced above are mistaken and can be successfully rebutted, it appears that the United States has, since the commencement of the war in 1914, received or purported to receive as citizens numbers of foreign born individuals whose status is somewhat doubtful here and decidedly doubtful abroad. If we grant that the nations cobelligerent with us are likely in courtesy and good feeling to waive any rights concerning their nationals, our opponents still remain to be considered. Embarrassment amounting to a dilemma is clearly possible. It is hard to see how we can refuse to protect even in Germany a German native naturalized here between August 3, 1914, and the end of the war. Our own statute law requires the executive to tender such protection.<sup>28</sup> Yet if we do so, we shall be denying Germany a right which the United States has recognized and asserted for itself. To put the point in another way, no persons have exceeded Americans in denunciation of those provisions of the Delbrück Law which encourage the conscious creation of dual allegiance. Can we continue this denunciation with much justice if our courts and our Congress have been making decisions and passing laws which tend toward precisely the same end?<sup>29</sup>

JOHN M. MAGUIRE.

THE THEORY OF THE PLEADINGS. — It might be thought that if a defendant has had ample notice of the claim against him and an opportunity to defend, and the facts have been fully presented on both sides, and a judgment has finally been recovered against him, he ought to pay. Even more clearly it would seem that when the defendant in his answer has expressly admitted a right of action in the plaintiff, the plaintiff should be entitled to recover on that right of action. In New York according to a recent decision of the Court of Appeals this is not the case. One Jackson brought suit against one Strong alleging that they had entered into a contract to prosecute an undertaking for their joint benefit, sharing equally as partners in the expenses and in the receipts; and the plaintiff asked for an accounting and for a recovery of the amount due. The defendant denied the agreement to share equally but alleged that he had agreed to employ the plaintiff as his assistant and to pay him the reasonable value of his services. The case was tried before a referee who reported that there was no agreement to share but that the defendant had agreed to pay the plaintiff the reasonable value of his services. Judgment was given for the plaintiff for the reasonable value of his services. After several years the Court of Appeals has at length decided that the judgment should be reversed.<sup>1</sup> And why? Not because the

<sup>27</sup> If this doubt turns out to be really substantial, the air should be cleared by a remedial act.

<sup>28</sup> U. S. REV. STAT., § 2000.

<sup>29</sup> The whole tangled situation should be straightened out by explicit provisions of the final treaty of peace. Otherwise we have stored up squabbles for the next fifty years.

<sup>1</sup> *Jackson v. Strong*, 222 N. Y. 149. See RECENT CASES, page 179.

plaintiff did not have a right to recover the amount awarded him in the judgment — the defendant in his answer had expressly admitted that the plaintiff had a right to recover such an amount — but because in his complaint he had proceeded on the theory of a partnership and his complaint was in the nature of a bill in equity; whereas the judgment was based upon a contract and was in the nature of a judgment at law. The language of the court might have appealed to a special pleader of the seventeenth century. The court says:

"The inherent and fundamental difference between actions at law and suits in equity cannot be ignored. As has often been said: 'Pleadings and a distinct issue are essential to every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint would serve no useful purpose.' And further: 'The rule that judgment should be rendered in conformity with the allegations and proofs of the parties, *secundum allegata et probata*, is fundamental in the administration of justice. Any substantial departure from this rule is sure to produce surprise, confusion, and injustice.'"

This is a striking example of the technical doctrines governing pleadings at common law,<sup>2</sup> and an illustration of the miscarriages of justice which the codes were intended to prevent.<sup>3</sup> The only real difficulty in the case would be that there was no trial by jury. But a perfect answer is that, owing to the defendant's admission that he had made a contract with the plaintiff and had broken it, there was no question on this point for the jury to try.<sup>4</sup>

There has been a similar difficulty in New York in abolishing the forms of action in actions at law. In an earlier New York case<sup>5</sup> the plaintiff alleged that the defendant had by fraud induced the plaintiff to enter into a contract with him, and that the defendant had broken the contract. The defendant denied the fraud but did not deny the making and breaking of the contract. The court refused to give judgment for the plaintiff on the contract because his complaint was based on the theory of fraud and not of contract.<sup>6</sup> In a somewhat similar case<sup>7</sup> there is a striking dissenting opinion by Peckham, J., who expressed himself in the following plain and convincing words:

"The merits of the cause have been fully tried, without surprise to either party. . . . The defendant understood the complaint; no pre-

<sup>2</sup> Cf. *Marsh v. Bulteel*, 5 B. & Ald. 507 (1822), in which the plaintiff who declared on one breach of contract was not allowed to recover on another which was expressly admitted by the defendant in his plea.

<sup>3</sup> See N. Y. CODE CRV. PROC., § 3339, abolishing the distinction between actions at law and suits in equity, and the forms of those actions and suits; and § 723, providing for the liberal allowance of amendments, and providing that in every stage of the action the court must disregard an error or defect in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party.

<sup>4</sup> See 31 HARV. L. REV. 669, 675-678.

<sup>5</sup> *Barnes v. Quigley*, 59 N. Y. 265 (1874). But see *Connor v. Philo*, 117 N. Y. App. Div. 349, 102 N. Y. S. 427 (1907).

<sup>6</sup> For another recent case committing New York to the reactionary view, see *Walrath v. Hanover Fire Ins. Co.*, 216 N. Y. 220 (1915). Indiana clings to the same view. See *City of Union City v. Murphy*, 176 Ind. 597, 96 N. E. 584 (1911).

<sup>7</sup> *Degraw v. Elmore*, 50 N. Y. 1 (1872).

tense that he was misled by it. This variance, between the pleading and the proof, the court had full authority to amend or to disregard under the Code. This question of pleading has been a terror to suitors for many years before the Code. Legislatures have sought in vain to give relief, and now if this decision be sustained, I think our movement is backward much more than half a century. . . . Probably in not one case in ten thousand has injustice been done from the ignorance of a suitor as to the matters to be tried. But the cases of loss and damage to suitors by some defect of pleading have been innumerable."

The whole tendency in modern times is away from the technical view of the New York court; and the view of Peckham, J., is becoming more and more widely accepted.<sup>8</sup> It cannot be said that the modern view has actually resulted in the surprise or confusion so dreaded by the court in *Jackson v. Strong*; and certainly, as Peckham, J., observed, it is the technical view rather than the modern view which results in injustice. The New York decisions emphasize the necessity of bringing about those changes in procedural law which are now being so strongly urged by the practical and intelligent members of the bar of that state.

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**INCOME TAX ON NONRESIDENTS.** — All taxation is based upon protection furnished by the sovereign levying the tax to person, property or business.<sup>1</sup> The income tax, like all other taxes, must be supported upon this principle, and it has therefore been held that income received by a nonresident from property situated beyond the state is not within the taxing power of the state.<sup>2</sup> So where a Wisconsin decedent left personal property to a nonresident trustee in trust for a nonresident, and the trustee removed the property from the state, it was held that income thereafter accruing was not taxable in Wisconsin.<sup>3</sup>

The right to tax the domiciled resident upon all his income, from whatever source, seems to be clear, since the sovereign is exercising thereby his jurisdiction over the person taxed. Most jurisdictions impose the tax upon all domiciled residents.<sup>4</sup> What effect the decision of the Supreme Court in *Union Refrigerator Transit Co. v. Kentucky*<sup>5</sup> may have upon the American acts is not altogether clear. The courts will probably allow the taxation of all income, even that derived from chattels situated elsewhere, at the state of the domicile, on the ground that the permission and protection of that state enables the owner to receive and enjoy the income; just as they allow the state of domicile of a decedent to tax the inheritance of chattels situated in other states.<sup>6</sup>

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<sup>8</sup> See *Knapp v. Walker*, 73 Conn. 459, 47 Atl. 655 (1900); *Bruheim v. Stratton*, 145 Wis. 271, 129 N. W. 1092 (1911); *Cockrell v. Henderson*, 81 Kan. 335, 105 P. 443 (1909); 50 L. R. A. (N. S.) 1. See also 24 HARV. L. REV. 480.

<sup>1</sup> *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 Sup. Ct. Rep. 36 (1905).

<sup>2</sup> *State v. Wisconsin Tax Commission*, 161 Wis. 111, 152 N. W. 848 (1915).

<sup>3</sup> *Bayfield County v. Pishon*, 162 Wis. 466, 156 N. W. 463 (1916).

<sup>4</sup> *British Tax Act of 1853*, § 2, Sched. C. D.; U. S. Tax Act of October 3, 1917, § 1; *Wisconsin Income Tax Act*, § 1087 m, § 2.

<sup>5</sup> 199 U. S. 194, 26 Sup. Ct. Rep. 36 (1905).

<sup>6</sup> *Bullen v. Wisconsin*, 240 U. S. 625 (1916).



The imposition of a tax upon incomes derived from property situated or from business carried on within the state seems hardly open to question. Whether we regard the tax as an excise duty, or as a property tax, it is equally true that the state which protects the property and business and permits the owner to enjoy it is entitled to tax the income arising from it. In a recent case, *Shaffer v. Howard*,<sup>7</sup> a tax was levied in Oklahoma upon the income from an oil well there situated, and operated under lease by a resident of Illinois. The proceeds of the sale of oil were actually received by the owner in Illinois. The majority of the court (Stone, Circuit Judge, and Cotteral, District Judge) held that the last fact made no difference, and that the tax was valid. Campbell, District Judge, dissented, upon the ground that in taxing the income of all residents, from whatever source, as the act did, the state was creating a tax based upon personal jurisdiction, and it was not permissible in the same act to impose a tax upon income derived by a nonresident from property in the state, which must be supported upon the ground of jurisdiction over the property. The ground of dissent seems unsound; if a tax is valid on any ground, it cannot be invalidated by classifying it as a particular kind of tax, and then alleging its invalidity because it is so classified.<sup>8</sup> The decision of the majority, affirming the power of the state to tax income derived from property within its territory, no matter where the income may chance to be received by the owner, seems unassailable.

WHAT CONSTITUTES A PUBLIC USE.—From the time of Magna Charta, the property of A could not be taken and given to B. A's property could only be taken for a public purpose, and then only after compensation. But when A in the use of his property had "affected it with a public interest, it ceased to be *juris privati* only,"<sup>1</sup> and it was because in the voluntary use of his property he had so affected it with a public interest that his use of it was subjected to public control. This was the common law whence come the rights our Constitution protects. Legislation cannot change it,<sup>2</sup> property cannot become affected with a public interest by mere legislative fiat. It is the voluntary use of one's property in such a manner as to make it of public consequence that gives the public the right to control its use.<sup>3</sup>

Looking again at the common law, certain businesses and professions were as early as the thirteenth century subject to regulation.<sup>4</sup> From the nature of things practically every business and every profession was

<sup>7</sup> 250 Fed. 873 (Okla.) (1918).

<sup>8</sup> Holmes, J., in *New York Central R. R. Co. v. Miller*, 202 U. S. 584, 596 (1906).

<sup>1</sup> 1 HARG. LAW TRACTS, 78.

<sup>2</sup> State *ex rel.* M. O. Danciger & Co. v. The Public Service Commission, 205 S. W. 36 (Mo.) (1918); *Associated Pipe Line Co. v. The Railroad Commission*, 169 Pac. 62 (Cal.) (1917); *Munn v. Illinois*, 94 U. S. 113 (1876). See *Producers' Transportation Co. v. The Railroad Commission*, 169 Pac. 59, 61 (Cal.) (1917): "It is not the *ipse dixit* of the law, but the fact that the petitioner has voluntarily devoted its property to a public use, which justifies the control assumed by the Railroad Commission."

<sup>3</sup> *Producers' Transportation Co. v. The Railroad Commission*, *supra*; 1 WYMAN, PUBLIC SERVICE CORPORATIONS, § 200.

<sup>4</sup> 1 WYMAN, §§ 1-15; 17 HARV. L. REV. 156.

monopolistic;<sup>6</sup> competition was not the normal situation. With the rise of industrialism coincident with the settlement of America and culminating in the first half of the nineteenth century, competition became the normal situation, effectually regulating businesses, governmental control disappearing in practically all cases<sup>6</sup> except that of the innkeeper<sup>7</sup> and the carrier.<sup>8</sup> It would therefore seem that the failure of competition, actual or potential, to safeguard the public interests was the common-law test of a public calling subjecting it to public control.

In determining what constitutes a public use legislation, as has been shown, cannot be depended upon.<sup>9</sup> The presence or absence of exclusive or other legal privileges, eminent domain, use of highways, or governmental financial aid, though helpful, are not conclusive;<sup>10</sup> for if given for other than public purposes the grant is void.<sup>11</sup> Precedents are of little avail, for what is a public use to-day may not be to-morrow.<sup>12</sup> That it is one's main undertaking or only incidental thereto is no criterion.<sup>13</sup> The number of consumers to whom the service is rendered is immaterial, there may be one or there may be many.<sup>14</sup> We must revert to the common-law standard, which is invariable, though the results attained may differ owing to modern developments and change of circumstances.<sup>15</sup> In applying the common-law standard to determine whether in any particular undertaking competition or substantial monopoly is the normal situation, two elements must be considered — that of monopoly and great public interest.<sup>16</sup> Limitations of source of supply,<sup>17</sup> limitations of time,<sup>18</sup> scarcity of sites,<sup>19</sup> and area of distribution<sup>20</sup> give one a natural monopoly; the enormous investments sunk in one place,<sup>21</sup>

<sup>6</sup> 17 HARV. L. REV. 158. But see 28 HARV. L. REV. 135, 141.

<sup>7</sup> 1 WYMAN, § 27.

<sup>8</sup> *Thompson v. Lacy*, 3 B. & Ald. 283, 286 (1820).

<sup>9</sup> *Bretherton v. Wood*, 3 Brod. & Bing. 54, 62 (1821). See 11 HARV. L. REV. 158.

<sup>10</sup> See note 2, *supra*.

<sup>11</sup> *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, 36 Sup. Ct. Rep. 583 (1916); *State ex rel. Wood v. Consumers Gas Co.*, 157 Ind. 345, 61 N. E. 674 (1901); *Munn v. Illinois*, *supra*; *Polk v. Coffin*, 9 Cal. 56 (1858). See *State ex rel. M. O. Danciger & Co. v. Public Service Commission*, *supra*.

<sup>12</sup> 17 HARV. L. REV. 217 and 222.

<sup>13</sup> The doctor, Y. B. 19 HEN. VI, 49, pl. 5 (1441), or the smith, *Anon.*, Keilway, 50, pl. 4 (1450), could not at present be called public utilities. *Hurley v. Eddingfield*, 156 Ind. 416, 59 N. E. 1058 (1901).

<sup>14</sup> *Hahl v. Laux*, 93 S. W. 1080, 42 Tex. Civ. App. 182 (1906); *Gordon v. Hutchinson*, 1 W. & S. 285 (1841).

<sup>15</sup> *Bridal Veil Lumbering Co. v. Johnson*, 30 Ore. 205, 46 Pac. 790 (1896).

<sup>16</sup> It is no longer required that the innkeeper provide for the traveler's horse.

<sup>17</sup> 17 HARV. L. REV. 221.

<sup>18</sup> Natural-gas fields or the supply of water are limited by nature.

<sup>19</sup> The limitation of time is the big factor in subjecting the innkeeper to public control. The immediate needs of the traveler prevent choice and bargain.

<sup>20</sup> Favorable locations are big factors in business, and their scarcity prevents effective competition in that locality. *Barrington v. The Commercial Dock Co.*, 15 Wash. 170, 45 Pac. 748 (1896); *Munn v. Illinois*, *supra*; *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682 (1889).

<sup>21</sup> Gas and electricity are distributed by means of pipes and wires laid in the public highways, for which permission from the local authorities must be had. This makes competition with the established company improbable if not impossible, while candles or coal can be shipped from any factory or mine to any market, thus preserving competition.

<sup>22</sup> The enormous sums required to build an electric plant or railroad is a deterrent to others to duplicate such in light of the risk so incurred.

the cheapness and efficiency of large scale production, the lack of an adequate substitute<sup>22</sup> create a virtual monopoly,<sup>23</sup> and where any or all of these monopolistic elements are present to a substantial degree, competition as a practical matter is superseded by the normal situation of substantial monopoly. Couple to these elements of monopoly the great public interest in the business undertaken, and the need of governmental control to prevent the exploitation of the public for private gain is apparent. "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large."<sup>24</sup>

The decisions of Public Service Commissions as to what constitutes a public use in those businesses admitting of both a public or private calling have been almost unanimously *contra* to the decisions of the courts.<sup>25</sup> The decisions of the commissions show a belief that the declarations of the legislature,<sup>26</sup> the number of consumers,<sup>27</sup> or the mere profession of a public use<sup>28</sup> are conclusive, without inquiring whether such use has in fact become affected with a public interest. Thus where the respondent was held to be a public utility on the grounds that he was conducting a business declared by statute to be subject to the jurisdiction of the commission,<sup>29</sup> the court, in the recent case of *State ex rel. M. O. Danciger & Co. v. The Public Service Commission*,<sup>30</sup> after setting forth the statute defining an electric plant, said: "While the definitions quoted *supra* express therein no word of public use, or necessity that the sale of electricity be to the public, it is apparent that the words 'for public use' are to be understood and to be read therein." The court proceeded to show that the respondent had not in the use of its property affected it with a public interest, that the undertaking was not therefore a public utility, and so overruled the decision of the commission.

That there should be a conflict between the decisions of the Public Service Commissions and the courts is undesirable. The decisions of the commissions may be due to the radical tendencies present in all new fields, or they may be due to the fact that temporary jurisdiction is at

<sup>22</sup> He who burns candles is obviously at a greater disadvantage than his neighbor who is supplied with gas from the local company.

<sup>23</sup> 17 HARV. L. REV. 227. See *People v. Budd*, *supra*, where the court speaks of "practical" monopoly.

<sup>24</sup> *Munn v. Illinois*, *supra*.

<sup>25</sup> *State ex rel. Public Service Commission v. Spokane & Inland Empire Ry. Co.*, 89 Wash. 599, 154 Pac. 1110 (1916); *Del Mar Water, Light & Power Co. v. Eshleman*, 167 Cal. 666, 140 Pac. 591, 948 (1914); *Cawker v. Meyer*, 147 Wis. 320, 133 N. W. 157 (1911); *State Public Utilities Commission ex rel. Evansville Telephone Co. v. Okaw Valley Telephone Co.*, 282 Ill. 336, 118 N. E. 760 (1918); *De Pauw University v. Public Service Commission*, 247 Fed. (Ore.) 183 (1917); *Brown v. Gerald*, 100 Me. 351, 61 Atl. 785 (1905); *Minnesota Canal & Power Co. v. Koochiching Co.*, 97 Minn. 429, 107 N. W. 405 (1906); *Associated Pipe Line Co. v. Railroad Commission*, *supra*.

<sup>26</sup> *Associated Pipe Line Co. v. Railroad Commission*, *supra*; *Cawker v. Meyer*, *supra*. In the latter case it was contended by the Public Service Commission that anyone supplying light, heat, or power to another for compensation was by statute subject to the jurisdiction of the commission. See *Munn v. Illinois*, *supra*: "It may not be made so by the Constitution of Illinois or this statute, but it is by the facts."

<sup>27</sup> That the number of consumers is immaterial, see note 14, *supra*.

<sup>28</sup> 1 WYMAN, § 200.

<sup>29</sup> Vol. 4, Mo. P. S. C. R. 650.

<sup>30</sup> 205 S. W. 36 (Mo.) (1918).

least lost to the commission should a use be declared private, while if held public the aggrieved party has an appeal to the courts.<sup>31</sup> But it is submitted that the real difficulty is the failure on the part of the commissions to comprehend the basic principles underlying governmental control of businesses and the failure to appreciate and respect constitutional limitations.

## RECENT CASES

AGENCY — SCOPE OF EMPLOYMENT — TEST. — It was the duty of the defendant's automobile driver to take a certain infirm employee of the defendant home each evening from work. One evening on arriving home this employee directed the driver to take his wife's dressmaker to her home which was in the direction of but far beyond the garage. On this mission, and before reaching the garage, and on the route that the driver would have taken in the course of his employment in driving the car to the garage, the car ran into and injured the plaintiff who was using due care. *Held*, the defendant is not liable. *Clawson v. Pierce Arrow Motor Car Co.*, 170 N. Y. Supp. 310 (App. Div.).

The principal case raises the question of whether the servant was within the scope of his employment when the injury occurred in doing, from the objective point of view, the very act authorized, and when the servant was innocent of any determination to disobey the master. The exact facts of the principal case are novel, but in a similar case the subjective test was held decisive. *Thompson v. Aultman and Taylor*, 96 Kans. 259, 150 Pac. 587. This view accords with the principles enunciated by leading cases which consider the test to be whether the servant was merely deviating or on an independent journey. *Joel v. Morison*, 6 C. & P. 501; *Mitchell v. Crassweller*, 13 C. B. 237. This in effect makes the test whether what the servant was doing was merely a poor or roundabout way of doing the master's work or no way at all. See *Limpus v. London General Omnibus Co.*, 1 H. & C. 526, 542-43. To determine this, modern cases have considered along with the objective test the intent of the servant. *Fleischer v. Durgan*, 207 Mass. 435, 93 N. E. 801; *Provo v. Conrad*, 130 Minn. 412, 153 N. W. 753; *Colewell v. Aetna Bottle & Stopper Co.*, 33 R. I. 531, 82 Atl. 388; *Healey v. Cockrill*, 202 S. W. 229 (Ark.); *Dockweiler v. American Piano Co.*, 94 Misc. Rep. 712, 160 N. Y. Supp. 270; *Jones v. Strickland*, 77 So. 562 (Ala.); *Trombley v. Stevens-Duryea Co.*, 206 Mass. 516, 92 N. E. 764; *Nelson Business College Co. v. Lloyd*, 60 Ohio St. 448, 54 N. E. 471; *Davies v. Anglo-American Tire Co.*, 145 N. Y. Supp. 341. The principal case is interesting in that it decides that the whole journey from the time of taking the dressmaker in the car is independent and not a roundabout way of performing the master's work, although objectively there had been at the time of the accident not even a deviation.

CONFLICT OF LAWS — ENFORCEMENT OF FOREIGN STATUTES — PENAL NATURE OF DEATH STATUTE. — For injuries resulting in death a Massachusetts statute gave damages of \$500 to \$10,000, depending upon "the degree of culpability" of the person causing the same. (R. L. c. 171, § 2, as amended by L. 1907, c. 375). The administrator of the deceased sues in New York under this statute. *Held*, he can recover. *Loucks v. Standard Oil Co. of N. Y.*, 120 N. W. 198 (N. Y.).

Suits for torts committed in one state may be brought in another unless public policy forbids. See 31 HARV. L. REV. 1161. But penal statutes will not be so enforced. *The Antelope*, 10 Wheat. (U. S.) 66, 123. In the principal

<sup>31</sup> See *Salt Lake City v. Utah Light & Traction Co.*, 173 Pac. 556 (Utah) (1918).

case a recovery without showing special injury, a minimum lump sum, and increased damages dependent upon culpability look toward a penalty. But courts divide as to whether the statute is penal within the meaning of private international law. Some confine penal to the strictly criminal aspect or to where its characteristics, punishment, etc., predominate. *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. Rep. 224; *Strait v. Yazoo, etc. R. Co.*, 209 Fed. 157, 126 C. C. A. 105; *Hill v. Boston, etc. R. Co.*, 77 N. H. 151, 89 Atl. 482; *Malloy v. Amer. Hide & Leather Co.*, 148 Fed. 482; *Knight v. Ry. Co.*, 108 Pa. 250; *Louisville, etc. R. Co. v. McCaskell*, 98 Miss. 20, 53 So. 348; *Gullege Bros. Lumber Co. v. Wenatchee Lane Co.*, 122 Minn. 266, 142 N. W. 305; *Chesapeake, etc. R. Co. v. Amer. Exch. Bank*, 92 Va. 495, 23 S. E. 935; *Whitlow v. Nashville R. Co.*, 114 Tenn. 344, 84 S. W. 618; *Boyce v. Wabash R. Co.*, 63 Ia. 70, 18 N. W. 673; *San Louis Obispo v. Hendricks*, 71 Cal. 242, 11 Pac. 682. Others construe any statute penal which is not predominately compensatory. *Christilly v. Warner*, 87 Conn. 461, 88 Atl. 711; *Adams v. Fitchburg R. R. Co.*, 67 Vt. 76, 30 Atl. 687; *Raisor v. V. C. & A. Ry. Co.*, 215 Ill. 47, 74 N. E. 69; *Dale v. Atchison, etc. R. Co.*, 57 Kans. 601, 47 Pac. 521; but see *Battese v. Union Pac. R. Co.*, 170 Pac. 811; *O'Reilly v. N. Y. & N. E. R. Co.*, 16 R. I. 388, 17 Atl. 906; but see *Gardner v. N. Y. & N. E. Ry. Co.*, 17 R. I. 790, 24 Atl. 831; *Plymouth First Nat. Bank v. Price*, 33 Md. 487. The act in question has been variously construed. See cases cited *supra*. It is submitted that the principal reasons sustaining the latter view are formal rather than substantial. That the only action for death at common law was criminal has made difficult the recognition of the above recovery as a tort action. See 21 HARV. L. REV. 383, 386; but despite penal earmarks its essence is tort compensation as the historical analysis by the court shows. *Loucks v. Standard Oil Co. of N. Y.*, *supra*, 199. The contention that it is against the public policy of the trial state more often appears as an excuse than a reason. It has been argued that the trial state is bound by the highest decision of the enacting state; but this is not so, since the matter is purely one of the law of the forum. See *Huntington v. Attrill*, *supra*, 669, 683. See also WESTLAKE, PRIVATE INTERNATIONAL LAW, 5 ed., 318 b. Note also that while some state courts have assumed that Massachusetts has settled that this is a penal statute, the Massachusetts court leaves the matter open. *Booth Mills v. B. & R. R. Co.*, 218 Mass. 582, 592, 106 N. E. 680.

CONSTITUTIONAL LAW — DUE PROCESS — PROHIBITION OF MAKING HANDING OVER TIPS A CONDITION OF EMPLOYMENT. — A state statute made it a misdemeanor for an employer to require his employee to hand over tips in consideration, or as a condition, of employment. Held, that the statute was in violation of the due process clause of the Fourteenth Amendment. *Ex parte Farb*, 174 Pac. 320 (Cal.).

As under the present statute the employer and employee cannot contract freely, it must be justified under the police power. *Bailey v. Alabama*, 219 U. S. 219, 31 Sup. Ct. Rep. 145. See 28 HARV. L. REV. 496. To keep the public in ignorance, when knowledge would undoubtedly cause tipping to cease, is fraud, and as such subject to regulation or prohibition. *Plumbley v. Mass.*, 155 U. S. 461, 15 Sup. Ct. Rep. 154; *Powell v. Penn.*, 127 U. S. 678; *Burdick v. People*, 149 Ill. 600, 36 N. E. 948. See 31 HARV. L. REV. 490. Such legislation, if it tends to the result desired, will be overthrown, only when utterly unreasonable. *Otis v. Parker*, 187 U. S. 606, 23 Sup. Ct. Rep. 168; *McLean v. Arkansas*, 211 U. S. 539, 547, 29 Sup. Ct. Rep. 206, 208; *Rast v. Denman*, 240 U. S. 342, 357, 36 Sup. Ct. Rep. 370, 374. However, the principal case presents a new criterion, namely, reasonable regulation, where practicable, is the only method by which incidental evils of legitimate business may be overcome. Under this rule it seems that a different result would have been reached in the following cases. *Otis v. Parker*, *supra*; *Powell v. Penn.*,

*supra*. Salutory legislation would therefore be defeated in many cases, and so it is submitted that possible regulation should only be a circumstance in determining whether the legislature acted reasonably.

CONTEMPT OF COURT — CONSTRUCTIVE CONTEMPT — BRINGING PRESSURE TO BEAR ON ATTORNEY. — In a suit for divorce, the plaintiff's father wrote a letter to the defendant urging him to withdraw his defense, and he personally threatened to bring political pressure to bear on defendant's attorney provided he did not withdraw from the case. *Held*, that these acts constituted contempt of court. *In re Bowers*, 104 Atl. 196 (N. J.).

The commonest kind of contempt occurring outside the court room is that which impedes the court in reaching a result in accord with the rules and principles of law. Thus publication of proceedings may so arouse the community, including witnesses, counsel, and jurors, as to make calm judgment difficult. *Globe Newspaper Co. v. Commonwealth*, 188 Mass. 449, 74 N. E. 682. See 28 HARV. L. REV. 605. This may be the effect, even though the matter published be true; hence truth is no defense. *Hughes v. Territory*, 10 Ariz. 119, 85 Pac. 1058; *People v. News-Times Pub. Co.*, 35 Colo. 253, 84 Pac. 912. But truth may be considered in mitigation of punishment. *Globe Newspaper Co. v. Commonwealth*, *supra*. Within the same principle comes arrest of witness. *Smith v. Jones*, 76 Me. 138. Also writing letters to influence witness. *Welby v. Still*, 66 L. T. Rep. (N. S.) 523. Assault on a witness who has testified would seem to be contempt, since general security of witnesses, after as well as during the trial, is essential to freedom in testifying. *Brannon v. Commonwealth*, 262 Ky. 350, 172 S. W. 703. So concealing or tampering with evidence. *Commonwealth v. Braynard*, Thach. Crim. Cas. (Mass.) 146. The principal case is a new and novel example of this sort of contempt of court. To force an attorney to withdraw from a cause would deprive the court as well as the party of the services of an officer, and would obviously tend to an incomplete presentation of the case for one of the parties. This would obstruct the court in applying accurately its rules and principles. For a general discussion of the subject, see Beale, "Contempt of Court, Criminal and Civil," 21 HARV. L. REV. 161.

DEEDS — CONSTRUCTION AND OPERATION — LAKE AS A BOUNDARY. — A conveyed land to B. The deed described a boundary as "along said road and lake." The road bordered on the lake, which was not navigable. *Held*, the deed conveys title to the land under the lake to the center thereof. *Land & Lake Association v. Conklin*, 170 N. Y. Supp. 427 (App. Div.).

If the fee in a highway is in the abutting owners subject to a public easement, a conveyance describing land as "along said road" *prima facie* conveys to the center thereof. *Peck v. Denniston*, 121 Mass. 17; *Columbus Ry. Co. v. Witherow*, 82 Ala. 190, 3 So. 23. Cf. *Thomas v. Hunt*, 134 Mo. 392, 35 S. W. 581; *In re Ladue*, 118 N. Y. 213, 23 N. E. 465. A deed of land "along a lake" conveys, *prima facie*, the bed thereof as far as the grantor owns. *Gouverneur v. National Ice Co.*, 134 N. Y. 355, 31 N. E. 865; *Lembeck v. Nye*, 47 Ohio St. 336. Cf. *Brophy v. Richeson*, 137 Ind. 114, 36 N. E. 424. Literal construction, therefore, of a deed "along said road and lake" is impossible. But construing it against the grantor, as is the rule, the deed would be interpreted as if it read "along said lake." *Lake Erie & W. R. Co. v. Whitham*, 155 Ill. 514, 40 N. E. 1014. Thus the question is raised as to how far titles of owners of land bordering on lakes extend. In some jurisdictions the state holds the title to lake beds so that the public may enjoy the boating and fishing. *Wright v. Council Bluffs*, 130 Iowa, 274, 104 N. W. 492; *Dolbeer v. Suncook, etc. Co.*, 72 N. H. 562, 58 Atl. 504. Cf. *Paine v. Woods*, 108 Mass. 160. In some, riparian owners hold title to the beds. *Glasscock v. National Box Co.*, 104 Ark. 154, 148 S. W.

248; *Fuller v. Bils*, 161 Mich. 589, 126 N. W. 712; *Cobb v. Davenport*, 32 N. J. L. 369; *Hinckley v. Peay*, 22 Utah, 21, 60 Pac. 1012. Cf. *Gouverneur v. National Ice Co.*, *supra*, with *Geneva v. Henson*, 140 App. Div. 49, 124 N. Y. Supp. 588. Other states reserve title only in the case of non-navigable lakes. *Broward v. Mabry*, 59 Fla. 398, 50 So. 826; *Lamprey v. State*, 52 Minn. 101, 53 N. W. 1139; *Conneaut Lake Ice Co. v. Quigley*, 225 Pa. 605, 74 Atl. 648. Cf. *Webster v. Harris*, 111 Tenn. 668, 69 S. W. 782. The rights of the public would be sufficiently protected if riparian owners held in fee lake beds subject to a public easement to the use of the waters. Such is the rule in Michigan. *People v. Horling*, 137 Mich. 406, 100 N. W. 691.

**DOMICILE — RIGHT OF AN INFANT ORPHAN TO CHOOSE.** — The plaintiff was born in Massachusetts and resided there with his parents. When eight years old he was hurt by the defendant railroad and suit was started in a Massachusetts court. Then his parents died, and at the age of nineteen he moved to Maine to live with an aunt. At the age of twenty the plaintiff sued the defendant, a Massachusetts corporation in a federal court on the ground of diversity of citizenship. *Held*, the plaintiff was domiciled in Maine. *Bjornquist v. Boston & A. R. Co.*, 250 Fed. 929.

The domicile of an infant orphan is the domicile of the last surviving parent and cannot ordinarily be changed by any act of the infant. *Ex parte Dawson*, 3 Bradf. (N. Y.) 130; *In re Henning*, 128 Cal. 214, 60 Pac. 762; *In re Benton*, 92 Ia. 202, 60 N. W. 614; *Vennard's Succession*, 44 La. Ann. 1076, 11 So. 705. The reason is, "a person who is under the power and authority of another possesses no right to choose a domicile." See STORY, CONFLICT OF LAWS, 41. And so grandparents — but no others — who are regarded as natural parents with control of an infant orphan, have been allowed to change the domicile of the infant. *In re Benton*, 92 Ia. 202, 60 N. W. 614; *Kirkland v. Whateley*, 86 Mass. 462; *Mintzer's Estate*, 2 Pa. Dist. R. 584. There is not, however, this identity of domicile where the guardian is not a natural but an appointed one, since he has no right to change the domicile of the orphan outside the state of appointment. *Daniel v. Hill*, 52 Ala. 430; *Lamar v. Micou*, 112 U. S. 452. Where an infant has been emancipated by his parents he has been held able to change his own domicile. *Russell v. State*, 62 Neb. 512, 87 N. W. 344. See 19 HARV. L. REV. 215. To prove emancipation it is necessary only to show that by circumstances the infant has been freed from his father's control. *Sword v. Keith*, 31 Mich. 247; *Jacobs v. Jacobs*, 130 Ia. 10, 104 N. W. 489; *Bristol v. Chicago & N. W. R. R.*, 128 Ia. 479, 104 N. W. 487; *West Gardiner v. Manchester*, 72 Me. 509. An infant orphan who has reached an age of discretion and is without grandparents or guardian should be regarded as emancipated by circumstances, since he is under the control of no one. Being emancipated, he is then capable of choosing his own domicile and the principal case is clearly right.

**ELECTIONS — NOTICE TO NONRESIDENT VOTERS — RIGHT TO VOTE.** — The Constitution of New Jersey allows voters engaged in military service outside the election district to vote. Pursuant to this authority, a statute provides the method by which such voters shall be notified of impending elections. ACT FEB. 28, 1918, §§ 4-6, 9, P. L. 437. A special election on the liquor question was held in which these statutory requirements as to notice were not complied with, and the number of voters thereby disfranchised was sufficient to have changed the result. *Held*, that the election be set aside. *In re Holman*, 104 Atl. 212 (N. J.).

Where the time and place of an election are designated by law, statutory provisions as to the notice which must be given voters are construed to be merely directory. *Commonwealth v. Kelly*, 255 Pa. 475, 100 Atl. 272; *Kleist*

v. *Donald*, 164 Wis. 545, 160 N. W. 1067. See 17 HARV. L. REV. 191. But where the time or place are not prescribed by law, so that notice is essential for that purpose, such provisions are generally regarded as mandatory. *State v. Staley*, 90 Kan. 624, 135 Pac. 602; *Staples v. Astoria*, 81 Or. 99, 158 Pac. 518. See McCrARY, ELECTIONS, 4 ed., §§ 182-185. In either case, however, the better view is that failure to give notice will not render the election void unless the number of voters deprived of a chance to vote was sufficiently large to have changed the result. *Lyon v. Smith*, Cl. & H. 101; *State v. McFarland*, 98 Neb. 854, 154 N. W. 719; *Hill v. Skinner*, 169 N. C. 405, 86 S. E. 351. Since, in the principal case, the number of absent voters in the military service who received no notice of the special election was sufficient to have changed the result, the election was properly set aside. In a *dictum*, however, the court says that the right to vote inheres in citizenship and is guaranteed by the Constitution. But participation in the suffrage is not a right; it is a privilege, the exercise of which is dependent upon the will of the state. *Anderson v. Baker*, 23 Md. 531; *People v. Barber*, 48 Hun (N. Y.) 198. See COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW, 2 ed., 259. Accordingly, the suffrage is not within the privileges and immunities guaranteed by the Constitution. *Minor v. Happersett*, 21 Wall. 162; *Gongar v. Timberlake*, 148 Ind. 38, 46 N. E. 339. See 2 STORY, CONSTITUTION, 5 ed., § 1932.

EQUITY — NEGATIVE COVENANTS — UNIQUE PERSONAL SERVICE — DOCTRINE OF LUMLEY VERSUS WAGNER. — The defendant entered into an exclusive contract to serve as an editorial writer, and covenanted not to write for any publication in competition with the plaintiff during the term. Before expiration of the contract he left the plaintiff's employ and began to write for a competitor. It appeared that plaintiff had spent over \$40,000 in exploiting the defendant and that he occupied a unique position among writers upon the war. *Held*, injunction allowed. *Tribune Association v. Simonds*, 104 Atl. 386 (N. J.).

The case is chiefly interesting as showing the settled adherence of American courts to the doctrine of *Lumley v. Wagner*, in cases of unique service or unique servants. *Lumley v. Wagner*, 1 De Gex, M. & G. 604. But the large expenditure made by plaintiff in exploiting defendant for the purpose of rendering his services as a writer more valuable suggests a further question. If the master has given the servant an exceptional value for the purposes of the service in reliance upon the contract, would not the grave injury to him involved in the loss of this expenditure in case of breach, and the accrual of the benefit thereof to a competitor, suffice to overcome the practical difficulties involved in enforcement of negative covenants in such cases and justify an injunction although many other servants of equal intrinsic capacity might be available? After all the significance of unique service, or unique qualifications in the servant, lies in the grave hardship to the plaintiff involved in such cases. Other exceptional cases of grave hardship should not be treated on a different basis.

FEDERAL COURTS — RELATIONS OF STATE AND FEDERAL COURTS — EFFECT OF STATE STATUTE GIVING COURTS OF GENERAL CIVIL JURISDICTION PROBATE POWERS. — A nonresident filed a *caveat* to proceedings for the probate of a will in the Georgia courts. An application by him to remove the case to the United States courts was denied, and in accordance with a state statute allowing appeals from any decision of the ordinary, the case was taken to the Superior Court without an adjudication on the will. Subsequently, the record in the case was brought into the federal court under the rule allowing a petition for removal to be filed in spite of an adverse decision by the state court. *Held*, that the case be remanded to the state court. *Meadow v. Nash*, 250 Fed. 911.



Originally, in the United States, probate jurisdiction was of a special character, exclusively vested in independent courts, and removal to the federal courts was not available. *Broderick's Will*, 21 Wall. (U. S.) 503. A removal of a will contest is, however, permitted when the state courts of general civil jurisdiction, as distinguished from special appellate courts of probate, are authorized by statute to determine the validity of a will; provided also that the will has been probated by lower courts and is attacked as a muniment of title. *Gaines v. Fuentes*, 92 U. S. 10; *Brodhead v. Shoemaker*, 44 Fed. 518. See *Ellis v. Davis*, 109 U. S. 485, 496, 3 Sup. Ct. Rep. 327, 334. But a bill to contest a will and to enjoin a distribution under it is not removable. *Farrel v. O'Brien*, 199 U. S. 89, 25 Sup. Ct. Rep. 727. A distinction is drawn between an independent controversy *inter partes* and a proceeding ancillary to the original probate. Yet the proof of the will is the same in both cases; so that the distinction hardly seems tenable. In the principal case, the only issue on appeal may have been the one of removal and not the probate of the will, for the lower court had not passed on the will. If the state court did have probate jurisdiction, probate by the lower court is immaterial, for the appeal is an investigation *de novo* at any rate. See 1914 PARK'S ANN. CODE GA., § 5014.

**JUDGMENTS — FOREIGN DIVORCE DECREE — COLLATERAL ATTACK FOR FRAUD.** — A husband sued for divorce in Vermont. He offered to show that his wife's divorce from her first husband was obtained in New York through false testimony as to her age. *Held*, the foreign decree cannot be attacked collaterally. *Deyette v. Deyette*, 104 Atl. 232 (Vt.).

If a court obtains jurisdiction through fraud of a party, its judgment is merely voidable, impeachable by direct proceedings. *Ex parte Moyer*, 12 Idaho, 250, 85 Pac. 897; *Mahon v. Justice*, 127 U. S. 700, 8 Sup. Ct. Rep. 1204. See 20 HARV. L. REV. 239. But if the court is defrauded into thinking it has jurisdiction when there is none in fact, the judgment is assailable collaterally. *Dunham v. Dunham*, 162 Ill. 589, 44 N. E. 841; *Magowan v. Magowan*, 57 N. J. Eq. 322, 42 Atl. 330; *Plummer v. Plummer*, 37 Miss. 185. If the fraud merely goes to the evidence, there can be no collateral attack. *Field v. Sanderson*, 33 Mo. 542; *Christmas v. Russell*, 5 Wall. (U. S.) 290; *Nicholson v. Nicholson*, 113 Ind. 131, 15 N. E. 223. But see *contra*, *Dumont v. Dumont*, 45 Atl. 107 (N. J.). Even a direct attack will generally not be allowed in such a case; otherwise litigation would become endless. *Greene v. Greene*, 2 Gray (Mass.) 361; *United States v. Throckmorton*, 98 U. S. 61; *Parish v. Parish*, 9 Ohio St. 534. But if the fraud is extrinsic, as in preventing the unsuccessful party from fully presenting his case, the judgment may be attacked collaterally. *Daniels v. Benedict*, 50 Fed. 347. A stranger, however, may in any case of fraud impeach the judgment collaterally, because it is his only means of availing himself of the fraud. *De Armond v. Adams*, 25 Ind. 455; *Sidensparker v. Sidensparker*, 52 Me. 481; *Ogle v. Baker*, 137 Pa. St. 378, 20 Atl. 998. See *Greene v. Greene*, 2 Gray (Mass.) 361, 366. But the stranger must be prejudiced with regard to some pre-existing right. *Ruger v. Heckel*, 85 N. Y. 483. See also FREEMAN, JUDGMENTS, § 335. In the principal case the second husband had no such right. Some courts will never disturb a divorce decree even in case of the grossest fraud, because of the extensive collateral effect on third parties. *Parish v. Parish*, *supra*; *DeGraw v. DeGraw*, 7 Mo. App. 121. Generally, however, divorce decrees are treated like any other. *Daniels v. Benedict*, *supra*; *Johnson v. Coleman*, 23 Wis. 452. For a discussion of the distinction between collateral and direct attack, see 23 HARV. L. REV. 67.

**MASTER AND SERVANT — WORKMEN'S COMPENSATION ACTS — RECOVERY FOR NON-OCCUPATIONAL DISEASES.** — A common laborer was directed in the course of his employment to do some painting on a building. The cold weather

made the paint very difficult of application, and he was required, at intervals, to heat it in a closed unventilated room provided for the purpose. After working for two days on this employment, he contracted a severe case of lead poisoning, from the effects of which he died shortly thereafter. *Held*, that this was an injury by accident and not an occupational disease. *Industrial Commission of Ohio v. Roth*, 120 N. E. 172 (Ohio).

The courts have been very cautious in awarding compensation for diseases, other than occupational, because the danger of fraudulently attributing every illness to the industry is considerable. The strict compliance, therefore, with the provisions present in most acts, that the injury be traceable to accidental origin, and that the date of such be definitely fixed, has been required. *Brintons, Ltd. v. Turvey*, [1905] A. C. 230; *Glasgow Coal Co. v. Welch*, [1916] 2 A. C. 1; *Vennen v. New Dells Lumber Co.*, 161 Wis. 370, 154 N. W. 640. The English courts, however, in an important case seem to have imposed these requirements too stringently, in demanding that the injury result from a single fortuitous event, and to them it is insufficient to show that it must have been the outcome of one or more of a few occurrences. *Eke v. Hart-Dyke*, [1910] 2 K. B. 677. The facts in the principal case are almost analogous to those in the English case, yet the Ohio court reached the opposite result. The facts in both show that the illness resulted from accidental source and the dates of such were sufficiently fixed and certain. The causal connection in both was obvious and imposition was amply guarded against. It seems, therefore, that the Ohio court, in refusing to construe so strictly, has arrived at a more sound and just result.

**MECHANICS' LIENS — RIGHT OF SUBCONTRACTOR TO LIEN REGARDLESS OF ORIGINAL CONTRACT.** — A statute provided that a subcontractor shall have a lien for labor or material furnished for the erection of a house, such lien being perfected only after notice thereof had been filed within a period of sixty days. It further provided that "the risk of all payments made to the original contractor shall be upon the owner until the expiration of the 60 days hereinbefore specified." *Held*, that the subcontractor's lien does not depend upon the terms of the original contract. *Coates Lumber & Coal Co. v. Klaas*, 168 N. W. 647 (Neb.).

The statute governing in the principal case is of the type which creates in favor of the subcontractor a direct lien, as distinguished from the type of statute which grants a lien derivatively, through the principal contractor's right thereto. See 2 JONES, LIENS, § 1286. The former type of legislation has been frequently assailed on the ground of unconstitutionality, but the courts have declared in its favor in most jurisdictions. Thus, the validity of a statute securing a lien irrespective of the state of accounts between the owner and the principal contractor has been sustained practically in all states. *Ballou v. Black*, 21 Neb. 131, 31 N. W. 673; *Mallory v. La Crosse Abattoir Co.*, 80 Wis. 170, 49 N. W. 1071; *Jones v. Great Southern Fireproof Hotel Co.*, 86 Fed. 370. *Contra*, *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313. And a statute construed to create a lien despite a stipulation against such in the original contract, though meeting with greater opposition, has been sanctioned by the weight of authority. *Norton v. Clark*, 85 Me. 357, 27 Atl. 252; *Miles v. Coultis*, 20 Mont. 47, 49 Pac. 393; *Whittier v. Wilbur*, 48 Cal. 175. *Contra*, *Kelly v. Johnson*, 251 Ill. 135, 95 N. E. 1068; *Waters v. Wolf*, 162 Pa. 153, 29 Atl. 646. It is true that such statutes do somewhat impair the freedom to contract and do create a danger of making the owner liable to double payment, but no undue hardship results by requiring him to regard sufficiently the rights of a third person who has increased the value of his property. Again, the desirability of these statutes is obvious when we consider the encouragement they offer to a class which by its activities aids so materially in promoting the public welfare.

**PLEADING — THEORY OF THE PLEADING.** — The plaintiff in his complaint alleged that he and the defendant had made a contract of partnership, and demanded an accounting. The defendant in his answer denied the contract of partnership but admitted that he had contracted to employ the plaintiff. A referee was appointed and he found that there was no partnership but that there was a contract of employment. The court gave judgment for the plaintiff for breach of contract. *Held*, that since the complaint was framed as a bill in equity, and the judgment was in the nature of a judgment at law, the judgment should be reversed. *Jackson v. Strong*, 222 N. Y. 149.

For a discussion of the principles involved, see NOTES, page 166.

**PUBLIC SERVICE COMPANIES — WHAT CONSTITUTES A PUBLIC USE.** — A brewery generating its own electricity for light, heat, and power contracted to sell its surplus under the name of M. O. Danciger and Company to individuals within a radius of three blocks of the brewery. No use was made of the streets or highways; the consumers furnished their own poles and wires; paid for the construction, though the work was usually done by employees of the brewery. Rates were charged in a few instances on the meter basis, the meters belonging to the consumers, but in most instances the charge was governed by a flat rate. Having discontinued service without prior notice, and on refusal to reinstate service, a proceeding was brought before the Public Service Commission who ordered a reinstatement of the service. On appeal to the court, *held*, appeal sustained. *State ex rel. M. O. Danciger & Co. v. The Public Service Commission*, 205 S. W. 36 (Mo.) (1918).

For a discussion of the principles involved, see NOTES, page 169.

**QUASI-CONTRACTS — RIGHTS ARISING UNDER MISTAKE OF FACT AS TO PRICE.** — A corporation made an agreement with the owner of one-half its capital stock to buy him out on the basis of an inventory. The price was set at \$13,000. It was then found that an item of \$900 had been omitted from the liabilities in the inventory and a consequent overcharge of \$450 to the corporation, which now sues to recover that amount. *Held*, the corporation cannot recover at law. *Borough Paper Co. v. Scher*, 170 N. Y. Supp. 395 (App. Div.).

The court suggests that the corporation should have gone into equity for reformation. The older decisions held that price like quality was not to be regarded as going to the essence of the contract. *Paulison v. Van Inderstine*, 28 N. J. Eq. 306; *Stettheimer v. Killip*, 75 N. Y. 282; *Okill v. Whittaker*, 1 DeG. & Sm. 83; *Segur v. Tingley*, 11 Conn. 134. But in the principal case the inventory was expressly made the basis of the sale and so became itself the subject matter of the contract. And for such cases equity allows rescission. *De Voin v. De Voin*, 76 Wis. 83, 44 N. W. 839. See 23 HARV. L. REV. 609-10, 614. Or equity might force the vendor to return the overcharge and let the sale stand. *Lawrence v. Staigg*, 8 R. I. 256; *Wirsching v. Grand Lodge of Masons*, 67 N. J. Eq. 711, 56 Atl. 713. Then if equity could give relief, an action at law should also lie, since money has been paid under an essential mistake of fact. The authorities, however, are in conflict as the parol evidence rule has been usually held to bar showing the mistake. See WOODWARD, QUASI-CONTRACTS, § 180, and notes; KEENER, QUASI-CONTRACTS, 123, 124. But here there is no difficulty on the parol evidence rule as the inventory was expressly made the basis of the contract price.

**RAILROADS — LICENSE TO USE TRACKS — LIABILITY OF LICENSOR FOR NEGLIGENCE OF LICENSEE.** — Under a statute authorizing railways to make joint running arrangements with any other railway, the defendant railway corporation allowed another railway to run trains over the licensor's tracks to fill a gap in the licensee's system. While using the defendant's tracks, the

licensee's employees negligently damaged the plaintiff. *Held*, that the licensor is liable. *Sorenson v. Chicago, R. I. & P. Ry. Co.*, 168 N. W. 313 (Iowa).

Where there is no statutory authorization, the lessor of a railroad is generally held for the liability of the lessee in operating the road. *Hays v. Railroad*, 20 C. C. A. 52, 74 Fed. 279. If there is such authorization, some courts hold that this carries with it exemption by necessary implication. *Haks v. Cape Girardeau & C. R. Co.*, 126 S. W. 525 (Mo.); *Vadas v. Pittsburg M. & Y. R. Co.*, 203 Pa. 41, 79 Atl. 166. See 20 HARV. L. REV. 334. However, it would seem that mere permission to do acts which otherwise might be illegal does not absolve the lessor by necessary implication. *Clinger's Adm'x v. Chesapeake & O. Ry. Co.*, 33 Ky. Law R. 86, 109 S. W. 315. In the principal case it was a license to use the tracks. In such a case the licensor has, in absence of statutory authorization, been held liable. *Jefferson v. Chicago & N. W. Ry. Co.*, 117 Wis. 549, 94 N. W. 289; *Pennsylvania Co. v. Ellett*, 132 Ill. 654, 24 N. E. 559; *Chicago & E. R. Co. v. Meech*, 163 Ill. 305, 45 N. E. 290. If there is statutory authority some courts might make a distinction between a lease and a license of joint user. See 1 ELLIOTT, RAILROADS, 2 ed., § 477. It is submitted, however, that the principal case rests the lessor's or licensor's liability on its true basis. The franchise has imposed duties upon the railway, the occupier of the premises, to operate its road carefully. The railway may carry them out through lessees or licensees, but it must see to it that no one is injured by any breach of duty or negligent use, unless a statute expressly exempts it from liability. *Braslin v. Somerville Horse R. Co.*, 145 Mass. 64, 13 N. E. 65; *Chicago & Grand Trunk Ry. Co. v. Hart*, 209 Ill. 414; 70 N. E. 654; *Clinger's Adm'x v. Chesapeake & O. Ry. Co.*, *supra*. But see 20 HARV. L. REV. 334. An analogy is found where the occupier of premises is held liable for the negligence of an independent contractor where he is charged with a "non-delegable duty." *Doll & Sons v. Ribetti*, 121 C. C. A. 621, 203 Fed. 593; *Strickland v. Montgomery Lumber Co.*, 171 N. C. 755, 88 S. E. 340; *Covington & Cincinnati Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 55 N. E. 618.

#### RELIGIOUS SOCIETIES — JURISDICTION OF COURTS — PROPERTY RIGHTS. —

The constitution of a religious society provided that in case of a schism those adhering to the doctrines of the Lutheran Synod of Missouri should hold the property. The defendants, being a majority of the society, formed a separate organization affiliated with the Lutheran Synod of Iowa, certain essential doctrines of which are repudiated by the Missouri Synod. On demurrer to these facts the right of the defendants to the church property turned on whether it was necessary for some ecclesiastical authority first to determine the doctrinal question involved. *Held*, that the demurrer be sustained. *Bendewald v. Ley*, 168 N. W. 693 (N. D.).

Although civil courts in this country will not interfere in purely ecclesiastical matters they will take jurisdiction to determine controverted claims to church property. *Hendrickson v. Decow*, 1 N. J. Eq. 577; *Rottman v. Bartling*, 22 Neb. 375, 35 N. W. 126; *Fussell v. Hail*, 233 Ill. 73, 84 N. E. 42. Accordingly, where such controversy arises out of a division in a religious society, civil courts will ascertain which of the rival factions continues the original organization and will award it the property. *Hayes v. Manning*, 263 Mo. 1, 172 S. W. 897; *Mack v. Kime*, 129 Ga. 1, 58 S. E. 184; *Horsman v. Allen*, 129 Cal. 131, 61 Pac. 796. In a congregational society, where majority rule prevails, the church property is usually given to the numerical majority of the members. *Bouldin v. Alexander*, 15 Wall. 131; *Fernsler v. Seibert*, 114 Pa. 196, 6 Atl. 165; *Gipson v. Morris*, 31 Tex. Civ. App. 645, 73 S. W. 85. But if the society belongs to an ecclesiastical system, the decision of the highest church judicatory on doctrinal matters is generally accepted as conclusive by the civil courts. *Watson v. Jones*, 13 Wall. 679; *Presbyterian Church v. Cumberland Church*, 245 Ill. 74,

91 N. E. 761; *Sanders v. Baggerly*, 96 Ark. 117, 131 S. W. 49. *Contra*, *Landrith v. Hudgins*, 121 Tenn. 556, 120 S. W. 783. The principal case is one of the latter class. The complaint clearly alleged a repudiation by the Missouri Synod of certain essential doctrines of the Iowa Synod with which the defendants had become affiliated. Since this fact was admitted by the demurrer it seems that there was no theological question for the court to decide, and that the demurrer was improperly sustained.

**TAXATION — STATE INCOME TAX — VALIDITY OF STATUTE.** — An Oklahoma statute provides for an income tax on residents, and imposes a like tax on incomes earned by nonresidents on property or businesses within the state. A resident of Chicago, who had large oil holdings in Oklahoma, asks for a temporary injunction restraining the collection of the tax. *Held*, that the tax is valid. *Shaffer v. Howard*, 250 Fed. 873 (District Court, E. D. Oklahoma).

For a discussion of this case, see NOTES, page 168.

**TRUSTS — POWERS AND OBLIGATIONS OF TRUSTEES — MANDATORY PROVISIONS AS TO INVESTMENTS.** — The settlor of a trust directed the trustees to invest in railway bonds bearing at least 4 % interest. A loss was occasioned by investments in 4½ % New York City Bonds and 3½ % Liberty Bonds of the first issue. *Held*, trustees liable for loss occasioned by investments in 4½ % New York City Bonds, but not for the loss occasioned by the investment in Liberty Bonds. *In re Loudon's Estate*, 171 N. Y. Supp. 981 (Surrogate Ct.).

As a general principle trustees are bound to do whatever the creator of a trust directs them to do, unless the beneficiaries, being *sui juris*, excuse them from so doing. *Denike v. Harris*, 84 N. Y. 89; *Womack v. Austin*, 1 S. C. 421; *Handley's Estate*, 253 Pa. St. 119, 97 Atl. 1040; *Robinson v. Robinson*, 11 Beav. 371. But where it is impossible to carry out directions, or where the interests of the beneficiaries absolutely require a change, mandatory provisions may be disregarded. *McIntire v. Zanesville*, 17 Ohio St. 352. See *Citizens National Bank v. Jefferson*, 88 Ky. 651, 11 S. W. 767. That there was nothing in the principal case to justify a disregard of mandatory provisions is shown by the court in holding the trustees liable for the investment in 4½ % New York City Bonds. It is conceivable that a situation may arise where investments in war bonds would be made by a prudent man to protect his other property, in which case it is submitted, a like investment by trustees in disregard of directions, would be justified. But again no such crisis presented itself in the principal case. In not holding the trustees liable for the loss occasioned by the investment in 3½ % Liberty Bonds, the court sanctioned a patriotic motive of the trustees, at the expense of the beneficiary and without his consent.

**UNFAIR COMPETITION — BY MEANS UNLAWFUL AS AGAINST THIRD PERSONS — UNNECESSARY IMITATION OF WARES HAVING SECONDARY MEANING — BURDEN OF PROOF.** — The defendant was selling Shredded Wheat Biscuits that were exact imitations of the plaintiff's product. The biscuits had acquired a secondary meaning, in that the consumer considered them to be produced by a single maker, to whose manufacture was ascribed part of the value. Since, in several places, the biscuits were sold unpacked with no distinguishing marks, it was claimed the public was being misled. But a change in the form, size, or color of the products was impracticable. It was doubtful whether some letter or symbol could be impressed on the biscuit or whether a band or tag could be attached which would designate the manufacturer without involving too great expense. *Held*, that the defendant be enjoined, but if in six months he shows that all possible distinguishing marks are impracticable, the injunction should be dissolved. *Shredded Wheat Co. v. Humphrey Cornell Co.*, 250 Fed. 960 (C. C. A.).

The cases on the doctrine of secondary meaning seem to divide themselves into two classes, depending on whether or not the imitated features are functional, *i. e.*, essential to the commercial success of the article. When the distinctive characteristics are non-functional, the defendant's conduct is palpably unfair, and marked changes are ordered. *Yale and Towne Mfg. Co. v. Alder*, 154 Fed. 37, 83 C. C. A. 149; *Hiram Walker v. Grubman*, 222 Fed. 478. Even the appearance of the defendant's name is insufficient, unless it is clear no confusion will result. *Fox v. Glynn*, 191 Mass. 344, 78 N. E. 89; *Enterprise Mfg. Co. v. Landers*, 131 Fed. 240, 65 C. C. A. 587. But when all the elements are functional, usually no relief is given. *Globe-Wernicke Co. v. Fred Macey Co.*, 119 Fed. 696, 56 C. C. A. 304; *Marvel Co. v. Pearl*, 133 Fed. 160, 66 C. C. A. 226; *Daniel v. Electric Hose and Rubber Co.*, 231 Fed. 827; *Edward Felker Mop Co. v. U. S. Mop Co.*, 191 Fed. 613, 112 C. C. A. 176; *Diamond Match Co. v. Saginaw Match Co.*, 142 Fed. 727, 74 C. C. A. 59. However, a clearly inexpensive noticeable alteration is ordered. *Flagg Mfg. Co. v. Hohway*, 178 Mass. 85, 59 N. E. 667; *Edison Mfg. Co. v. Gladstone*, 58 Atl. 391 (N. J.). In the principal case, all the characteristics are apparently functional, and it would seem that in alleging unfair competition the plaintiff should have had the burden of showing a commercially practicable means of distinguishing the products. The better analysis, however, sanctioned by the result in the principal case, is that the defendant is interfering with the plaintiff's interest in a valuable good will, and the justification that the injury is due to fair competition is an affirmative defense to be proven by the defendant who sets it up.

**VENDOR AND PURCHASER — IMPLIED WARRANTY IN SALE OF CATTLE — NEGLIGENCE — DUTY TO DISCLOSE CONTAGIOUS DISEASE.** — Defendant sold a calf to the plaintiff, who, although not a veterinary, was known to be skilled in diagnosing and treating diseases of cattle. Defendant knew the calf had ring-worm, a contagious disease common in the locality, but did not disclose the fact. Plaintiff did not buy the calf until he had had it on trial, and he knew the calf was not sound, although he was unaware of the nature of its ailment. The disease was communicated to other cattle belonging to plaintiff and to himself and his son. By statute it was forbidden to sell animals afflicted with contagious diseases. (ANIMAL CONTAGIOUS DISEASES ACT, REV. ST. CAN., 1906, c. 75, §§ 35-38.) *Held*, that there was no implied warranty, and that the statute gave plaintiff no right of action. *O'Mealey v. Swartz*, [1918] 3 WEST. WKLY. REP. 98 (Saskatchewan).

The holding that there was no implied warranty seems justified, since the vendee apparently relied on his own judgment. *Hight v. Bacon*, 126 Mass. 10; *Waeber v. Talbot*, 167 N. Y. 48, 60 N. E. 288. See *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 116, and 25 HARV. L. REV. 75. On the question of negligence, however, the court's conclusions cannot be accepted. A vendor, by the reasonable view, should use due care not to sell without warning articles which are likely to cause harm. *Blood Balm Co. v. Cooper*, 83 Ga. 856, 10 S. E. 118; *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050. See Brett, M. R., in *Heaven v. Pender*, 11 Q. B. D. 503, 509. The English courts seem unwilling to hold a vendor liable for negligence in the sale of animals. *Ward v. Hobbs*, 4 App. Cas. 13. However, see *contra*, *Skim v. Reutter*, 135 Mich. 57, 97 N. W. 152; *Grimes v. Eddy*, 126 Mo. 168, 28 S. W. 756. In the principal case the court seems horrified at the thought that the general principle of negligence would hold one liable for spreading a disease through his person. Such liability has been imposed in at least one case. *Missouri, Kansas & Texas Ry. v. Wood*, 68 S. W. 802 (Tex.). It should be for the trier of fact to determine under the circumstances of the particular case whether non-disclosure amounted to negligence. But no judge or jury should be permitted to find it due care to violate a statute designed to prevent the very injuries for which

recovery is sought. See *Osborne v. McMasters*, 40 Minn. 103, 41 N. W. 503; *Marino v. Lehmaier*, 173 N. Y. 530, 66 N. E. 572. For a general discussion of the subject, see Thayer, "Public Wrong and Private Action," 27 HARV. L. REV. 317.

**WILLS — CONSTRUCTION — GENERAL REVOCATORY CLAUSE.** — The testatrix duly executed a will consisting of items numbered from one to nine, disposing of all her property. An executor was also appointed. A later paper, titled "Item Ten," began with a general revocatory clause, and merely provided for the care of her estate by an attorney until the arrival of her executor. There was also a statement of her desire to dispose of all her property. *Held*, the express revocatory clause does not revoke the first will. *Owens v. Fahnestock*, 96 S. E. 557 (S. C.).

In the construction of wills, the intention of the testator should govern. *Finlay v. King's Lessee*, 3 Pet. (U. S.) 346; *Patch v. White*, 117 U. S. 210, 6 Sup. Ct. Rep. 617. See *Lemage v. Goodban*, L. R. 1 P. & M. 57, 62. Nevertheless, the expressed intention is controlling irrespective of the internal state of the testator's mind. *Jackson v. Sill*, 11 Johns. (N. Y.) 201. See *Simpson v. Foxon*, 1907 P. 54, 57. This intention must be gathered from all the parts of the will taken together, whether the will consists of several papers executed as one instrument or of separately executed documents. See *Rogers v. Rogers*, 49 N. J. Eq. 98, 23 Atl. 125; *Lemage v. Goodban*, *supra*. See also PAGE, WILLS, §§ 462, 470. The words, "This is my last will and testament," are very slight evidence of an intention to revoke prior testamentary dispositions. *Stoddard v. Grant*, 1 Macqueen's Rep. 163; *Culto v. Gilbert*, 9 Moore P. C. 131; *Gordon v. Whitlock*, 92 Va. 723, 24 S. E. 342. See *Aldrich v. Aldrich*, 215 Mass. 164, 169, 102 N. E. 487, 490. Even the words, "last and only will," have been held not to be an express revocation. *Simpson v. Foxon*, 1907 P. 54. But a general revocatory clause is very much stronger, and *prima facie* revokes prior testamentary papers. *Southern v. Denning*, 20 Ch. D. 99; *In re Kingdon*, 32 Ch. D. 604. See *Cadell v. Wilcocks*, [1898] P. 21, 26. If it is clear, however, from all the testamentary papers, that the testator had no intention to revoke, the revocatory clause will be treated as mere surplusage. *Denny v. Barton*, 2 Phillim. 575; *Van Wert v. Benedict*, 1 Bradf. (N. Y.) 114. See *Dempsey v. Lawson*, 2 P. D. 98, 105-107; *Smith v. McChesney*, 15 N. J. Eq. 359, 363. The principal case is more clearly right, because it can be ascertained from the alleged revocatory instrument itself that there is no intention to revoke. "Item Ten" indicates a continuation of a will of nine items. The testatrix desires to dispose of all her property, yet this paper makes no such provision. Moreover, she speaks of an appointed executor who must necessarily administer under a will disposing of some property.

## BOOK REVIEWS

**LEMUEL SHAW, CHIEF JUSTICE OF MASSACHUSETTS, 1830-1860.** By Frederic Hathaway Chase. Boston and New York. Houghton Mifflin Company. 1918. pp. 329.

Fifty-eight years ago, Chief Justice Lemuel Shaw resigned his great office. Fifty-seven years ago he died. Few men now living remember his face; and probably no lawyer survives who ever argued before him. His judicial record stretches through fifty-six volumes and his name is almost daily on our lips. But until Judge Chase printed his interesting volume, no biography of him had appeared.

Born January 9, 1781, in what is now called Barnstable, his father, Reverend Oakes Shaw, fitted him for Harvard, from which he graduated in 1800. He taught school during winter vacations and wrote for, and became an Assistant Editor of, the *Boston Gazette*. In 1801, he was entered as a student of law in the office of David Everett in Boston, and, after the three years of study, without which no student could become a member of the bar, he was admitted in 1804 in the Court of Common Pleas. Two years of practice were then required before being allowed to act as an attorney before the Supreme Judicial Court, and two years' additional experience as an attorney was necessary to become a counsellor who could try cases in the highest court. He opened an office at first in Amherst, N. H., for two years. Then he returned to Massachusetts and started as a lawyer in Plymouth, but in December, 1806, he removed to Boston and shared the office of Thomas O. Selfridge, shortly before Selfridge's famous quarrel with Charles Austin, which resulted in Austin's death.

In 1818, being then thirty-seven years old, he married Elizabeth Knapp; but she died in 1822, leaving him a son and a daughter. In 1827, he married Miss Hope Savage of Barnstable, and in 1831 he established his home at No. 49 Mt. Vernon Street, Boston. There he lived during the rest of his life. His son, Samuel, who never was married, continued there and kept his father's home quite unchanged, until he himself died in 1915.

Lemuel Shaw devoted himself closely to his profession until 1830. His practice was the ordinary experience of a young attorney, and became extensive. He was the active manager in the impeachment, in 1821, of Probate Judge Prescott, who was finally convicted and removed from his office. While he sat in the Massachusetts House of Representatives and also in the Senate for brief periods, he never inclined to political life. His practice at the bar was largely in commercial law, but he never became prominent as an advocate. He was the author of the Boston City Charter and a member of the Constitutional Convention of 1820. The original draft of the Boston Charter in his own handwriting is still preserved in the State archives. This charter, which was an enduring piece of constructive legislation, continued in force as originally fashioned until 1913, when the present charter of the city was adopted. It is a noteworthy standard among the forms of Community-Government, and probably was the most important piece of professional work which Shaw accomplished while at the bar. His office, at last, became very popular and desirable as a place for students. In 1820, when Sidney Bartlett graduated at Harvard, he became a student in Shaw's office, and very soon became Shaw's partner. It is believed that this ten years of close connection with Mr. Bartlett contributed much to Shaw's financial success. Shaw never tried many cases before juries. It is also true that Mr. Bartlett, leader of the bar as he was for so many years, and continuing actively in the courts until he was over ninety years of age, never acquired the reputation of a great advocate; but still, the learned author of Shaw's biography, Judge Chase, of the Superior Court, is not quite accurate in supposing that Mr. Bartlett seldom tried many cases at *nisi prius*. He certainly was frequently before juries in his earlier years; and, as late as 1879, in the case of *Clark v. Wilson* (103 Mass. 509), Mr. Bartlett led in its trial to the jury before Chief Justice Brigham in the Superior Court. He was senior counsel throughout the trial, although he insisted that his junior should make both the opening and the closing arguments to the jury. But this was undoubtedly the last jury trial in which Mr. Bartlett ever took part.

Lemuel Shaw was, through his entire life, devoted to the law, and had no taste for politics or legislation. He refused to run for Congress, and, although he was asked to accept the office of Judge of Probate in 1819, he did not comply with the request. During his later professional life, Shaw was certainly employed in many large cases. He was consulted frequently by the City of Bos-



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questions and difficulties in Massachusetts courts. It was not, until about the time when Shaw ceased to be Chief Justice, that either Boston or New York had succeeded in outstripping the old town of Salem in the competition for African, Asiatic and Pacific commerce. Moreover, commerce was in wooden vessels chiefly. Iron steam-vessels did not largely replace wooden vessels and packet lines and navigation by sails, until near the time of Shaw's resignation, and consequently made over the rules of admiralty and maritime commerce which had come down from the days of Columbus and the rules of Oléron. During the thirty years of Shaw's chief justiceship, steamships began to rule the ocean, and steam-engines and railroads began to take the place on land of the stagecoach and the baggage wagon. The entire body of railroad law grew up during the time when Shaw was Chief Justice. Street railways had not even been invented in 1830. Life insurance also had only begun in this country. The oldest life insurance company in this country, — the New England Mutual Life Insurance Company, — occupied, in 1860, only a single floor over a store on State Street. It needed no more room to accommodate its President, Secretary and all its clerks. Emigrants came to America only in packet-line wooden vessels. Sleeping cars had not even been invented. No Pullman ever entered Boston until the Jubilee, after the Civil War, in 1865. Passenger travel between Washington and New York, in 1856, involved nine changes. Travelers had to make use of ferryboats, omnibuses and cars drawn by horses, as well as steam-engines, to pass between those cities prior to, and indeed mostly during, the Civil War. When gold was discovered in California in 1848, prospective miners from New England had two choices. They had either to go in sailing vessels round Cape Horn, or they could travel in caravans with horses from the Mississippi River over the Rocky Mountains. Fifty prospective gold seekers in New England would, at that time, often unite in buying as joint owners a vessel in Boston in order to sail round Cape Horn; and then work it around Cape Horn as sailors themselves, and finally sell the vessel when they reached San Francisco. It is simply true that the history of the country is best disclosed in the subject matter litigated in the reported cases. These new business devices created new rules of law, and new applications of old rules. The decisions made while Shaw was on the bench, for this reason, possess peculiar and unusual interest from the extraordinary and varied character of the litigated issues.

Moreover, in Shaw's time courts did not try, as much as they do now, to decide every case by ruling only on one single point which could settle the single case at bar. For instance, when the statute for fish investigation came before the court, the Chief Justice discussed nearly every one of its provisions. He construed practically the whole statute in its different clauses. The result was that that single opinion anticipated and prevented future disputes under the statute; and the statute never came before the court again for construction.

To discuss Chief Justice Shaw's decisions, however, is quite beyond the scope of this article, and cannot be attempted. Besides their wide scope, and their novelty, and the habits of the court, bitter political fights were impending, and cast their shadows over the court. Controversies which brought on the Civil War raised great legal questions and resulted in decisions of too large moment to be here taken up. Judge Chase's book is well worth careful study for its discussion of them alone.

Chief Justice Shaw's personality was not much more than a tradition before Judge Chase wrote his book. One little incident which shows how the Chief Justice not only declared the law, but obeyed it himself, is worth preserving. The writer's home in childhood was close to Judge Shaw's home on Mt. Vernon Street and naturally his person was familiar to all the children. One day a little playmate ran out of Belknap (now Joy) Street and was about to cross Mt. Vernon Street in front of the chaise of the Chief Justice, as he was driving

home. Half way across the street, the child noticed the horse and turned to scamper back to the sidewalk. But Judge Shaw at once pulled up his horse and, beckoning to the boy to keep on, said: "Cross over, little boy, it is your right." This trifling circumstance shows the character of the man. He was the very embodiment of reverence for the law itself, its rights and duties. When the legislature in 1843 reduced his judicial salary, he would refuse to complain; but he would not, and did not, draw the reduced salary. He waited for the unjust and unconstitutional law to be repealed later, and this was done in the next year. We, college boys, used to smile at his never failing in his speeches at Commencement dinner to refer to the absolute necessity of an "independent judiciary." But time has shown his insistence to be right and wise.

The Chief Justice's appearance on the bench was almost stern in its simplicity and dignity. The court itself seemed immortal and changeless in the many years during which Shaw, Dewey, Wilde, and Metcalf sat together. The custom of having murder trials always before a full bench, in order then and there to dispose of all legal questions arising in it, lasted until after the Civil War. Doctor Webster's trial in 1850 continued through eleven days before a full bench. The writer, then a Latin-school boy, followed it closely in his school intermissions. Attorney-General Clifford, in his blue coat, brass buttons and buff waistcoat; Dr. Webster, always wearing his black gloves, sitting in the cage; the Chief Justice and his three associates, in watchful, solemn dignity on the bench; the attentive jurors; the crowded room packed within the rail by the bar; and every other seat filled; — made a scene never to be forgotten. It was altogether suited to the temple of justice. The numerous stories about the Chief Justice's peculiarities of manner may serve for the entertainment of later generations, but to the men who tried cases before him they were mere empty talk. Shaw was the impersonation of absolute fairness. No counsel ever feared he would not have his case fairly heard, or that he would fail to get full appreciation of his points or full justice in its trial. The writer, who began practice less than two years after Chief Justice Shaw had retired, is thoroughly familiar with the views and thoughts of the men who then were leaders of the bar. He is able to speak with assurance. Their great regard and respect for the Chief Justice and their view of the way in which he performed his duties could hardly be increased. The writer never heard a single word from any of them which did not express profound reverence for the great Chief Justice. He was truly a great judge, and he is fortunate now in having so good a biographer at last, after long years of silence.

E. H. A. (1855).

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THE ARMY AND THE LAW. By Garrard Glenn. New York: Columbia University Press. 1918. pp. 197.

It is a little surprising that the war has not produced a greater number of books relating to the law governing the army either in its internal government or in its external relations. The ante-bellum literature is composed chiefly of books on military law, like those by General Davis, General Dudley, and Colonel Winthrop, which, with the notable exception of Colonel Winthrop's excellent treatise, are largely compilations of statutes and opinions of the Judge Advocates General; the official Manual for Courts Martial; the official Rules of Land Warfare; Major Birkhimer's well-known work on Military Government and Martial Law; and the numerous books on international law. With the exception of the books on international law this literature is largely the product of army officers. Professor Glenn's little book, written from the point

of view of a lawyer familiar with the atmosphere of the common law, and dealing chiefly with the legal relations of the army to the outside world, is a real contribution to military-legal literature. The author, writing in the midst of the great war and in a time of crisis when the issue was still doubtful, naturally wishes to give the army wide scope for its activities. He strongly indorses the point of view of the minority in *Ex parte Milligan*, 4 Wall. 2. But his attitude is not at all one-sided, as is shown in his criticism (pp. 59, 60) of *Ex parte King*, 247 Fed. 868.

The least satisfactory part of Professor Glenn's book is that which deals with military law in its narrow sense, *i. e.*, the law governing the discipline of the army. He cites (pp. 24-26) early cases and statutes on the question as to the time when draftees become subject to military law, but fails to make any reference to the 2d Article of War in which Congress has definitely settled the question. He shows (pp. 38, 39) that a court-martial has criminal jurisdiction only and that neither courts-martial nor courts of inquiry have jurisdiction to entertain a civil suit and award damages, but fails to mention boards of investigation which under the 105th Article of War have jurisdiction to assess damages. He seems (p. 40) to treat the question whether a court-martial ceases to exist after it has reported to the appointing authority, as though it depends upon whether new trials may be awarded, although nothing is better settled than that a court-martial may be reconvened for revision. (See Manual for Courts Martial, par. 352 and App. 6.) In stating (p. 60) that the 74th Article of War gives precedence, at least in time of peace, to the civil courts in cases where the civil and the military courts have concurrent jurisdiction, he ignores the important exception, contained in that article, of cases where the accused is held by the military authorities to answer, or is awaiting trial, or result of trial, or is undergoing sentence for an offense punishable under the Articles of War. In stating (pp. 30, 163) that "citizens," except spies, are not punishable under the Articles of War, he fails to mention persons relieving, corresponding with, or aiding the enemy, who by the 81st Article are also punishable under the Articles of War. In the paragraph relating to the jurisdiction of the various kinds of courts-martial, the proof-reader has made such havoc (p. 37) that one unfamiliar with the Articles of War would have some difficulty in ascertaining the author's meaning.

These defects are, however, not of the essence, and lawyers and officers will read the book with interest and profit. The book gives a very concise and, for the most part, an accurate view of the place of the army in our legal system.

AUSTIN W. SCOTT.

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# HARVARD LAW REVIEW

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VOL. XXXII

JANUARY, 1919

NO. 3

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## A NEW PROVINCE FOR LAW AND ORDER

### II

UNDER this name there appeared in this REVIEW in November, 1915, an article written by me at the instance of the editor. It gives in a summary form the results of my experience as President of the Australian Court of Conciliation and Arbitration. As the article seems to have attracted some attention in America, and also in Great Britain and Australia, it may not be amiss to report progress after three more years; especially now that a national labour administration has been created in the United States in the charge of my friend, Professor Frankfurter.

This Court has not to deal with mere theories. It does not work in the air — in the cloud-cuckoo town of Aristophanes. As I said in 1915, the Court

“has to shape its conclusions on the solid anvil of existing industrial facts, in the fulfilment of definite official responsibilities. It has the advantage as well as the disadvantage of being limited in its powers and its objects.”

I propose to make this article supplementary to the former. But, for the benefit of those who have not read the other, I may say that the new province to be rescued from anarchy is that of industrial matters. A court has been constituted under the Australian federal constitution by virtue of a power to make laws with respect to “conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of

any one State." Each of the six states of Australia has tribunals, wages boards or courts, for industrial matters; but this Court was created for disputes which pass beyond the boundaries of any one state, disputes which cannot be effectually dealt with by state laws. In recent years there have been proposals in the direction of enlarging the powers of the federal court, and even of altering the constitution by committing to the federal Parliament the whole subject of labour; but I address myself to the court as it stands under the existing constitutional power.

It is a court for compulsory arbitration — in the sense that its awards are binding as law upon the parties. I have found that in Great Britain as well as in America the idea of compulsory arbitration is repugnant to the leaders of the working class, whereas in Australia, facing different stars, the opposition comes principally from the class of employers. In the earlier years of my work I received through the post many insulting anonymous letters, most of which I have kept as curiosities, and nearly all of these letters came from partisans of the employers. The party with a stronger economic position naturally wants to be free to act as it thinks fit; it objects to be bound by orders from outside. The act makes it the first duty of the Court to endeavour to get agreement on the matters in dispute and to exercise its compulsory powers only when an agreement is impossible; but when the party with a stronger economic position refuses to agree on lines of justice instead of economic strength the Court has to interfere by dictating terms such as would, in its opinion, be just in a collective agreement. The ideal of the Court is a collective agreement settled, not by the measurement of economic resource, but on lines of fair play. The stronger economic position is usually held, of course, by the party which has the right to give or withhold work and wages, the means of livelihood. It is usually held by the employers. This is the reason why the awards necessarily operate more frequently as a restraint upon employers than as a restraint on employees.

I desire to deal in particular with the constructive part of the work of the Court. The awards have to be framed on some definite system, otherwise in getting rid of one trouble you create many others. Some years ago a friend who had had on one or two occasions the function of reconciling parties to industrial troubles

told me that he had found it best to put the leaders into a good humour by getting them to dine together with him and to have a friendly chat. A veteran leader of the shearers has written a book in which, with much *naïveté*, he recommends in the first place that leaders of workers in conferences with employers should first adduce the solid arguments, and then in the last resort make a powerful appeal on behalf of the women and children — “give them the women and children hot.” Neither of these courses is permissible for the Court which has to deal, not with single isolated disputes, but with a series of disputes. The awards must be consistent one with the other, or else comparisons breed unnecessary restlessness, discontent, industrial trouble. The advantages of system and consistency in the awards are increasingly apparent, as parties, knowing the lines on which the Court acts and understanding its practice, often now make agreements in settlement of a dispute in whole or in part without evidence or argument.<sup>1</sup> The agreement if certified by the President and filed in the Court is deemed to be an award.<sup>2</sup>

In the previous article I have set forth a goodly number of propositions laid down by the Court, and on looking through them I cannot find that any of them have been overruled or set aside. They have been amplified and applied to varying circumstances, and new propositions have been added. The claims for the assistance of the Court have been so numerous that my colleagues of the High Court have come to my assistance, and in particular Mr. Justice Powers, acting as Deputy President. Although Mr. Justice Powers has had an absolutely free hand in dealing with the disputes which he undertakes, I do not think that in any essential or substantial point he has seen fit to reject any of the propositions; but as I must take the sole responsibility for any statements made in this article I confine myself to a review of the position as it stands under my awards.

#### MINIMUM WAGE

The Court adheres to its practice of dividing the minimum wage awarded into two parts — the “basic wage” — the minimum

<sup>1</sup> *c/-* Engine-drivers, 8 Com. Arb. 206 (1914); Tramway employees. 9 Com. Arb. 208 (1915); Marine stewards, 10 Com. Arb. 539 (1916).

<sup>2</sup> § 24.

to be awarded to unskilled labourers on the basis of "the normal needs of an average employee regarded as a human being living in a civilised community"; and the other, the "secondary wage" — the extra payment to be made for trained skill or other exceptional qualities necessary for an employee exercising the functions required.

A curious controversy arose in 1915 as to the effect of awarding a minimum rate. The act allows the Court<sup>3</sup> to prescribe a minimum rate, and does not mention a maximum rate; and one would have thought it sufficiently obvious that there is no breach of an award on the part of a worker if he decline to take employment at the minimum rate prescribed. The contrary view, however, has been hotly urged, and some partisans of the employers, newspapers and others, have gone so far as to call it a "strike" when men refuse to accept work which is offered at the minimum rate. In Webster's Dictionary "strike" is defined as "the act of *quitting* work; specifically, such an act by a body of workmen done as a means of enforcing compliance with their demands made on their employers." But our act is clear on the subject. According to section 4, "strike" includes the total or partial *cessation* of work by employees acting in combination as a means of enforcing compliance with the demands made by them or other employees on employers. The question first arose in connection with "special cargoes" in the case of the waterside workers (called, I believe in America, "longshoremen"). These men were casual labourers hired by the hour. They turned up at the wharf when a vessel arrived and the foreman made his selection. The minimum rate prescribed was 1/9d. per hour. The union had claimed that wheat should be treated as a special cargo so that the wheat carriers should be entitled to a minimum rate of 2/- per hour. The Court had refused this claim, as there seemed to be no sufficient difference between wheat and other commodities for the purpose of a *minimum* rate. But it appeared that certain members of the union had adopted the practice of following the wheat ships from north to south, and having acquired a certain dexterity in the handling of wheat, had succeeded with some employers in enforcing the payment of 2/- per hour. Under the exigencies of the war the

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<sup>3</sup> § 40.



various wheat states had formed wheat pools, and the state governments were quite willing to pay the extra third per hour in order to get the services of these men in loading the ships for export to Great Britain; but they did not like to pay the extra third in the face of the decision just given by the Court. The Court reassured the employers of the wheat pool thus: <sup>4</sup>

"It is not necessarily an unjust extortion for a man or a class of men who make wheat-carrying a speciality, to demand more than the minimum rate for his or their services. It is quite in harmony with the principle of freedom of contract subject to the minimum wage that an employer should seek by extra wages to attract men, who, as he thinks, will give him extra speed and efficiency. The device of a minimum wage will soon prove to be a bane instead of a blessing if the position be perverted as the arguments tend to pervert it. I can only say plainly that there is no breach of the award or impropriety in a man refusing his services in loading wheat unless the employer pay him more than the minimum. It is all a matter for contract."

The extra third was paid. The wheat was loaded and carried to the Allies, while at the same time no obligation was imposed on all the exporters for the term of the award to pay a minimum rate of 2/-.

The doctrine, however, which now appears to be a mere truism, was attacked by certain newspapers and employers in a tirade of abuse. The men, it was said, were actually encouraged by the Court to "strike" for higher wages. Even if the legal position were clear the Court was not justified in stating it, in suggesting higher demands, and so forth. However, I took the first opportunity of stating a case on the subject for the opinion of the High Court; and the High Court, by a unanimous decision, upheld the doctrine.<sup>5</sup>

It would, of course, be an astounding position if, while the employer remains free to give or to refuse employment at the minimum rate, the employee were bound to take employment at that rate. The employer has the formidable power of refusing to give work to any particular man, the power even to put an end to all his own business operations; why should not the employee be free to refuse to take work? A minimum rate is in effect a restraint on

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<sup>4</sup> *Waterside workers*, 9 Com. Arb. 315 (1915), 10 Com. Arb. 1 (1916).

<sup>5</sup> *Waterside workers*, 21 Com. L. R. 642 (1916).

the employer; a maximum rate would be in effect a restraint upon an employee. The act gives power to prescribe a minimum rate, and the object of that power would be defeated if a man who thinks that his services are worth more than the minimum rate were not free to hold out for a higher rate. Some employers pay more than the minimum for the avowed purpose of attracting the best men. Incidentally it may be remarked that the position as now settled here is very far from justifying the fears of those who look on provisions for minimum rates as tending to the establishment of a "servile state." Mr. Belloc's dogma<sup>6</sup> that "the principle of a minimum wage involves as its converse the principle of compulsory labour," is not confirmed by such experience as I have had.

The statement has often been made that the minimum rate tends to become the maximum rate. I have not found it so. It is quite true that far more employees get the minimum rate prescribed than got it before the rate was fixed, for, before that time they usually got varying rates, mostly below the minimum. I have not found unions objecting to members taking extra pay for extra usefulness; for instance, in building operations an expert scaffolder often claims, and gets without objection, a higher rate than the flat minimum prescribed; and leading hands in a labouring process often get higher rates than their mates;<sup>7</sup> but unions object to extra rates for extra servility, for disloyalty to one's comrades.

#### OFFENSIVE JOBS, ETC.

Connected with this doctrine are the propositions that the Court does not attempt to discriminate in minimum rates on the ground of comparative laboriousness, and that the Court will not prescribe an extra minimum to compensate for unnecessary risks to the life or health of the employee, or for unnecessary dirt.<sup>8</sup> For instance, members of the Amalgamated Society of Engineers failed to get an increase of rate under the name of "dirt money" when handling dirty work. That is to say, the Court refused to increase the *minimum* rate prescribed.<sup>9</sup> So, too, in artificial manure works,

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<sup>6</sup> "The Servile State," 172.

<sup>7</sup> Broken Hill, 10 Com. Arb. 200, 201 (1916).

<sup>8</sup> Propositions 12 and 19 of the previous article.

<sup>9</sup> Broken Hill, 10 Com. Arb. 155 (1916).

the employees asked for an increase in the minimum rate because of dust and fumes. It was said that dust affected the air passages and produced catarrh, etc.; but there was no evidence to show how far, if at all, the dusty conditions operated to reduce the effective wages. The Court was unable to express the injury in terms of money. Of course, if the subject of defective arrangements under which dust is produced come before the Court directly as a grievance for regulation, the Court would have to decide the matter as best it could; but employers must not be allowed to purchase by money a right to injure health. The same principles are applied to cases of excessive strain on employees, as by excessive weights or excessive use of certain muscles or injury to clothes:

"This Court tends rather to refuse to make differences in minimum rates except for clearly marked distinctions and qualifications, such as craftsmen's skill, or exceptional responsibility, or special physical condition, necessary for the function. . . . Differentiation in minimum rates prescribed must be made on broad lines."<sup>10</sup>

On the same grounds the Court expressed disapproval of the system of extra minimum rates for special cargoes handled by waterside workers. When one special cargo was conceded by another tribunal there were incessant efforts to make more cargoes special, until at last the complaint was that all cargoes should be special except case goods. No subject has caused more incessant friction. There can be, however, no objection to a man refusing to accept employment for a cargo which injures his health or is beyond his powers, or if he think that he ought to get a payment beyond the minimum. Beyond the minimum there is an ample area for free bargaining.

#### REGULATION OF EMPLOYERS' METHODS

But although the Court does not prescribe a differential minimum rate on the ground that a job is offensive or distressing, it has sometimes to award directly on the subject when it is made the ground of a substantive dispute. For instance, the waterside workers complained that the weights put upon them to carry or to wheel were too heavy; and the Court prescribed a maximum of

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<sup>10</sup> Artificial manures, 9 Com. Arb. 187-89 (1915).

1 cwt. for bagged ore to be lifted, a maximum of 5 cwt. for one man using a two-wheeled truck (the truck itself weighs 2 cwt.), a maximum of 200 lbs. for bagged cargo to be carried, a maximum of 15 cwt. for two men using a trolley.<sup>11</sup> There were certain exceptions made; it was recognised also that the weight might vary with the condition of the wharf; and, above all, there was no appropriate scientific evidence of the kind that is collected in the excellent work of Miss Goldmark, "Fatigue and Efficiency." But interference on such subjects is rare. It is well known that the Court is very chary about dictating to those that have to direct the work as to the mode of carrying it out;<sup>12</sup> and that it will not dictate conditions unless it be clearly shown that the mode adopted involves undue pressure on human life. The Court usually refuses to prevent the employer from having the work done as he thinks desirable for his undertaking,<sup>13</sup> or to dictate the number of men to be employed,<sup>14</sup> or to alter the functions of the respective officers,<sup>15</sup> or to prevent an employer from calling on an employee to work extra hours if paid substantial extra rates,<sup>16</sup> or to prevent coastal vessels from being at sea on Sundays,<sup>17</sup> or to prescribe the number of retorts to be drawn and charged by a stoker in his shift,<sup>18</sup> or to interfere with the choice of men for appointment or promotion. The Court does not favour the arbitrary limitation of the proportion of boys to adults if the employer finds that boys will answer the purpose of his undertaking as well as men, and especially if he bind himself to teach the boys a definite trade. But the position is different if the boys would not be employed for certain heavy or risky work except for their wages being lower — if the employer would not employ boys but for the cheaper rate.<sup>19</sup> In one case the Court refused to exempt any boys from the minimum adult wage unless they were properly apprenticed.<sup>20</sup> Similar principles are

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<sup>11</sup> Waterside workers, 9 Com. Arb. 305-09 (1915).

<sup>12</sup> See proposition 30.

<sup>13</sup> Pastoralists, 11 Com. Arb. (1917).

<sup>14</sup> Marine engineers, 10 Com. Arb. 528 (1916).

<sup>15</sup> Postal electricians, 10 Com. Arb. 578 (1916).

<sup>16</sup> Merchant Service Guild, 10 Com. Arb. 673 (1916).

<sup>17</sup> *Ibid.*, 214 (1916).

<sup>18</sup> Gas employees, 11 Com. Arb. (1917).

<sup>19</sup> Linemen, 10 Com. Arb. 602, 613 (1916).

<sup>20</sup> Butchers, 10 Com. Arb. 465, 495 (1916).

applied in the case of women. If women are put to work more suited for men, as that of a blacksmith, or even to work for which men are equally suited, the women must get a man's minimum.<sup>21</sup>

#### DIRECTORS OF INDUSTRY

The Court does not ignore, however, the increasing demand of employees for some voice as to the conditions of working, the uneasy feeling that the employers, or rather their foremen, have an autocratic power which is too absolute. Wages and hours are not everything. A man wants to feel that he is not a tool, but a human agent finding self-expression in his work. The Court tries, therefore, to encourage by all the means in its power the meeting of representatives of the unions with representatives of the employers. Such meetings produce a good effect, even when the employers adhere to their methods, giving their reasons. Fortunately there is no difficulty as to recognition of the unions. The unions have come and have come to stay. Our act could not be worked without unions. One of the chief objects of the act is, under section 2, "To facilitate and encourage the organisation of representative bodies of employers and employees, and the submission of industrial disputes to the Court by organisations." Now the act<sup>22</sup> enables the Court to appoint "Boards of Reference," and such boards involve opportunities for meeting for discussion of methods and alleged grievances. The difficulties which the Court has to face as to such boards appear in a passage in a judgment of last year, a passage which I take the liberty of setting out:

"The most serious difficulty that I see in the agreements and in this award is the absence of the provision for a Board of Reference — a Board in which the employer and the employed could take counsel together for the purpose of dealing with any grievances which employees allege and which the directors and managers, owing to their remoteness from the stress of actual operations, cannot realise. It is one of the signs of the times, of which employers would do well to take heed, that the workers are gravely dissatisfied, because they have no voice whatever in the regulation of the conditions under which they spend so much of their lives, that their opinions as to the possibility of preventing unnecessary hardship are not to be treated as being of more account than

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<sup>21</sup> Fruit-growers, 6 Com. Arb. 61, 71 (1912).

<sup>22</sup> § 40 a.

as if they were engines or horses. Many a grievance, or supposed grievance, would be removed before it developed into a serious trouble by a proper board of reference. I have hoped and worked for an agreement for such boards in this case, one at least for each undertaking; but the parties cannot agree as to the conditions. The companies want to insert a provision that before a grievance can come before the board of reference it must be brought by the individual employee aggrieved before his foreman or immediate superior. The union desires that the grievance shall be brought before the management by the works committee of the union, and then, if necessary, before the board of reference; but it is willing, as a compromise, to agree that either the individual or the board may approach the management. The companies unite in insisting that the individual employee must first make the complaint. Such a provision was not in the agreements of 1913, and there is no evidence that the lack of it has had any ill-effect. But the companies are firm on the subject. It is suggested that I should exercise my power under Sec. 40-A to appoint a board of reference. That section enables me to assign to a board the function of dealing with "any *specified* matters or things which *under the award or order* may require from time to time to be dealt with by the board." Unfortunately these words mean, according to a majority of the High Court, that I must specify now, in my award, the specific grievances which the Board may deal with (*Federated Engine-drivers v. Broken Hill Company*, 16 C. L. R. 245). Apparently it is not enough for me to commit to the Board all or any matters which may arise — even arise under the award or order. As I have said in previous cases, it is impossible for me to specify beforehand the grievances which will arise or be alleged. Whether the view of the High Court is correct or not, I shall obey it. I had hoped that Parliament would have come to the assistance of the Court by an amendment of the section, but it has not done so. I cannot make use of the section, at all events, so as to meet the circumstances of this case."<sup>22</sup>

The fundamental difficulty of the position seems to be that the employer and the union look at the methods used from different points of view. The employer — generally a company acting through directors — looks at money results, at profits, at expenses. The union looks at the results to the human instrument. Both sides of the subject ought to be considered. It is significant that the unions are always willing to have such boards, and the Court often manages to get an agreement on the subject. The board of

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<sup>22</sup> Gas employees, 11 Com. Arb. (1917).

reference has been the only means within the power of the Court for meeting the increasing demand to which I have referred. It meets the demand to a certain extent, and tends to further developments.

#### HOW THE BASIC WAGE IS FOUND

The "basic" or living wage, the minimum wage for the unskilled worker, is the primary factor in the fixing of all wages by award; and the fixing of the proper basic wage is necessarily of an importance that can hardly be exaggerated. It must vary with the cost of living in the various districts: for instance, the basic wage for the seaports would not be a proper basic wage for inland mining districts such as Broken Hill. But sometimes by general consent a uniform basic wage is desirable, as in the case of the waterside workers or seamen; and the Court then takes as its guide the mean cost of living for the several ports. In such cases it becomes possible to form some idea of the immense sums which an award of the Court may transfer from the employing (or the consuming) class to the employed. An increase of 1/- per working day for ten thousand men means an increased expenditure of £156,500 per annum; and there were about seventeen thousand men in the union of waterside workers. In that case arbitration was sought by about one hundred and fifty employers — trading oversea, interstate, within a state. Not only in the vastness of the sums involved, but in the effects on families and the proper nurture of children, and in indirect consequences in all employments, the responsibility of the Court is very grave. The decisions of the Court probably affect directly more human lives than the decisions of all the other courts. The Court has repeatedly invited full enquiry on scientific lines as to the cost of living, but neither the government nor the parties have yet responded. Preferably the enquiry should be made by expert statisticians and on the basis of distinct regimens, but the responsibility of fixing the basic wage should be left with the Court. In the meantime the Court has been obliged to work out the problem on the best materials that it can get. At present the Court takes as *prima facie* evidence the findings as to the cost of living on then existing habits in Melbourne in 1907, and then it takes the statistician's figures as to the depreciation in the value of money as against commodities as *prima*

*facie* evidence of the increase in the cost of living. The Commonwealth statistician has found that in Melbourne it took in 1916, 26/6d., to purchase commodities that could be purchased in 1907 for 17/6d.; and the decrease in the value of money is nearly the same elsewhere. That is to say, the increase in the cost of living is over 50 per cent, chiefly owing to the existing state of war.

It is a curious fact that there has been little or no attack on the empirical finding of 1907 as to the actual cost of living. Employers generally admit that the amount of 42/- per week was fair at that time; but there have been of late strenuous attacks on the statistician's figures of increase. The statistician has taken some forty-seven staple articles of food and rent as consumed by all classes of the community, and has found the changes in price of those articles; and he very properly adheres to the same articles and assumes that they are consumed in the same quantities. He does not, as some people fancy, pretend to show the cost of living in a wage-earner's family, but he shows the depreciation in the value of money as regards the selected commodities, and, as he says,

"in normal circumstances properly computed index numbers of food and groceries and house rent combined form one of the best possible measures of those variations in the purchasing power of money which affect the cost of living."

Then the Court comes in, and, *until the contrary be shown*, infers that the depreciation in the value of money which is found in relation to the selected commodities is to be found also in relation to the other commodities. This method is in accordance with the views and intentions of the statistician; for he says "once a standard of living or living wage has been fixed the tables published . . . can be legitimately used as showing the variations in the cost of living." No party is bound by these tables as by a matter of absolute irrefutable law, but they are on the right method, and the Court makes use of them until it can find better evidence.<sup>24</sup> The criticisms made hitherto on the statistician's findings are made under a misapprehension.

It is the practice of the Court to let no consideration of competition with foreign countries reduce what is found to be the proper

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<sup>24</sup> Butchers, 10 Com. Arb. 477-84 (1916); Merchant Service Guild, 10 Com. Arb. 225 (1916); Gas employees, 11 Com. Arb. (1917).



basic wage;<sup>26</sup> and this practice, it must be admitted to the credit of the employers, has never been disputed so far as I know. The proper sustenance of the persons employed (on the basis of family life) is treated in effect as a first charge on the product.

### SECONDARY WAGE

With the secondary wage the position is different. There is more scope for compromise or arrangement. At the same time it has been found inadvisable except in extreme circumstances to diminish the margin between the man of skill and the man without skill. One of the drawbacks of industry in Australia is that lads do not learn their trades thoroughly — do not take the trouble to become perfect craftsmen. There is a tendency to be content with imperfect workmanship, to put up with the “handyman,” and his rule of thumb, to put up with what is “good enough”; and nothing should be done by the Court which would lessen the inducements to learn a trade and to learn it properly.<sup>26</sup>

However, when the Court has increased the basic wage because of abnormal increase of prices due to the war it has not usually increased the secondary wage. It has merely added the old secondary wage, the old margin, to the new basic wage. It is true that the extra commodities which the skilled man usually purchases with his extra wages become almost indispensable in his social habits as the commodities purchased by the unskilled man, and have no less increased in price; but the Court has not seen fit to push its principles to the extreme in the abnormal circumstances of the war, and the moderate course taken has been accepted without demur. I may add here that the Court, where necessary, adopts gradations in the secondary wage. For instance, after fixing the basic wage for unskilled labourers in the gas employees case, it awarded 6d. per day for men classed as skilled labourers, 1/- per day more for men in charge of plant, etc., 2/- per day more for men of necessarily exceptional physical qualities, etc., such as stokers; and 3/- per day more for artisans fully trained.<sup>27</sup> The margin between the basic and the secondary minimum follows the margin usually adopted in the time of unregulated practice.

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<sup>26</sup> Marine engineers, 10 Com. Arb. 532 (1916).

<sup>27</sup> Butchers, 10 Com. Arb. 485 (1916).

<sup>27</sup> Gas employees, 11 Com. Arb. (1917).

## HOURS

With regard to hours of work, the Court generally adheres to the Australian standard of forty-eight hours per week. Any overtime has to be paid for at higher rates; but there are some exceptions to the forty-eight-hour rule. Fewer hours have been prescribed where the occupation is very nerve-racking, where as in the case of the builders' labourers the men have to "follow the job," and now in the case of underground mines and smelters.<sup>28</sup> It may interest American readers to know that as to underground mines and smelting the Court availed itself of the reasoning of the Supreme Court of the United States in the constitutional case of *Holden v. Hardy*.<sup>29</sup> In that case a state statute limiting the hours in mines and smelters was upheld, notwithstanding the Fourteenth Amendment of the Constitution, because the state legislature had regarded the limitation as conducive to health and life. The work was not only risky but also unhealthy. Lead poisoning and pneumonia were common. Special mention ought to be made here of the conduct of the men at the Port Pirie smelters. The lead ore which comes from Broken Hill is smelted at Port Pirie, and the produce is sent during the war to the British government. The men were working seven shifts of eight hours, Sundays as well as ordinary days, and they had been for years seeking a six-day week on a rotation scheme; but they recognised that there was a shortage of men suitable for the smelters and that without the fifty-six-hour week the continuous process could not be kept up. So they asked me to postpone the boon of shortened hours till after the war. They did this as a gift to the nation for the purpose of the war, not under compulsion in the interests of the employers.

On the other hand, the forty-eight-hour week is not a rigid rule for all occupations. Sometimes the Court has fixed fifty-two hours where the nature of the trade required it, and where the operation has variety and is of an open air character, as in the case of certain carters and drivers.<sup>30</sup> In the case of station hands (boundary riders, bullock drivers, and generally useful men employed by pastoralists); it was found impracticable to set any definite limit

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<sup>28</sup> Broken Hill, 10 Com. Arb. 155, 185-91 (1916).

<sup>29</sup> 169 U. S. 366 (1898).

<sup>30</sup> Butchers, 10 Com. Arb. 496 (1916).

to the hours except for those men who were employed at or about the homestead; and in the case of the latter class the hours were fixed at fifty-two with the general assent of employers.<sup>31</sup>

In connection with the subject of hours I may mention two curious facts tending to show a positive increase in efficiency and in results arising from well-regulated pauses in muscular exertion. In some industries — that of the waterside workers, for instance — “smokos” have for many years been permitted in Australian practice. I have been unable to find any analogue in America or in Europe. A “smoko” is a cessation for a short rest period in a run of work, a pause usually given without reduction of pay, and experienced managers and foremen have assured me that the “smoko” actually helps the working results. The men work with “more heart.” They take a “snack” or a “pull” at their pipes. With the consent of the employers the court prescribed two night “smokos” of half an hour each; but as a day “smoko” would in many ports interfere with the work of the carters the matter of day “smoko” was left to the discretion of the employers.<sup>32</sup> Another fact is that in shearing operations where there are piecework rates, so much per hundred sheep, the employers actually sought for more pauses in the work than the union. Yet the employers’ interest is clearly on the side of brief time of shearing; for the overhead expenses and the wages of men on daily wage run on all the time. The union asked for two four-hour runs of work between 8 A. M. and 5:30, with one meal between runs, instead of six runs with two meals and three “smokes” interposed between 6 A. M. and 6 P. M. The Court prescribed as requested by the employers.<sup>33</sup> The case of the waterside workers is a case of payment by time, and yet the employers prefer to allow a pause, a deduction from the time sold to them. The other case is one of payment by result, piecework. Piecework tends to speed, but tempts to imperfect workmanship; time-work tends to proper care but tempts to slowness. In certain metropolitan abattoirs the manager prefers time-work with a tally of fifty-nine sheep per day, although in export meat works the average tally is eighty to one hundred a day.<sup>34</sup> In

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<sup>31</sup> Pastoralists, 11 Com. Arb. (1917).

<sup>32</sup> Waterside workers, 9 Com. Arb. 293, 300, 317 (1915).

<sup>33</sup> Pastoralists, 11 Com. Arb. (1917).

<sup>34</sup> Butchers, 10 Com. Arb. 491 (1916).

the shearing of sheep of exceptional value it is usual for the employer to prefer payment by time wages. In piecework slaughtering the inducement of greater pay was not sufficient to prevent the union from asking for shorter hours. The employers opposed, but they have a quaint device called "the clock." The foreman tells the leading hand, the "clock-man" at what rate per hour he wants the slaughtering done; and the employers say that this course is taken to prevent the men from absenting themselves as a consequence of over-exertion, as well as to ensure that the flesh, pelt, etc. are not injured by too furious a use of the knife. Speed for the day is not the only thing to be considered.

#### STOPPAGES

The disputes brought under the attention of the President or Deputy President, or under the cognisance of the Court, since it was started in 1905 are very numerous. There must be several hundreds apart from incidental applications, and the points in dispute might almost be called infinite. The operations of the Court now occupy most of the time of two High Court Justices, but the expenditure of the time and labour will probably be thought a good investment. For, though the disputes dealt with are many, the stoppages of work are very few; and it is the prevention of stoppages in operations required by the public that is the object of the power given by the Constitution. The work of the country must be carried on. The community requires that what it needs shall be continuously supplied, and to that end it provides for the redress of alleged grievances a tribunal which should render stoppages unnecessary. In a free country people may think they see the way to a better industrial economic system, and they may work towards that system, but in the meantime food, clothing, and shelter must be provided, and other commodities. The need for the day's food and supplies "subtends a greater angle" for the time being (the expression belongs to O. W. Holmes, I think), than all our theories, and above all the needs of those who are dearest to us, as the most helpless, — the children. Their constitutions and the future of the race must not suffer by privation. Men have ever to

"Keep the young generation in hail  
And bequeath them no tumbled house."

In other words, the people are consumers as well as producers, and the object of the power in the Constitution is primarily to protect the people as consumers; and as incidental to that end to provide means whereby producers can have their legitimate human needs satisfied without recourse to stoppages. There should be no more necessity for strikes and stoppages in order to obtain just working conditions than there was need for the Chinaman of Charles Lamb to burn the house down whenever he wanted roast pork. The arbitration system is devised to provide a substitute for strikes and stoppages, to secure the reign of justice as against violence, of right as against might — to subdue Prussianism in industrial matters. Unfortunately the public do not know all the disasters from which they have been saved by the machinery of the Court. They "do not see because they do not feel." They know the inconveniences to which they have been put, but they do not realise the inconveniences from which they have been saved. In one case, for instance, little noticed, some of the principal cities would have been left without light but for the interposition of the Court.<sup>25</sup> However, something may be learned from a comparison. In Great Britain, according to Mr. G. D. H. Cole,<sup>26</sup> the Board of Trade acting under the Conciliation Act of 1896 dealt with five hundred and ninety-seven cases up to the end of 1912, and of those two hundred and ninety-two involved stoppages; and in 1912 of the seventy-three cases, thirty-four involved stoppages. That is to say, stoppages occurred in nearly half of the disputes handled. In the case of the Australian Court I can recall only two stoppages extending beyond the limits of any one state in disputes so extending, and yet during the same period strikes in local disputes, outside the competence of the Court, have been very numerous. People here know what a gain there is in the fact that there have been no such social upheavals as occurred in connection with the shearers and the shipping employees before this Court was constituted. The men know well that they cannot get arbitration if at the same time they try to enforce their demands by stoppage of work. They cannot have arbitration and strike too. I find that in the previous article I stated that since the act came into operation there had

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<sup>25</sup> Gas employees, 11 Com. Arb. (1917).

<sup>26</sup> "THE WORLD OF LABOUR."

been no strike extending beyond the limits of any one state. That cannot be said now; but the exceptions are worthy of study.

The first was that of the coal miners at the end of October, 1916. About 80 per cent or 90 per cent of the coal miners are in New South Wales, but the miners of Victoria and of Queensland had joined those of New South Wales in a federation. At the request of the federation the President held a conference in June, 1916. The principal subject of dispute was a claim for eight hours bank to bank, and no agreement was reached; but certain concessions were accepted to tide over the time till arbitration, and the President promised to give the case, for certain reasons, precedence; but when the case came on it appeared that in several of the mines the men were taking the hours which they sought. The union officials were not obeyed. The Court refused to proceed with the arbitration until the men resumed the former hours:— "I shall certainly not go on with arbitration with my hands tied, and my hands would be tied if the men were getting by direct action . . . that which they are asking me for."<sup>37</sup> There followed several adjournments with the view of allowing the officials of the federation to use persuasion, but the matter was complicated by the bitter opposition of the unions to a proposal for conscription, and by an extraordinary antipathy to the Prime Minister, Mr. Hughes. They passed resolutions not to work except on the conditions named, and the work was stopped on or about the day of the referendum. The position was very serious. The stocks of coal available for the gas companies were running very low, especially in Sydney. The Prime Minister held a series of conferences in which he found that the miners were firm in their refusal to work unless they got the eight hours bank to bank, and the employers insisted that if this concession were granted they would have to raise the price of coal. The Prime Minister asked the President to deal with the case as under a recent War Precautions Regulation (of doubtful validity), and, as incidental to the concession as to hours, to find what additional price the mine-owners might charge for coal. All such proceedings were outside my proper functions, but, as the Prime Minister was in great difficulty, I was willing to enter upon the enquiry as to the claim for the eight hours under our own

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<sup>37</sup> Coal and shale employees, 10 Com. Arb. 246 (1916).

act — not at the instance of the union, but on the application of the Prime Minister and if the mine-owners concurred. But I stipulated that my hands must be free either to grant or refuse the eight hours as should seem just. The Prime Minister then, by other machinery — (assuming it to be valid) — caused the claims of the miners and the mine-owners to be granted without evidence and without argument as to the eight hours, the union undertaking that there should be no further trouble during the war. It is not seemly that I should make use of this review for the purposes of putting my view of the action of the Prime Minister, but those who care to follow the controversy will find it in the eleventh or twelfth volume of the reports of the Court. The consequences of the action were certainly disastrous. The union failed in its undertaking; there were frequent local stoppages; and at last in August, 1917, the men of the union, with the approval of their leaders, struck work in sympathy with the railway employees of New South Wales — of which I shall say more presently. This Court, at all events, was preserved from a course which would have fatally injured its character and its influence.

The second case occurred about June, 1917. The glass bottle-makers of three cities suddenly struck work. At the request of the employers the President called a conference. The dispute was as to payment for defective machine-made bottles. Nothing would induce the men to return to work unless their demand was conceded. According to their leaders, the men thought that the employers would yield rather than have their furnaces extinguished and their plants idle, but the employers did not yield. The President gave his sanction to a prosecution for penalties. Certain penalties were imposed and the men had to return to work on the employers' terms. A refusal of this kind to accept arbitration is unprecedented, and I have not been able to understand it unless it be an explanation that the industry depended on imported German or Austrian glass-blowers.<sup>28</sup>

In addition to these two cases there has been a "sympathetic strike" on the part of a registered union; but it was not in support of any dispute of which the Court could take cognisance. In August, 1917, there was a strike of engineers and others in the state railway

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<sup>28</sup> Glass bottle-making, 11 Com. Arb. (1917).

works of Sydney. The engineers struck work because the Railway Commissioner of New South Wales (the railways belong to the state) was introducing some card system for recording the time taken by each man in several operations. Then the other railway men, engine-drivers, stokers, etc., struck in sympathy, then the Sydney tramway men (government tramways), then the coal miners, then the waterside workers, the seamen, and so on. The strike of the waterside workers extended to the principal ports of Australia. The waterside workers were actually working under an award of the Court; yet it is surely significant that the alleged grievance from which this general strike started was not within the competence of this Court, could not be handled by this Court under the law: for two reasons, each sufficient in itself. (1) The dispute as to the card system was a dispute between a state "instrumentality" and its employees; and according to a decision of the High Court given in pursuance of the American doctrine of *McCulloch v. Maryland, etc.*, this Australian Court of Conciliation cannot touch a state "instrumentality";<sup>39</sup> (2) the dispute as to the card system was confined to one state. It is not even an offence under our act for men to strike on account of a dispute as to an industrial matter if the dispute be confined to one state.<sup>40</sup> It appears that the leaders of the railway men in Sydney asked the government to refer the dispute to the Arbitration Court of New South Wales, and that the government declined. I have not been able to ascertain the ground for the refusal, but at all events it is clear that our Australian Court could not deal with the root of the trouble.

Nevertheless, the operations required by the country at the wharves had ceased, and it became the duty of the Court to do anything in its power to get the operations resumed. Therefore on the thirtieth of August, 1917, the Court at the instance of some thirty employers struck out of the award a clause which embarrassed them in making use of outside labour. The Prime Minister, however, had been President of this union, and he evidently thought that something drastic should be done by way of punishment to the members. The public were alarmed and indignant at the wide-

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<sup>39</sup> Federated railway association, 4 Com. L. R. 488 (1906).

<sup>40</sup> Coal and shale employees, 24 Com. L. R. 85 (1917).



spread suspension of activities. The mode of punishment which the Prime Minister chose was the cancellation of the registration of the union in the registry of the Court. So he got the Governor-General to sign a regulation as under the War Precautions Act to enable him to cancel the registration of any union on strike if registered in the books of the Court. On the very day that the regulation was published, the Prime Minister caused an application to be made to the President for a rule *nisi* for the union to show cause before the Court why the registration should not be cancelled. This seemed to the President to mean "You must cancel; for if you do not cancel I shall myself cancel." Such an attitude recalls the efforts of the Tudor and Stuart sovereigns to interfere with the judges in the execution of their duty, and especially the amusing controversy between James I and Lord Coke in the evocation case; but the President granted the rule so that the matter might be discussed. It turned out in the argument that the Prime Minister thought by cancellation to destroy the award; but this was a mistake, for an award is not destroyed by cancellation of the registration of the union. The Court discharged the rule. The grounds were that the powers to cancel were not to be used as an instrument of fruitless vengeance; that the cancellation would not free the employers from the obligations of the award; that it would be unjust to members at ports at which there was no strike; that it would free the property of the union from penalties for future strikes; that it would prevent the union from suing members for breach of its rules, that it would deprive the registrar of his power to get returns of members, officers, etc.; that it would make it difficult to know whom to summon to conferences. Moreover, the strike was against the advice of the executive union, and the union was now induced by the President to alter its rules so as to give to the executive more control over its members and branches, and so as to forbid strikes without the consent of the executive. Deregistration would not conduce to industrial peace, but would turn a public responsible body into an underground, irresponsible combination.<sup>41</sup> It is curious indeed to observe how, under the southern sky, the position has been reversed, and the registration of unions which nearly led to a labour revolution in France in Waldeck-Rousseau's

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<sup>41</sup> *Waterside workers*, 11 Com. Arb. (1917).

time, about 1884, has become a *desideratum* of the union, is regarded by the unions as a privilege. The Prime Minister was very much displeased; but he did not attempt to make any further use of his supposed power under the regulation.

I have felt it necessary to state these three exceptions at some length. In the first case, to speak summarily, the trouble was mainly political. In the third case the Court had no jurisdiction — it was forbidden to touch the root of the trouble. But the second case was a clear case of strike for conditions of work which ought to have been submitted to the Court. It is satisfactory to find that in none of those cases was the strike owing to the failure, or alleged failure, of the Court to grant justice in any dispute as to which it had jurisdiction. It is significant also that the widespread strike of August, 1917, was in a dispute which was outside the jurisdiction of this Court, and which was not submitted to the court of the state in which the dispute occurred.

#### SYMPATHETIC STRIKE

The occurrences of August, 1917, have led to the consideration of the proper mode of dealing with the "sympathetic" strike. The difficulty is mainly a psychological difficulty — it might be called a moral difficulty. What is a man to do who wants to lead a peaceful life, but whose comrades refuse to work in order to aid other unionists in their struggle with other employers? He wants to be true to unionism and his comrades. He hates the idea of taking advantage of his comrades' self-denial, of taking a job that one of them might get but for making common cause with those who have an alleged grievance:

"The pathetic feature of the position is that most of the men think that by ceasing work in sympathy with the New South Wales railway men they are doing what is virtuous — sacrificing themselves for their fellows: or, putting the matter in another way, they are afraid of being charged with perfidy towards other unionists. If men in a union could be brought to see that their duty to the public, to their humankind, is higher than their duty to other unions (whether the other unions are right or wrong) the problem of sympathetic strikes would be nearly solved. If they could be brought to weigh the probabilities of advantage coming to the fighting union from the sympathetic strike against the

certainty of general loss, unemployment, misery, this would also help to the solution of the problem." <sup>42</sup>

Transport workers, especially, of all kinds, are always made to bear the brunt of the struggles of other unionists. The grievance is not the grievance of his union and there is nothing for the Court to arbitrate about, no subject matter in dispute between the sympathetic striker or his union and any employer. It may be said that an arbitration court cannot be expected to achieve the impossible, that it must stop short of a case in which there is no alleged industrial grievance as between the sympathetic striker and his employer, and that the Court ought not to attempt to take away the right of every man to put his hands in his pockets and to say, "I shall not accept the work offered — no matter what my reason may be." Individual freedom of action to work or not to work must be preserved at all costs; and yet it cannot be right that the community should be wilfully held up in its necessary activities when the community provides means for preventing the oppression of the poor for their poverty. It would be a great gain to the community if each union were to confine its efforts to its own grievances. In the case of the engine-drivers, a class of workers whose members are found in all sorts of undertakings, the Court intimated that an award for such a craft should be regarded as a special privilege entailing special obligations, and asked what the members would do for instance in a strike of miners — would they lower and raise the officials and any men remaining at work? The leaders of the union were reasonable, admitted that the members should do so, and gave the Court an undertaking to that effect. Then, in the case of the Merchant Service Guild, I found that the masters and officers of the vessels were required to contract to do manual work if and when required. This was obviously meant to provide for the case of the seamen or others striking. The guild objected to this clause, and the Court forbade the insertion thereof in any contract. The masters and officers were to carry out their own function, whatever men of other unions did. In the case of the waterside workers just quoted, where so many members joined in a sympathetic strike in aid of the New South Wales railway employees — employees whom the Court had no

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<sup>42</sup> Waterside workers, 30 August, 1917, 11 Com. Arb. (1917).

jurisdiction to touch — the union consented to give a bond rendering the union liable to £50 for each time that any two or more members of the union in combination struck work or refused to accept work as a means of enforcing compliance with any demand made by them or in their behalf on any respondents bound by awards of the Court in favour of the union or with any demand made by any other union on any employer or employers. It was gratifying to find that the leaders of the union accepted the position as a fair one —

“that in conceding to members of the union safeguards of the kind now suggested the Court should require the members to forego combination to enforce demands on the employers while preserving their individual independence — their full liberty individually to refuse or to take work offered. For the work of the country must be done, and so long as the law provides an appropriate remedy for any injustice the remedy of withholding labour in combination in such a way as to prevent necessary operations is intolerable.”<sup>43</sup>

I may add that the union so altered its rules as to make it practically a breach of loyalty to the union to strike or refuse work in combination without the consent of the central executive. The union applied to the Court to restore the privilege of preference in employment, a privilege which had been conceded to the union by voluntary agreement with the employers on representations made by the union that there would be no stoppage of operations; but in the meantime the employers had terminated the agreements in pursuance of the powers therein, and had succeeded in getting their work done by others under promises that these others would get preference in employment; and the Court refused to interfere. It did not grant preference to the so-called “loyalists”; but it declined to give preference to members of the union and thereby interfere with arrangements which were successful so far as achieving a result which the public needed so badly, especially under war conditions. The ships were being loaded and unloaded, and that was enough. In another case the Court dismissed the matter of the dispute, refused to arbitrate for a union whose members were involved in this sympathetic strike. The Court had cognisance of a dispute on the application of an association of iron-

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<sup>43</sup> *Waterside workers*, 28 June, 1918, 12 Com. Arb. (1918).

workers. Information having been received that the members — about three thousand — had struck work in New South Wales in sympathy with the New South Wales railway men, the president directed the case to be put in his list with liberty to any party to file affidavits. It appeared that the members, though engaged in manufacturing steel for rails and rifles required by the British and Australian and state governments, had struck; and the court dismissed the dispute under a clause of the act empowering the Court to dismiss it if further proceedings are not desirable in the public interest.<sup>44</sup>

"This Court has repeatedly expressed the value which it attaches to unionism and with no uncertain voice, but this Court cannot help unionism in a struggle against the public interest."<sup>45</sup>

It is hard to see what more could be done by the Court, a court created by and for the public of Australia. It remains to be seen how far these methods will be successful. The only complete remedy is the adoption of a clearer and higher ideal of duty. The moral and psychological problem remains.

#### IMPROVEMENTS IN THE LAW, ETC.

I referred in the previous article to the applications previously made to the Court for prohibition against the president for alleged excess of the constitutional powers. The applications mostly turned on the meaning of the word "*dispute*," or the words "*extending beyond the limits of any one State*"; and the prohibition proceedings were extraordinarily long and costly. The Court of Conciliation might take weeks in investigating the merits of the case and in making an award, and then any one dissatisfied party might bring proceedings for prohibition on the ground that there was no "*dispute*," etc. The proceedings were generally unsuccessful, it is true, but the uncertainty as to being able to hold an award should they get it, deterred many unions from approaching the Court for relief instead of stopping work. My American friends will be pleased to know that this obstacle to the usefulness of the Court is no longer formidable. In the first place the High Court has better defined the meaning of the words by certain decisions; and

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<sup>44</sup> § 38 k.

<sup>45</sup> Ironworkers, 11 Com. Arb. (1917).

in the second place Parliament has amended the act by enabling a Justice of the High Court to decide whether there is a "dispute extending" or not, before arbitration, and his decision is final.<sup>46</sup> Now, when a dispute extending is not admitted an application is made to the Justice of the High Court for such a decision before the case is dealt with in the Court of Arbitration.

Another great addition to the usefulness of this Court has been made by a decision of the High Court to the effect that the Court of Conciliation has jurisdiction to "prevent" an industrial dispute extending by taking the quarrel in hand and even making an award as to it before it extends to other states.<sup>47</sup> For instance, there is a dispute at the port of Rockhampton. If it be not settled there the members of the union in the ports of other states will probably treat the vessels which come from Rockhampton as "black" and refuse to work them. The Court of Conciliation in such circumstances has on several occasions settled the dispute before it has extended.<sup>48</sup>

The utility of the power conferred on the President to call a compulsory conference of representative disputants has been time after time demonstrated. Frequently the conference has prevented a local strike which was imminent. Frequently, arrangements are made for carrying on work until award: frequently, quarrels are settled or agreements are made as the result of a conference. The power to call a conference is discretionary; and if in any locality members of the union have struck work the President refuses to call a conference unless work is resumed in the meantime on the old terms (that is to say, refuses to call a conference at the instance of the union). This refusal has on some occasions set the wheels of industry going again until the award has been made.

Since the previous article, employers more frequently than before seek the assistance of the Court for the settlement of disputes. They often ask for compulsory conferences. For instance, the fruit-growers at the interesting settlements of Mildura and Renmark on the Murray River had, year after year, much trouble

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<sup>46</sup> § 21 *aa*.

<sup>47</sup> Merchant Service Guild, 16 Com. L. R. 591 (1913).

<sup>48</sup> Waterside workers, 10 Com. Arb. 429 (1916); Merchant Service Guild, 10 Com. Arb. 214, 228 (1916).

with the seasonal employees for picking, packing, etc. An award was made in 1912, at the instance of the Rural Workers Union and another, and the work went on for the term of the award, three years, without any conflict. When the term expired the union had been disbanded, its members having joined the Australian Workers Union. The employers wanted to get the same award as between themselves and the Australian Workers Union, and the latter union was willing to accept the same award; but there was no dispute and, therefore, the Court had no jurisdiction. Subsequently in view of the increase in the cost of living the Australian Workers Union made a demand for higher wages, etc. This demand was disputed, and then the Court got jurisdiction. After a discussion in conference an agreement was made and filed, and the work went on smoothly.<sup>49</sup> This case, however, points to the inconvenience of limiting the jurisdiction of the Court to disputes. It may be that the same power that deals with the disputes should be enabled to regulate labour where necessary.

The President has frequently been asked to act in a one-state dispute as voluntary arbitrator on an ordinary submission by agreement. The request has generally to be refused but in exceptional cases the Court has acted at the request of Ministers of a state or of the Commonwealth, especially where the matter affects the defence of the Commonwealth.

Another encouraging feature of the position is that the practice of arbitration, instead of the practice of strike, is favoured by all, or nearly all, the greater unions. Federal unions are frequently constituted with the avowed view of making common cause in the several states as to existing grievances, and of getting the Court to settle the dispute all round. The Australian Workers Union — the greatest union in Australia, comprising about seventy thousand members in pastoral, farming, and other rural occupations — is a staunch supporter of the work of the Court. Formerly there was continual trouble with the shearers, shed hands, wool pressers, etc. There was no certainty that the pastoralists could get their work done; and yet wool is probably the principal export of Australia. Since the constitution of this Court there has been no general strike of these men. There have been some local troubles, but the

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<sup>49</sup> Fruit-growers, 9 Com. Arb. 288 (1915).

executive of the union brings all its influence to bear in favour of waiting for the Court. In 1911, the Court gave an award which did not increase the existing rate for shearing (24/- per hundred), and it actually reduced some rates for wool pressers; and although in the succeeding years the cost of living increased to a formidable extent, the executive of the union insisted on the members taking employment under the award conditions until the Court should deal with an application for an advance. In 1917 the union came before the Court for an advance to 30/- per hundred, and with the consent of the employers who appeared, the Court prescribed that rate. The same union recently took under its wing the workers called "station hands" — boundary riders, bullock drivers, and generally useful employees on the huge pastoral properties. The conditions of these station hands had hitherto been wholly unregulated. The men were paid wages which were wholly inadequate for family life — some 20/-, some 25/- per week or less. The Court granted them the basic wage, but allowed the employers to satisfy the wages in kind by allowances and perquisites (such as residence and provisions) to an amount not exceeding 30/- per week, provided that the value of the allowances and perquisites be approved by a board of reference or by a union official. I have found gratification expressed in unexpected quarters on account of this approach to the solution of a very difficult problem. One of the drawbacks of Australia is the want of population in the back country, the drift to the cities, to occupations which are regulated, and which provide opportunities for family life. On the whole, and although it involves great difficulty and much toil, I am safe in saying that this interesting Australian experiment is so far a success, and that there is not the slightest indication of any movement to revert to the old anarchic state. There are plenty of suggestions, however, for the improvement of the system.

There is a very real antinomy in the wages system between profits and humanity. The law of profits prescribes greater receipts and less expenditure — including expenditure on wages and on the protection of human life from deterioration. Humanity forbids that reduction of expenditure should be obtained on such lines. Other things being equal, the more wages, the less profits: the less wages, the more profits. It is folly not to admit the fact and face it. Moreover the economies which are the easiest to



adopt in expenditure tend to the waste and degradation of human life — the most valuable thing in the world; therefore so long as the wage system continues there is need of some impartial regulating authority. Even if the wages system were to be abolished tomorrow, as some thinkers desire, if in some way the producers had an equal influence on the mode of producing and equal opportunity for self-expression in the product, there would be need still for regulation. In proposition 30 of the previous article it is stated that "The Court refuses to dictate to employers what work they shall carry on, and how, etc." For "employers" substitute "elected directors of industry," and the proposition would remain sound. Even elected persons are sometimes found indifferent to the legitimate claims of a minority. Even unions have been found to disregard the just interests of craftsmen in their ranks, if the craftsmen are few in numbers. Those who favour new systems as the result of some cataclysm or catastrophe or revolution, and treat with scorn industrial tribunals as mere alleviations, or as mere devices to bolster up the existing system, had surely better reconsider their opposition. Let not the better be always the enemy of the good.

*Henry Bournes Higgins.*

MELBOURNE, AUSTRALIA.

August 2, 1918.

## DUE PROCESS OF LAW—TO-DAY\*

### I

**W**HILE trying to avoid didactic excerpts from the historical library that has grown around the phrase "due process of law," I ask leave for some reference to history, as prefacing and perhaps explaining contemporary thought. My excuse for this address is a belief that the ancient words do not (various courts to the contrary, notwithstanding) speak to us with the same voice, or connote the same mental assumptions, or suggest the same backgrounds, political and social, as they did two generations ago, or even when my generation at the bar took the professional oath.

For present purposes it makes no difference whether Coke was right or wrong in identifying due process with the law of the land, and thereby giving to a phrase twice inserted in our national Constitution, and in substance appearing in that of every state, an ancestry emerging into script in Magna Charta. That King John's agreement not to "go against" (whatever that meant) any freeman, except by the judgment of his peers, or (not and) *per legem terrae*, in due time begot our constitutional guarantees, may not be true, but it is accepted legal history, and lies at the bottom of all our classic legal writing.

May I remind you that the phrase is of convenient vagueness; forty years ago our highest court said that it could not be defined, or at all events definition was declined, because it was better to ascertain meaning in each case by a process of judicial inclusion and exclusion.<sup>1</sup> This reservation of mental liberty for succeeding courts has often since been insisted on,<sup>2</sup> and exercised.

It is putting the same thought in another way to say that the historical test is not final, for to hold that what was once due process must always remain so "would stamp upon our jurisprudence

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\* The Annual Lecture on the Frank Irvine Foundation, delivered May 3, 1918, at Cornell University.

<sup>1</sup> Davidson v. New Orleans, 96 U. S. 97, 104 (1877).

<sup>2</sup> Holden v. Hardy, 169 U. S. 366, 389 (1898); Orient Co. v. Daggs, 172 U. S. 557, 563 (1869).

the unchangeableness attributed to the laws of the Medes and Persians.”<sup>3</sup>

If definition is either impossible or impolitic, and history is a guide uncertain at the best, how is decision to be reached? And is it not obvious that when a promise of judicial inclusion or exclusion was held out, hope was encouraged that the especial sorrow of each particular litigant might be wiped away by the saving phrase? Complaints over the flood of litigation following the Fourteenth Amendment have a humorous side. We have encouraged what we criticize.

Nearly all suits at law, constitutional litigation included, arise in the same way: the plaintiff firmly believes that he is enduring oppression, due to active fraud or callous denial of right, and therefore he brings his suit to ascertain, as he might ironically put it, whether what he knows to be wrong is nevertheless according to law.

As no lawyer admits identifying even the law as it ought to be, with his client's ideas of natural or poetic justice, it is as well *in limine* to consider what is the law whose due process is so important. I attempt no definition of that word, observing that Moses, Blackstone, and Mr. James Coolidge Carter have not permanently succeeded; but for present purposes law is anything effectual in depriving any person of life, liberty, or property, provided it emanates directly or indirectly from a national governmental agency, or from a state. Both the Fifth and Fourteenth Amendments deal in negations only, — the nation agrees not to deprive without due process, and not to let a state do so; but it does not promise, nor is it authorized directly, to legislate against deprivation by other citizens,<sup>4</sup> and a state may be as unjust as possible in legislation or administration, and yet such oppression is law — of sorts.<sup>5</sup> Further, the “due process” imposed is not primarily a requirement that right be done, but that appropriate machinery for doing right be provided.

It is therefore almost impossible to imagine an action brought affirmatively to prove that due process has been provided; the prayer is always to declare that something definitely stated is

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<sup>3</sup> *Hurtado v. California*, 110 U. S. 516 (1884).

<sup>4</sup> *The Civil Rights Cases*, 109 U. S. 3, 13 (1883).

<sup>5</sup> *Memphis Gas Co. v. Shelby County*, 109 U. S. 398 (1883).

*not* due process; and the actual course of suit is to show what has been done, garnish the concrete facts if possible with opinion evidence, and leave the court to include or exclude as to it seems, — what? Expedient, politic, necessary, advisable, or desirable, — say the critics, — but whatever carping observers say, the court always says, *lawful*. Any study of actualities in this domain of constitutional applications presents this final query: — What are the preferred tests, what the evidential material most persuasive, — in producing a ruling that any given governmental act is or is not something that can be discovered, but cannot be defined. A process suggesting the analysis of organic bodies, of which the flavor or odor is often the leading characteristic; — with the vital element breathing defiance to the analyst.

The reasons urging our fathers in citizenship to put the words where they are, and the schools of interpretation generated by them, may be mentioned before attempting this legal chemistry.

The Fifth Amendment, like all those agreed on as the price of constitutional adoption, was based on an instinctive provincial fear that the new nation would minimize the states. I believe this is admitted by all students. The Fourteenth was a straight party measure, due to distrust of the states solely in respect of their possible treatment of the negro. The sufficient proof of party spirit is that in all the legislatures of all the states exactly one Democrat voted for it, — and that man's name should be rescued from oblivion.<sup>6</sup> He was Assemblyman Bernard Cregan of New York, — commonly known as "Tom Thumb" from his diminutive size. The Fifth Amendment was not opposed because most thinking persons deemed it harmless *per se*, and a sop to a parochial populace; and the Fourteenth was adopted, because the northern majority hoped thereby to secure for the negro that sort of political and personal liberty to which they were themselves accustomed and thought every human entitled, — not doubting African fitness therefor because he, by hypothesis, was human also. This is a small foundation for the superstructure of doctrine raised around the words "*liberty and property*," — life has borne but small part in the discussion. Every reported consideration of the constitutional phrase bears internal evidence that the writer

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<sup>6</sup> FLACK, ADOPTION OF THE FOURTEENTH AMENDMENT.

inclines to one of two views, — either he regards the words as importing and imposing a rule so venerable, universal and potent, that governmental results not logically developed by that rule from precedent authority, usually *judicial*, are indefensible; or he views them only as cautionary, prescriptive of a procedural pattern, usually *legislative*, but leaving to the lawmaker varieties in fashion exuberant as those of a woman's headgear.

The conservative and radical schools of thought exist at the bar as they must in respect of all ratiocination; but as soon as our profession became the interpreters, all American constitutional reasoning became and remains strongly tinged with the rigorous verbal logic of the lawyer who (to be happy) must connect with a precedent or two any and every result he reaches, and call the same law.

The nature of due process, as derived from history before 1789, or meditation on the nature of things, is a subject soon exhausted; and for the two generations I am considering we have reasoned on this matter in a way I think peculiarly American. We know that our Federal Constitution is one of delegated powers, and (however erroneously) incline to treat those of the states in the same way; and when a plaintiff asserts that something is not due process, he succeeds (if he does) not *ex rerum naturâ* but because that something is not contained within some other express or implied power of the law-making authority. This way of treating the constitutional question is accepted by even conservative writers, of whom Mr. William D. Guthrie<sup>7</sup> is perhaps the most distinguished living example.

Our present Chief Justice expressed the same thought when he said that the Fifth Amendment "qualified so far as applicable" all other constitutional provisions.<sup>8</sup> In result the lawyer-like way of defending a challenged act is to establish its propriety under some other constitutional provision so plainly that it defies the due-process clause.

Though the phrase pervades our every scheme of government, slight study of actual cases shows that the overwhelming majority of complaints arise in the attempted exercise of the powers of

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<sup>7</sup> THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION — LECTURES BEFORE DWIGHT ALUMNI ASSOCIATION, 1898.

<sup>8</sup> *McCray v. United States*, 195 U. S. 27, 61 (1904).

police, taxation, procedural regulation, and eminent domain, and in the order named, while as incident to the police power, or included within it, regulation of activities affected with a public use looms large, and classification for benefits or burdens is so large a part of or preparation for taxation or regulation, that at times one doubts the mathematical axiom that the whole is greater than any of its parts. Thus the modern study of due process almost becomes an examination of legislative activities *de rebus omnibus, — et quibusdam aliis*.

Why without any change of language, and no variation in procedure making our lawyer grandfathers, utter strangers in our courts, — litigation over the clause is a growth of almost exactly two generations as usually counted, — is a fascinating study. To me the reasons seem to have no very close relation to the law or its professors; but to rest on the social and material changes which have within the years indicated transformed this country from an agricultural to a manufacturing community, and its population so largely from rural to urban.

One short extract from one book illustrates where the bar in general stood as to the scope and meaning of due process of law, more than fifty years after independence. The first edition of Story on the Constitution appeared in 1833, and the sole reference to the Fifth Amendment is this: "This clause in effect affirms the right of trial according to the process and proceedings of the common law." Simple and summary, is it not? Story's was an encyclopædic mind, but with no tinge of prophecy; that sentence discloses the professional view that read the words only as affecting courts, administering interpersonal relations, — perhaps with special reference to the criminal side.

A dozen years later, it could be said in South Carolina, that "the law of the land" meant "the common law and statute law existing in this state at the adoption of our constitution."<sup>9</sup> About equally simple, I think; but the idea of a body of law, fixed as to kind at least by constitutional congealment, is perhaps discernible.

A few more years passed, and in 1855 the Supreme Court in *Murray v. Hoboken Land Co.*<sup>10</sup> considered the legality of the

<sup>9</sup> *State v. Simmons*, 2 Spears (S. C.), 761, 767 (1844).

<sup>10</sup> 18 How. (U. S.) 272, 276 (1855).

treasury warrants issued against Andrew Jackson's defaulting collector, under which much of the mosquito-bitten land on which to-day stand hundreds of factories near the Bergen Hills, had been sold. Story's successors thought they covered the subject by saying that

"though due process of law generally implies and includes *actor reus judex*, regular allegations, opportunity to answer and a trial according to some settled course of judicial proceedings,"

yet history showed some equally settled exceptions and treasury warrants were among them; — the title to the Hackensack Meadows was quieted.<sup>11</sup>

That all men of that day had no conception of due process, other than a summary description of a fairly tried action at law, is not asserted; but I do submit that reports before the Civil War yield small evidence that there was any professional conviction that it was more than that. The judicial parsimony of the best courts is proverbial, but it is plain that when the Supreme Court thus spoke in 1855 they felt that public necessity had been satisfied; and procedure only was in mind.

The idea, however, that what one generation calls vested rights, and the next one vested wrongs, was something for which "due process of law" afforded a shield, was planted; the evidence is found in the state reports. Contemporary with the Hoboken case was that of Wynehamer,<sup>12</sup> where Judge Comstock (*nomen clarum*) said in substance that the law of the land could not be a statute taking away property rights already existing. The judge was not the discoverer of the iniquity of confiscation, but his remark was typical of the thought then new to the reports, that existing property rights were things needing protection from legislation, — and the bar, while casting about for ways and means, was pondering over due process.

Life is legally a simple word, and property fairly easy, — but *liberty* was sure to grow in a country like ours, and before adoption

<sup>11</sup> Cf. *Commonwealth v. Byrne*, 20 Grat. (Va.) 165 (1871).

<sup>12</sup> 13 N. Y. 378, 393 (1856). E. g., "Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer; nor will it make any difference although a process and a tribunal are appointed to execute the sentence. If this is the "law of the land" and "due process of law" within the meaning of the constitution, then the legislature is omnipotent."

of the Fourteenth Amendment bench and bar had given the word meanings such as the right to use one's faculties in all lawful ways, to live and work where one wishes, to pursue any lawful calling, trade or profession, and acquire and retain the gains therefrom.

Very early in Fourteenth Amendment discussion the Supreme Court remarked<sup>13</sup> that the provision

"furnishes an *additional* guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society."

The words seemed to accept a meaning for *liberty* (worked out in New York quite as thoroughly as elsewhere), for which no historical warrant as of the year 1789 can be found,<sup>14</sup> but concerning which it is now as idle to cavil or complain as over Coke's historical accuracy or lack of it, in respect of Magna Charta.

To sum the assertions thus far ventured: — the generation that fought the Civil War usually identified due process with common-law procedure; they knew vested rights in property, had a generous definition of liberty in many new and quite American aspects, never doubted the fullest liberty to contract, and since the national government then scarcely touched the private citizen in days of peace, had given the Fifth Amendment very scant consideration.

It was that generation which, politically intent on the negro, and with nothing else in mind, worked out the Fourteenth Amendment, — which was over five years old before the Slaughter House cases<sup>15</sup> opened, before a very able court, the still continuing conflict between private desire and public authority.

## II

Case law resembles a patch-work quilt; it is strong and serviceable, but to see the pattern you must have distance, while the makers always look at the last patch when putting on a new one; so the latest decision seems most important, and the Slaughter House cases have become something practitioners cite but do not read. This excuses statement of the facts that made a curtain raiser

<sup>13</sup> *United States v. Cruikshank*, 92 U. S. 542 (1875).

<sup>14</sup> 4 HARV. L. REV. 365.

<sup>15</sup> 16 Wall. (U. S.) 36, 76 (1872).



for Fourteenth Amendment litigation. Louisiana interfered with the vested rights of New Orleans butchers by restricting slaughtering to one area controlled by one company and subject to sanitary regulation, but everyone could there kill cattle on payment of fees. From a lay standpoint, the facts prove my thesis, — could anything be more reasonable in a sub-tropical town, and would anyone now dream of complaining?

As a lawyer, however, it seems to me noteworthy that the strict and loose, conservative and liberal schools of interpretation not only instantly appeared at bar, but in the court, and along party lines, in a way not usually recognized. The justices were counted Republican, except Field, but both he and Bradley had Democratic minds in governmental matters; they distrusted government, the less of it the better; as successful lawyers they loved the rigor of the game, and hated anything that could not justify existence according to inherited rules. Miller, J., for the court, laid down two propositions here relevant: (1) The police power is something incapable of definition, necessary to sovereignty, not to be bargained away, and subject to which every man holds property. This was acknowledged borrowing from Shaw, C. J.,<sup>16</sup> and added nothing to Taney's epigram that it was no more than the power inherent in a sovereign, *i. e.*, sovereignty;<sup>17</sup> and (2) the Fourteenth Amendment could not be invoked as to privileges and immunities due one as a state citizen, invasion of the rights of a citizen of the United States must appear, but exactly what such rights were could not be stated comprehensively or in advance; to hold otherwise would belittle and degrade the states, a thing unthinkable. The dissent of Field and Bradley declared the nation charged by the amendment with the power and duty of protecting whatever privileges and immunities belonged of right to the citizens of *any* free government, a doctrine logically compelling the Supreme Court of the nation first, to draft a code of freemen's rights, and then enforce it *uniformly* in all the states.

I believe that the view of human rights glorified in common-law courts, — the Democratic view, inclined its holders to a bold constitutional doctrine, and Mr. Guthrie, also politically Democratic,

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<sup>16</sup> *Commonwealth v. Alger*, 7 Cush. (Mass.) 53, 84 (1851).

<sup>17</sup> *License Cases*, 5 How. (U. S.) 504, 583 (1847).

holds that the Slaughter House decision "dwarfed and dulled the *protective* power of the amendment," and so it did. The paradox is that men of the school who always inclined against national authority while state power was rarely exercised, magnified the greater sovereign when the states seemed to rouse from the rôle of King Log. That Miller, J., conceived himself as guarding the gate against an invasion of social questions, vexatiously beyond the concept of historic common law, is a fair speculation, for the court of that date is not usually regarded as very tender of "state's rights." But that phrase has a perverted meaning, being popularly identified with Calhounism and nullification, and in a very true sense the court of the Slaughter House cases cherished state's rights in what they considered non-political matters; vision was still concentrated on the political negro question.

Ten years passed, and my legal generation came to the bar (108 U. S. and 91 N. Y. were our first reports in 1883); down to that date appeals to due process were rare, and (barring the negro cases) never successful except on the procedural side. There *Pennoyer v. Neff*<sup>18</sup> is a true monument, laying down, in strict accordance with tradition, the requirement of a good judgment *in personam*, and for Field to write the opinion was doubtless a labor of love. When this generation of mine opened the reports, the chill of the Slaughter House decision was on the bar, with the added discouragement of the Granger cases,<sup>19</sup> whose language, and *we* thought decision, seemed to put all complaints of corporate regulation of service and charges out of court, if an appeal under the due-process clause was ventured against a state; the still continuing dissents of Judge Field seemed most unorthodox. The remark in another judgment, that due process was usually what the state ordained,<sup>20</sup> seemed to clinch the matter.

But the changes, before alluded to as wholly unrelated to our professional activities, but big with legal importance, were daily becoming more apparent. The youngsters of to-day of course regard the early '80's of the last century as sadly reactionary and stagnating in conservatism, but we thought ourselves progressive reformers, as does every age and generation of recorded history

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<sup>18</sup> 95 U. S. 714 (1877).

<sup>19</sup> 94 U. S. 113 (1876) *et seq.*

<sup>20</sup> *Walker v. Sauvinet*, 92 U. S. 90 (1875).

War memories were fading fast, greater cities needed more government than farming townships, increasing wealth tempted taxation, ambitious local improvements demanded it, and heavily indebted transportation lines controlled by distant security holders continued to irritate an increasing population that owed its existence to that which excited their anger. Everywhere was there quick material recovery from the collapse of '73, and everywhere increasing inclination to translate social yearnings into statutes that interfered with that also fast-increasing class who wished to be let alone because they were very well able to take care of themselves under a static common law; dynamic statute law was unknown and abhorrent.

The material was fast preparing, and the state courts were producing results as variegated as their political surroundings; but only a few preceptors taught their pupils that such increasing divergence in local results would surely lead to renewed and determined efforts to produce sameness if not harmony through the due-process clause in the Amendment still thought of as new.

It may be a personal whim, but I think that year, 1883, marks an epoch, for it considered *Hurtado v. California*.<sup>21</sup> When that enterprising state so far abolished grand juries as to prosecute serious felonies by information, it was held due process, with the remarks about Medes and Persians quoted earlier in this address, and the historical school had a quietus. If even in procedural matters our inherited law knew nothing of a state's new method, such method might be wrong, but it was necessary to show therefor some reason other than ancient history. But that was only procedure, a form, and all laymen and most lawyers contemporaneously overlooked the substance that was in it; theories of taxation were as yet simple, whatever their financial weight; the exercise of police power directly upon the citizen was still rare, and in the older states, as late as 1885, such a holding in favor of liberty of occupation and vested rights as that in the tenement-house cigar case<sup>22</sup> excited small comment; it was the ignorant and arbitrary action of local railway commissions that incited what from our present distance seems a strategic drive against the do-nothing policy of the Granger decisions.

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<sup>21</sup> 110 U. S. 516 (1884).

<sup>22</sup> *Re Jacobs*, 98 N. Y. 98 (1885).

There were some intermediate rumblings, like the intimation that "this power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation;"<sup>23</sup> but it was not until 1889 that any regulatory act or system of a state affecting transportation lines was nullified under the due-process clause, or otherwise, for that matter.<sup>24</sup>

The court was changing, the tide of litigation rising fast in response to business demands. Miller and Bradley (soon to be united in death) still disagreed; the former (the better political seer) consenting to coerce the state, only on the far-seeing ground that it was meddling with interstate commerce; the latter (the better trained lawyer) clinging in dissent to the Granger cases, which he declared to be overruled in principle, — a *dictum* generally approved, notwithstanding the continued use of them by the Supreme Court, — when convenient.

It is from that decision that I date the flood. Justice Bradley was as usual right in intuition; the thought underlying the Granger doctrine was that the law-making power was not only solely empowered to establish law, but to declare the reasonableness thereof; the departure made in 1889, and settled soon after Bradley's death in the Texas Commission cases,<sup>25</sup> practically arraigned legislators at the bar, and passed judgment *not*, mark you, on the justice or wisdom, but the *reason*, of what they had done, and "reason" is another of those words as to which inclusion and exclusion are more appropriate than definition. It may be added that most men with difficulty discover reason in that which they firmly believe unjust, unwise and probably dishonest. This, however, was no revolution, except within the court, whose changing personnel soon contained in Justice Brewer a powerful reinforcement to the school of Field, — his near kinsman. For the world at large, all that happened was that the Supreme Court joined hands with most of the appellate tribunals of the older states, and the legislatures had not only domestic censors, but another far away in Washington, to pass on their handiwork.

No state had more influence than New York, and the Wynehamer case is especially noteworthy. When vested rights in liquor

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<sup>23</sup> 116 U. S. 307, 331 (1886).

<sup>24</sup> Chicago, etc. Ry. v. Minnesota, 134 U. S. 418 (1890).

<sup>25</sup> 154 U. S. 362 (1894).

appealed against drastic legislation, Comstock, J., said that "we must be allowed to know that intoxicating liquors are produced for sale and consumption as a beverage." Surely not a very great assumption, but so taking judicial cognizance of social and business conditions, putting the court's own construction on that of which cognizance is taken, and then judging the legislative act by the result thereof, is practically making a category of reasons, judicially recognized, and then inquiring whether any of *those* reasons support the statute. That the legislators knew none of them, or rejected them, is immaterial.

Does it not seem clear that if the reasonableness of a body of railway rates could be tested by suit, the same inquiry must be open as to every serious regulation of any business, trade, or profession of a gainful nature? So it has been; and for something less than thirty years we have had every species of state action productive of pecuniary loss to vested rights, or limiting business liberty, put to the acid test of due process in the Supreme Court.

The result to-day of an enormous expenditure of argument and output of opinions may be measured in respect of either the nature of judgments given, or methods of reaching judgment. The mandate filed is usually of agreement with the legislature; in the ten years from 1890 there were one hundred and ninety-seven appeals over due process, but only six times in that century were such important matters as transportation rates successfully attacked; and speaking generally state courts having a reputation for independence and vigor are always sustained. Taking Massachusetts, New Jersey, and New York together, I can recall only one case in which the highest state tribunal has been reversed on the process clause. Considering (rather loosely) the legal topics usually suggestive of complaints of undue process, — as to procedure we stand on *Pennoyer v. Neff*, — applied sometimes in a way that must still disturb Justice Field. Taxation is always due in process if it is a real tax on property or rights within the jurisdiction, confirmed after hearing. Police power once freed from the shackles of the historic test has overshadowed every other head of litigation, and even eminent domain has advanced; for anything as yet discovered and deemed good for the public by the legislature is sufficiently eminent to have domain, and thus *ex vi termini* become due process. This form of statement may interest us as

citizens; as lawyers it is a duty to map out the path by which such uniformity in result is reached.

Justice Holmes, the Voltaire of our bench, once frankly said in an opinion that the Supreme Court never decided anything that could be avoided. The wisdom of the practice, and some errancy of statement is well illustrated by the case of Dred Scott and its aftermath; but when it comes to due process nowadays it is strictly true. The plaintiff must show damage, suits by *amici populi* need not be decided;<sup>26</sup> the damage must be in the present tense, an expectation of future loss is not enough;<sup>27</sup> loss in only one department of an integral business has been used to prevent consideration, for the whole business may be reasonably profitable;<sup>28</sup> any possible statutory construction, however surprising to the plaintiff and unheard-of in daily life, is enough to prevent unconstitutionality;<sup>29</sup> a failure to ask for a rehearing,<sup>30</sup> or actual appearance when a defective statute provided for none,<sup>31</sup> may put an otherwise meritorious plaintiff out of court; and if hearing had it is enough if it be held after tax already laid;<sup>32</sup> and a failure to go to the highest state court before troubling the Supreme Court may delay if not defeat relief.<sup>33</sup>

These few and recent illustrations might be much extended, and some comparison with other heads of jurisdiction induce belief that more pitfalls have been prepared for him who complains of undue process than for any other litigant, in what is usually a court of generous practice.

If decision cannot be avoided, presumptions are next considered, — such as the *prima facie* constitutionality of any act; that what is enacted expresses the public policy of the state, or that what is complained of is matter of discretion, — which is not reached by the clause.<sup>34</sup> A hardy remnant, however, demands answer to the

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<sup>26</sup> *Cusack v. Chicago*, 242 U. S. 526 (1917).

<sup>27</sup> *Knoxville v. Water Co.*, 212 U. S. 1 (1909); *Willcox v. Consolidated Gas Co.*, 212 U. S. 19 (1909).

<sup>28</sup> *C. & O. Ry. Co. v. Commission*, 242 U. S. 603, 604 (1917).

<sup>29</sup> *Pennsylvania, etc. Co. v. Gold, etc. Co.*, 243 U. S. 93 (1917).

<sup>30</sup> *Vandalia R. R. Co. v. Commission*, 242 U. S. 255 (1916).

<sup>31</sup> *Kryger v. Wilson*, 242 U. S. 171 (1916).

<sup>32</sup> *Embree v. Kansas District*, 240 U. S. 242 (1916).

<sup>33</sup> *Prentiss v. Atlantic Coast Line*, 211 U. S. 210 (1908).

<sup>34</sup> *St. Louis and Kansas City Land Co. v. Kansas City*, 241 U. S. 419 (1916).

real question, — has the legislature made the mere existence of rights secured by the Constitution the occasion of depriving their owner of them, — even under the *forms* that belong to due process of law? This was the inquiry as phrased in the *Wynehamer* case; it asks why, for what reason did the legislature do this thing? And when in answering, the courts take cognizance even of what *they* believe to be known *semper, ubique et ab omnibus* the result is often a verdict, a finding of fact and not of law, except as it is the law of that case.

This is the kernel (if there be one) of my thoughts, for I now leave procedure as intellectually still founded on *Penmoyer v. Neff*,<sup>35</sup> also eminent domain and taxation, as depending only on the query, is there a real taking or tax of something infra-jurisdictional, in a method procedurally due? There remains police power, *i. e.*, the concrete expression of sovereignty, — what is its modern relation to due process, under either amendment, or any state constitution?

The venerable ex-President of this University is the author of two bulky volumes concerning religious and scientific conflict, — they should be called White's History of Dissent. I wish a lawyer would measure the development of law by dissents, — which are worth more study than is usually accorded them. In a court not subject to sudden change, able and continued dissent delimits and accentuates decision; it reveals far more than does the majority opinion the intellectual differences of the council table; and the present status of police power is to me more clearly revealed by the dissents of Justice Holmes than by the syllabi of digests.

Sixteen years ago he entered a court already committed to that review of state action, which necessarily followed a successful appeal against local railway regulation; but as yet not much troubled with intimate statutory repressions or encouragements along a line now extending and recently extended from the peaks of wages and hours of labor,<sup>36</sup> through a jungle of blue sky,<sup>37</sup> employment agency,<sup>38</sup>

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<sup>35</sup> Cf. *Saunders v. Shaw*, 244 U. S. 317 (1917), for a very modern application.

<sup>36</sup> *Wilson v. New*, 243 U. S. 332 (1917).

<sup>37</sup> *Hall v. Geiger-Jones Co.*, 242 U. S. 539 (1917).

<sup>38</sup> *Brazee v. Michigan*, 241 U. S. 340 (1916); *Adams v. Tanner*, 244 U. S. 590 (1917).

and compensation statutes,<sup>39</sup> to the intellectual mud holes of ice cream<sup>40</sup> and trading stamp ordinances.<sup>41</sup>

The idea that due process was something like a writ, and if no writ could be found, the law afforded no remedy was duly exploded; it does not press the simile too far to say that since the *Hurtado* case, the legislatures of my generation could proceed as *in consimili casu*; but no court had given any more exuberantly American definitions of liberty than already existed in the Supreme Court reports,<sup>42</sup> even though in a rather hazy way it was admitted that liberty of contract was subject to police power limitations;<sup>43</sup> and one pregnant sentence, to the effect that no man could have a vested right in any rule of the common law,<sup>44</sup> *i. e.*, in the customs of our forefathers, had plainly survived the Granger wreck.

No man has seen more plainly that the court was measuring the legislature's reasons by its own intellectual yardstick than has Justice Holmes; none more keenly perceived that the notations thereupon marked those results of environment and education which many men seem to regard as the will of God or the decrees of fate. He has complained that a "constitution is not intended to embody a particular economic theory," though of course a statute may be and often is designed so to do; and in particular the "Fourteenth Amendment does not enact Mr. Herbert Spencer's social statics," and he deems the "word liberty perverted when held to prevent the natural outcome of a dominant opinion;"<sup>45</sup> while as for "principles," it is sometimes idle to speculate whether they are "eternal or a no longer useful survival, (for) constitutionality is independent of our (*i. e.*, the courts') views on such points."<sup>46</sup>

To arrive at what the Justice so simply calls the "osmose of mutual understanding,"<sup>47</sup> one asks, is anything left *not* independent of constitutionality? The seeming answer is that a statute

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<sup>39</sup> *Hawkins v. Bleakly*, 243 U. S. 210 (1917).

<sup>40</sup> *Hutchinson v. Iowa*, 242 U. S. 153 (1916).

<sup>41</sup> *Rast v. Van Deman*, 240 U. S. 342 (1916).

<sup>42</sup> *E. g. Allgeyer v. Louisiana*, 165 U. S. 578, 589 (1896).

<sup>43</sup> *Holden v. Hardy*, 169 U. S. 366 (1898).

<sup>44</sup> *Munn v. Illinois*, 94 U. S. 113 (1876).

<sup>45</sup> *Lochner v. New York*, 198 U. S. 45, 75 (1905).

<sup>46</sup> *Grant Co. v. Gray*, 236 U. S. 133 (1915).

<sup>47</sup> *Brown v. Elliott*, 225 U. S. 392, 404 (1911).



which a "rational and fair man would admit to infringe fundamental principles" <sup>48</sup> is unconstitutional. But what principles are fundamental? Except as illustrated by the Frank-Georgia mob case <sup>49</sup> and his delightful treatment of the statutory sandbag devised by Louisiana for the American Sugar Company <sup>50</sup> we remain uninstructed; but I humbly conclude that if there are any principles so fundamental as properly to invalidate formally correct legislative action, the differences between the present extremes of judicial opinion on this subject are of degree and not kind; for all agree that however correct in procedure, the *ipse dixit* of the legislature is not a sufficient reason for what it decrees, therefore a reason must be shown sufficient for the reviewing court, and the court's approval or disapproval is an opinion, which, as Justice Holmes says, "*tends to become law.*"

This is our condition to-day. It is hard for me to call this law in the same sense as we speak of patent law or that of insurance; but it is a far higher exercise of juridical thought, — to justify from term to term all exercises of popular will which do not plainly violate some express or plainly implied constitutional prohibition. It is really a function of political criticism.

Irrespective of party, and I respectfully believe with small regard most of the time for legalism, while maintaining legal form, — the highest court and most high courts have refused to regard constitutions as codes, and of late years have more and more made due process of law whatever process seems due to the demands of the times, as understood by the judges of the time being.

The direct appeal of property to due process has for the most part failed; and apparent successes have but taught legislators how to arrive at the same result in another way. The indirect appeal through liberty is still going on, for the American belief that every freeman can do what he likes, where and when he pleases, as long as he does not infringe the moral law as expressed in the usual criminal code, dies very hard. But it is dying, and the courts, when invoked to-day under the due-process clause, are doing little more than easing the patient's later days.

Charles M. Hough.

NEW YORK.

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<sup>48</sup> *Lochner v. New York*, *supra*.

<sup>49</sup> *Frank v. Mangum*, 237 U. S. 309, 345 (1915).

<sup>50</sup> *McFarland v. American, etc. Co.*, 241 U. S. 79 (1916).

## INDIRECT ENCROACHMENT ON FEDERAL AUTHORITY BY THE TAXING POWERS OF THE STATES.<sup>1</sup> V

### II. REGULATIONS OF INTERSTATE COMMERCE (*continued*)

#### 2. *Taxes not Discriminating against Interstate Commerce* (continued)

#### B. TAXES ON PROPERTY

REFERENCE has already been made to the cases which treat franchises as property and consider the assessment of such franchises by the criteria which obtain in judging whether taxes on property are regulations of interstate commerce.<sup>2</sup> This indicates that there is no hard and fast line to be drawn between privileges and property. When a franchise may be disposed of for a price, it is of course a form of property. Conversely, all property is to an extent a matter of privilege. The remedies for interference with property interests are essential to the security and salability of those interests. In so far as the remedies are the creation of the law, and are subject to amendment or withdrawal, the interests which the remedies serve partake of the nature of privilege, and taxes on those interests might by a chain of reasoning be deemed taxes on privileges.

The pursuit of these fascinating possibilities will be left to those who care to indulge in it. It is enough for our present purpose to disclaim any assumption of perfection or of inherent validity in the schematism here employed. The topical headings and their order of treatment are chosen solely from considerations of convenience. Though privilege and property are not mutually exclusive categories, horses and land and ties and rails are different from corporate franchises and the right to inherit. Roughly speaking, taxes on property may be distinguished from taxes on privileges, even though the two share some common because of vicinage.

<sup>1</sup> For preceding instalments of this discussion see 31 HARV. L. REV. 321-72 (January, 1918), *Ibid.*, 572-618 (February, 1918), *Ibid.*, 721-78 (March, 1918) and *Ibid.*, 932-53 (May, 1918).

<sup>2</sup> 31 HARV. L. REV. 768, note 166.

This common has already been pointed out in discussing taxes on privileges,<sup>3</sup> and there will be occasion to refer to it again. It is also to be borne in mind that no exercise of state fiscal power can adequately be judged in isolation. The legitimacy of any particular demand may depend upon the presence or absence of some other or others. But threads must first be spun before they can be woven together. If any misapprehensions are permitted or fostered by the effort to disentangle in analysis what is inter-related in practice, they will, it is hoped, be dispelled by a later venture in synthesis.

The taxes on property here to be considered do not include those levied on the property that is carried in interstate commerce and offered for sale after reaching its destination. Such taxes, with the exception of those which in some fashion discriminate against interstate commerce,<sup>4</sup> are not treated as instances of indirect encroachment on the realm of federal control. Property in interstate transit<sup>5</sup> and property that has completed its journey<sup>6</sup> present the issue of taxability rather than that of valuation. What we are here concerned with are the taxes which are confessedly on proper subjects of state power, but which are assessed in ways that are alleged to exceed that power. The issue is whether the subject or the method of assessment shall be regarded as controlling. The property taxes which raise this issue are those on property which is an instrument of interstate commerce, whether peripatetic like cars and engines or immobile like ties and track. When property of an intangible character intrudes itself into the discussion, it is because the Supreme Court has chosen to make a classification for which it must bear the responsibility.

## I

On December 15, 1873, in *Union Pacific R. R. Co. v. Peniston*,<sup>7</sup> a majority of the Supreme Court rejected the contention that the property of the Union Pacific was exempt from state taxation on account of the relation of the road to the federal government.

<sup>3</sup> 31 HARV. L. REV. 768, note 166.

<sup>4</sup> See 31 HARV. L. REV. 572-74.

<sup>5</sup> See editorial note in 26 HARV. L. REV. 358-60.

<sup>6</sup> *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 109 (1885).

<sup>7</sup> 18 Wall. (U. S.) 5 (1873). See 31 HARV. L. REV. 371, note 171.

Three dissenting justices, however, argued that the property itself was an agency of the United States, and was therefore as immune from state taxation as are the bonds of the United States or the operations of the United States Bank. Less than three months later, in *The Delaware Railroad Tax*,<sup>8</sup> Mr. Justice Field indicated without objection from any of his colleagues that a state tax on the property of an interstate carrier was not a regulation of interstate commerce. From that day forward it has never been seriously doubted that a tax on tangible property used as an instrument of interstate commerce is not a tax on that commerce.<sup>9</sup> Such disputes as we have here to chronicle relate to the propriety of methods adopted for assessing that property.

Mr. Justice Field's remarks about property taxation in *The Delaware Railroad Tax*<sup>10</sup> must be regarded as *obiter*, since he had previously stated that the tax before the court was not a tax on property, but one "upon the corporation itself, measured by a percentage upon the cash value of a certain proportional part of the shares of its capital stock."<sup>11</sup> It is to be inferred that the tax, if one on property, would have been held to be faulty because of the method by which the amount of property in Delaware was determined. The statute required each company subject to the act to pay a tax of one-fourth of one per cent on such proportion of the cash value of all its shares as the length of the line in Delaware bore to the total mileage. It was conceded that the "ratio of the value of the property in Delaware to the value of the whole property of the company" was considerably "less than that which the length of the road in Delaware bears to its entire length."<sup>12</sup> From this Mr. Justice Field concluded that "a tax imposed upon the property in Delaware according to the ratio of the length of its road to the length of the whole road must necessarily fall on property without the State,"<sup>13</sup> and observed that, upon the assump-

<sup>8</sup> 18 Wall. (U. S.) 206 (1873).

<sup>9</sup> In 1891 Mr. Justice Gray on page 23 of his opinion in the Pullman case, note 33, *infra*, declared: "It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction."

<sup>10</sup> Note 8, *supra*.

<sup>11</sup> 18 Wall. (U. S.) 206, 231 (1873).

<sup>12</sup> *Ibid.*, 230.

<sup>13</sup> *Ibid.*, 231.

tion that the tax was on property, there would be great difficulty in sustaining it.

The tax was therefore regarded as one "upon the corporation itself," which seems to mean upon the right to exist as a corporation. It was sustained on the theory that the state has absolute power over its own corporate creatures. After saying that "the State may impose taxes upon the corporation as an entity existing under its laws, as well upon the capital stock of the corporation or its separate corporate property,"<sup>14</sup> Mr. Justice Field added that "the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion."<sup>15</sup> In view of the previous indication that the caprice of the state would have been curbed, had the tax been one on property, this imputation to the state of arbitrary power must be confined to the assessment of the franchise. But the suggested limitation on the power to tax property is predicated, not on the commerce clause, but on the position that the state must confine its exactions to property within the jurisdiction.

The two closing paragraphs of the opinion dismiss the objections under the commerce clause. That the conclusion is not confined to taxes on the franchise is manifest from the final sentence:

*"The exercise of the authority which every State possesses to tax its corporations and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business or income, or the value of their property, when this is not done by discriminating against rights held in other States, and the tax is not on imports, exports, or tonnage or transportation to other States, cannot be regarded as conflicting with any constitutional power of Congress."*<sup>16</sup>

The tax in question was said to affect commerce among the states "just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed."<sup>17</sup> And Mr. Justice Field, though he had dissented in *State Tax on Railway Gross Receipts*,<sup>18</sup> decided twelve months earlier, quotes with approval from the opinion in that case to the effect that "it is not everything that affects com-

<sup>14</sup> 18 Wall. (U. S.) 231 (1873).

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, 232. Italics are author's.

<sup>17</sup> *Ibid.*

<sup>18</sup> 15 Wall. (U. S.) 284 (1872). See 31 HARV. L. REV. 576-77.

merce that amounts to a regulation of it, within the meaning of the Constitution."<sup>19</sup>

Of course the majority judges in the Gross Receipts case could find no fault with taxing property employed in interstate commerce. That case, it will be remembered, sustained a tax levied directly on gross receipts. One of the grounds adduced by the majority was that the receipts were a fund actually in the hands of the corporation, disassociated from the source whence they were derived. The artificiality of this conception was exposed by the minority at the time, and fourteen years later was recognized by a unanimous court.<sup>20</sup> But while the doctrine prevailed, there could be no doubt that a state might effectively tax interstate commerce, provided it was careful not to impose the tax formally on the commerce itself. It is significant, however, that the judges who dissented in *State Tax on Railway Gross Receipts*<sup>21</sup> interposed no objection to the statement in *The Delaware Railroad Tax*<sup>22</sup> that the property of an interstate carrier was taxable at its full value. The only qualification suggested was that this value must not be inflated by the inclusion of elements not local to the taxing state. It seemed to be assumed that the valuation could take the form of a capitalization of earnings, including those from interstate commerce, for the value of the entire road was fixed by the cash value of the shares of capital, which would of course be determined in large measure by some estimate of earnings.

Three years later, in the *State Railroad Tax Cases*,<sup>23</sup> the propriety of this mode of assessment was distinctly affirmed, so far as the Fourteenth Amendment was concerned. Mr. Justice Miller pointed out that "the visible or tangible property of the corporation . . . may or may not include all its wealth."<sup>24</sup> "There may be other property of a class not visible or tangible which ought to respond to taxation, and which the State has a right to subject to taxation."<sup>25</sup> And the method of assessment adopted by Illinois was indicated and approved as follows:

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<sup>19</sup> 15 Wall. (U. S.) 293 (1872); quoted in 18 Wall. (U. S.) 206, 232 (1873).

<sup>20</sup> *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. Rep. 1118 (1887).

<sup>21</sup> Note 18, *supra*.

<sup>22</sup> 92 U. S. 575 (1876).

<sup>23</sup> *Ibid.*

<sup>24</sup> Note 8, *supra*.

<sup>25</sup> *Ibid.*, 602.

"It is therefore obvious that, when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock." <sup>26</sup>

The *State Railroad Tax Cases* <sup>27</sup> did not involve interstate commerce, <sup>28</sup> since the complainants rested their objections wholly on other grounds. Not until twelve years later did the commerce question come again before the court. It was then decided in *Western Union Telegraph Co. v. Massachusetts* <sup>29</sup> that it was not a regulation of interstate commerce to assess the property of an interstate telegraph company by taking that proportion of the assessable value of the total capital stock which the miles of line within the state bore to the total miles of line. Mr. Justice Miller distinctly stated that the tax was not one on the franchise of the company, which interpretation seemed to be necessary to save the tax from being one on a federal instrumentality. "The tax in the present case," he said, "though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts." <sup>30</sup> Inasmuch as the assessable value of the total capital stock was based on the market value of the outstanding shares, the assessment necessarily took account of earnings. This is evident from *Massachusetts v. Western Union Telegraph Co.*, <sup>31</sup> a later case between the same parties involving subsequent taxes levied under the same statute. For there it appeared that the company "admitted its liability to pay a tax on the actual value, as stated in its answer, of its real and personal property within the

<sup>26</sup> 92 U. S. 605 (1876).

<sup>27</sup> Note 23, *supra*.

<sup>28</sup> For other cases sustaining the application of the so-called "unit rule" or some modification thereof, when interstate commerce was not involved, see *Kentucky Railroad Tax Cases*, 115 U. S. 321, 6 Sup. Ct. Rep. 57 (1885), *Marye v. Baltimore & Ohio R. Co.*, 127 U. S. 117, 8 Sup. Ct. Rep. 1037 (1888), *Charlotte C. & A. R. Co. v. Gibbes*, 142 U. S. 386, 12 Sup. Ct. Rep. 255 (1892), and *Columbus Southern Ry. Co. v. Wright*, 151 U. S. 470, 14 Sup. Ct. Rep. 396 (1894).

<sup>29</sup> 125 U. S. 530, 8 Sup. Ct. Rep. 961 (1888).

<sup>30</sup> *Ibid.*, 530, 552.

<sup>31</sup> 141 U. S. 40, 11 Sup. Ct. Rep. 889 (1891).

State,"<sup>32</sup> and paid into court the sum so admitted to be due, which was less than that held rightfully demanded under the statute.

On the same day the court also decided *Pullman's Palace Car Co. v. Pennsylvania*,<sup>33</sup> which sanctioned Pennsylvania's method of taxing the cars that ran in and out of the state during the year. Most of the discussion in both the majority and minority opinions was concerned with the question whether the cars had a taxable situs in the state. The minority insisted that, since no specific cars were permanently located there, no cars were taxable. But the majority held it proper to estimate the average number of cars and to tax such car property, even though no single car stayed still long enough to give it a situs within the state. The tax purported to be based on a portion of the capital stock, but the court treated it as substantially one on the cars as property.

Surprisingly little was said about the method of assessment, which is described in the majority opinion as follows:

"The mode which the State of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run."<sup>34</sup>

Then follows the approving comment:

"This was a just and equitable method of assessment; and, if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more."<sup>35</sup>

The validity of this method of assessment was said to have been established by the *State Railroad Tax Cases*<sup>36</sup> and *Western Union Telegraph Co. v. Massachusetts*.<sup>37</sup> But the former case raised no question under the commerce clause, and in the latter the only attention given to the method of assessment was to ascertain whether the state had correctly determined the proportion of the

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<sup>32</sup> 141 U. S. 40, 45, 11 Sup. Ct. Rep. 889 (1891).

<sup>33</sup> 141 U. S. 18, 11 Sup. Ct. Rep. 876 (1891).

<sup>34</sup> *Ibid.*, 18, 26.

<sup>35</sup> *Ibid.*

<sup>36</sup> Note 23, *supra*.

<sup>37</sup> Note 29, *supra*.



total property located in Massachusetts. The fact that the valuation took account of earnings from interstate commerce was neglected.

It is also neglected in the Pullman case. Mr. Justice Gray's opinion for the majority notes that the company had about one hundred cars in the state all the time, but does not suggest that the value of that number of cars might readily be estimated without adopting a method that reaches the business as well as the property of the company. Nor do the minority protest on this point. True, Mr. Justice Bradley questions whether a proper method of apportionment has been adopted, and shows that, since Illinois, the state in which the corporation was chartered, might tax it on the value of its total capital stock, the supposed equitable quality of the tax discovered by the majority depends upon an assumption not likely to be true. But this protest is one against inequitable and double taxation, and is not tied up to the commerce clause. Yet this tax had a more direct effect on interstate commerce than those previously considered, for its amount varied more directly with receipts. Under several of the Pennsylvania statutes the taxes on the Pullman Company were measured directly by dividends; under another they were measured by dividends when the dividends were six per cent or more on the par value of the capital, and by a valuation of the capital when the dividends were less. But the opinions do not refer to the fact that the result of Pennsylvania's method was to reap income from the interstate commerce in which the cars were engaged, in excess of a levy on the value of the cars as independent chattels.

Seven months later, however, in *Maine v. Grand Trunk Ry. Co.*,<sup>38</sup> the subject receives more direct attention. This case has already been considered in the section dealing with taxes on privileges,<sup>39</sup> but it has a bearing on the present topic on account of the interpretation subsequently put upon it.<sup>40</sup> The majority sustained a tax measured by gross receipts estimated to have been earned from business within the state, on the ground that the subject taxed was a privilege over which the state had complete control and which it

<sup>38</sup> 142 U. S. 217, 12 Sup. Ct. Rep. 121 (1891).

<sup>39</sup> 31 HARV. L. REV. 579-80.

<sup>40</sup> See *Galveston, H. & S. A. Ry. Co. v. Texas*, 210 U. S. 217, 226, 28 Sup. Ct. Rep. 638 (1908).

might therefore burden as it pleased. The minority, consisting of Justices Bradley, Harlan, Lamar, and Brown, insisted that the tax, though called one on the franchise, was in fact one "on the receipts of the company derived from international transportation."<sup>41</sup> Justices Bradley and Harlan had dissented in the Pullman case, in which Mr. Justice Brown had not sat, having been appointed to the bench after the case had been argued; but Mr. Justice Lamar had concurred in that case and also in *Western Union Telegraph Co. v. Massachusetts*,<sup>42</sup> in which Mr. Justice Harlan was with him. Mr. Justice Bradley for some reason did not sit in the Western Union case, but he was on the bench when *The Delaware Railroad Tax*<sup>43</sup> was decided by a unanimous court. It seems, then, that the dissent in the Grand Trunk case is to be attributed, not so much to long-standing convictions, as to a new recognition of the problem.

Mr. Justice Bradley's dissent in the Grand Trunk case starts with the position that, "whilst the purpose of the law professes to be to lay a tax upon the foreign company for the privilege of exercising its franchise in the State of Maine, the mode of doing this is unconstitutional."<sup>44</sup> The learned justice here seems to look behind the subject taxed, and to attach controlling significance to the measure by which the amount of the tax is determined — an enterprise which the court had hitherto regarded as beyond its province.<sup>45</sup> He insists that the nominal subject is not the actual subject. "The tax, it is true, is called a tax on a franchise. It is so called, but what is it in fact? It is a tax on the receipts of the company derived from international transportation."<sup>46</sup> And the cases then adduced as precedents against its constitutionality are those in which the *res* named as the subject of taxation included the business of interstate commerce, or receipts therefrom. Had the majority taken the same view of what was being taxed, they would undoubtedly have agreed that the tax was unconstitutional. But they accepted the state's declaration of what it was taxing, and thought that a tax on a privilege that the state might with-

<sup>41</sup> 142 U. S. 217, 235, 12 Sup. Ct. Rep. 121 (1891).

<sup>42</sup> Note 29, *supra*.

<sup>43</sup> Note 8, *supra*.

<sup>44</sup> 142 U. S. 217, 231, 12 Sup. Ct. Rep. 121 (1891).

<sup>45</sup> See 31 HARV. L. REV. 334 *ff*.

<sup>46</sup> 142 U. S. 217, 235, 12 Sup. Ct. Rep. 121 (1891).

hold could not be a regulation of interstate commerce, no matter how it was measured.

Mr. Justice Bradley's position that the measure by which the amount of the tax is determined is the controlling test of what is actually being taxed is of course as applicable to taxes nominally on property as to those nominally on privileges. Indeed, since there has never been ascription to the state of arbitrary power over property, there is more reason for scrutinizing assessments of property than assessments of franchises. Mr. Justice Bradley does not seem to make any distinction between the two. Yet it is possible that his objections are leveled chiefly against the cumulation of taxes in fact measured by the contributions of interstate commerce, and that he would have acquiesced in the solution of the vexed problem that the Supreme Court at the present time seems to be working towards.

The learned justice concludes his opinion as follows:

"Then it comes to this: A State may tax a railroad company upon its gross receipts, in proportion to the number of miles run within the State, as a tax on its property; and may also lay a tax on these same gross receipts in proportion to the same number of miles, for the privilege of exercising its franchise in the State. I do not know what else it may not tax the gross receipts for. If the interstate commerce of the country is not, or will not be, handicapped by this course of decision, I do not understand the ordinary principles which govern human conduct."<sup>47</sup>

And earlier, in describing the situation resulting from the case and its predecessors, he had said:

"A corporation, according to this class of decisions, may be taxed several times over. It may be taxed for its charter; for its franchises; for the privilege of carrying on its business; it may be taxed on its capital, and it may be taxed on its property. Each of these taxations may be carried to the full amount of the property of the company. I do not know that jealousy of corporate institutions could be carried much further."<sup>48</sup>

This dissenting note of lament and sympathy deserves attention from those who love to insist that the Supreme Court has been overzealous in shielding corporations from their just burdens. Its interest for our immediate purpose, however, lies in its indication

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<sup>47</sup> 142 U. S. 217, 235-236, 12 Sup. Ct. Rep. 121 (1891).

<sup>48</sup> *Ibid.*

of the possibility that what caused Mr. Justice Bradley most concern was the cumulation of taxes on the same economic interest, rather than the fact that interstate commerce did not escape entirely from giving sustenance to the states. It shows, too, the recognition that every tax may depend for its justification on the absence of certain other possible taxes. No just solution of the complex problem raised by alleged conflicts between state taxing power and the necessary freedom of interstate commerce can be reached if the state is not required to let its right hand know what its left hand doeth.

## II

From the foregoing review it appears that for two decades the Supreme Court had been allowing states to impose taxes that from an economic standpoint were levied more or less directly on receipts from interstate commerce. In all this time, however, none of the opinions had indicated clearly that the court knew exactly what it was doing and was prepared to support its decisions by accurate and detailed analysis of the economics of the matter. The judges were engaged in the task of finding what subjects of taxation were interstate commerce itself, and what were something else. They assumed that a tax on a subject not itself interstate commerce could not be a regulation of that commerce; and they were prone to indulge in nominalism and conceptualism in finding what was the subject taxed. In *State Tax on Railway Gross Receipts*<sup>49</sup> and in *Osborne v. Mobile*,<sup>50</sup> they took positions that they later abandoned.<sup>51</sup> They seemed to be feeling their way in the dark. From 1894 on, however, the issues are more clearly recognized and more adequately discussed.

In *Cleveland, C., C. & St. L. R. Co. v. Backus*,<sup>52</sup> Mr. Justice Brewer leaves no doubt as to what the majority of the court think about the propriety of assessing railroad property so as to include the value of the interstate commerce in which the road is engaged. This case and a companion one<sup>53</sup> had to do with Indiana statutes

<sup>49</sup> Note 18, *supra*.

<sup>50</sup> 16 Wall. (U. S.) 479 (1872).

<sup>51</sup> The former in *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, note 20, *supra*; the latter in *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380 (1888).

<sup>52</sup> 154 U. S. 439, 14 Sup. Ct. Rep. 1122 (1894).

<sup>53</sup> *Pittsburgh, C. C. & St. L. Ry. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. Rep. 1114 (1894).

which, while not requiring the tax commissioners to assess railroad property on the basis of its earnings, clearly permitted them to do so. And it was quite evident that they had done so, for one road was valued at \$6,000 per mile less than another, and the assessment of a previous year under the method then prevailing was nearly trebled under the new statute. The decision in the two cases is that value is a matter of fact for the assessors to determine, and that the court will not upset that determination unless it is fraudulent. But the opinion in the Cleveland case unequivocally approves of the position that the value in fact is what the road would sell for, that this depends on the earnings, and that therefore the earnings may and should be considered in estimating that value.

"The rule of property taxation," says Mr. Justice Brewer, "is that the value of the property is the basis of taxation."<sup>54</sup> "It does not mean," he adds, "a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon that value."<sup>55</sup> Then he states what value is:

"But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put."<sup>56</sup>

The opinion then goes on to say that "in the nature of things it is practically impossible — at least in respect to railroad property — to divide its value, and determine how much is caused by one use to which it is put and how much by another."<sup>57</sup> The learned justice asks whether an interstate bridge, the value of which depends entirely on interstate commerce, must "on that account be entirely relieved from the burden of state taxation."<sup>58</sup> He assumes two such bridges, one between two large centers of population and the other between two hamlets, and inquires whether they must be valued at the same amount, in spite of the fact that one is obviously worth much more than the other. "Will it be said that the taxation must be based simply on the cost, when never was it held

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<sup>54</sup> 154 U. S. 439, 445, 14 Sup. Ct. Rep. 1122 (1894).

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*, 439, 446.

that the cost of a thing is the test of its value?"<sup>59</sup> It is a practical impossibility to "eliminate all of the value which flows from the use, and place the assessment at only the sum remaining."<sup>60</sup> There are only two alternatives. "Either the property must be declared wholly exempt from state taxation or taxed at its value, irrespective of the causes and uses which have brought about such value."<sup>61</sup>

Of course Mr. Justice Brewer's conclusion is not so ineluctable as he seems to think. The value for purposes of state taxation need not be the economic exchange value. While railroad property is merged in the business in which it is engaged, since it has no feasible alternative uses, this is not true of all property, and by resort to hypothesis a separation can be made of the value of the property of a railroad from that of the business which it serves. The fact that it may be difficult or impossible to express the results mathematically with any degree of accuracy does not prevent some compromise between the two alternatives which Mr. Justice Brewer regarded as the only ones conceivable. Such a compromise the court has been compelled to make time and again in finding "fair value" for purposes of rate regulation.<sup>62</sup> And the same compromise might have been made in finding value for purposes of taxation. When the court declines to do so, it is guided by considerations of policy, whether it is aware of the fact or not.

Mr. Justice Brewer plainly invokes considerations of policy when he declares:

"And the uniform ruling of this court, a ruling demanded by the harmonious relations between the States and the national government, has affirmed that the full discharge of no duty entrusted to the latter restrains the former from the exercise of the power of equal taxation upon all private property within its territorial limits. All that has been decided is that, beyond the taxation of property, . . . no state shall attempt to impose the added burden of a license or other tax for the privilege of using, constructing, or operating any bridge, or other instrumentality of interstate commerce, or for carrying on of such commerce."<sup>63</sup>

<sup>59</sup> 154 U. S. 439, 446, 14 Sup. Ct. Rep. 1122 (1894).

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> See Robert L. Hale, "The Supreme Court's Ambiguous Use of 'Value' in Rate Cases," 18 COL. L. REV. 208.

<sup>63</sup> 154 U. S. 439, 446, 14 Sup. Ct. Rep. 1122 (1894).

Here the position seems to be that what the commerce clause inhibits is the cumulation of taxes on interstate commerce. But the cumulation denounced does not include taxes on the franchise to be a corporation or to employ corporate powers in local business. Whether taxes on such privileges may be imposed in addition to taxes on property is left uncertain. But there is no uncertainty as to the elements that may be considered in assessing property:

"It is enough for the State that it finds within its borders property which is of a certain value. What has caused that value is immaterial. It is protected by state laws, and the rule of all property taxation is the rule of value, and by that rule property engaged in interstate commerce is controlled the same as property engaged in commerce within the State."<sup>64</sup>

This, of course, is because the court chooses to have it so. The wisdom of their choice is not here disputed. But the effort to show that the choice does not result in burdening interstate commerce cannot receive the same approval. It is difficult to agree that the assessment of property by reference to the earnings of the business to which the property is devoted is not "an attempt to do by indirection what cannot be done directly — that is, to cast a burden on interstate commerce."<sup>65</sup> An accountant would hardly be satisfied with the argument that "it comes rather within that large class of state action, like certain police restraints, which, while indirectly affecting, cannot be considered as a regulation of interstate commerce, or a direct burden on its free exercise."<sup>66</sup> Even a rhetorician might find the argument a concession that the state may do indirectly what it is forbidden to do directly. If we are interested primarily in what happens, and only secondarily in what words are used to justify or condemn it, we observe little, if any, difference between a tax on receipts and a tax on property assessed on a basis of receipts. When a court holds that taxes on property may be measured by receipts from interstate commerce or a capitalization thereof, it allows a state to regulate interstate commerce, no matter what name may be affixed to the state action. In any factual sense, this regulation is still a regulation even though it is

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<sup>64</sup> 154 U. S. 439, 446-47, 14 Sup. Ct. Rep. 1122 (1894).

<sup>65</sup> *Ibid.*, 439, 447.

<sup>66</sup> *Ibid.*

abundantly justified by the demands of the "harmonious relations between the states and the national government."

The dissent in these two Indiana cases added nothing to what Mr. Justice Bradley had said in the Pullman case. Justices Bradley and Lamar were no longer on the bench. Only Justices Harlan and Brown remained of those who had disapproved of the Pullman case. They dissent also in the Indiana cases, Mr. Justice Harlan writing a brief opinion devoted chiefly to the contention that Indiana had taxed property which had no situs there. He insists that "the board had no authority to impart to the value of railroad track and rolling stock, within the State, any part of the company's various interests and property without the State."<sup>67</sup> With this the majority do not disagree. They deny that the state has done so. They say that the value of the property within the state is enhanced by the fact that it is used in connection with other property without the state. "Each state," says Mr. Justice Brewer, "is entitled to consider as within its territorial jurisdiction and subject to the burdens of its taxes what may perhaps not inaccurately be described as the proportionate share of the value flowing from the operation of the entire mileage as a single continuous road."<sup>68</sup> This he treats as a question distinct from that of whether receipts may be used as a test of the value of property. To this latter question Mr. Justice Harlan devotes no argument, although the general language of his opinion indicates disagreement on this point as well as on the one that he specifically discusses.

Two years later in *Western Union Telegraph Co. v. Taggart*<sup>69</sup> the doctrine of the Indiana cases was re-affirmed by an undivided court. The opinion of Mr. Justice Gray consists largely of quotations from previous opinions. It says that "the cost of the property, or of its replacement, is by no means a true measure of its value,"<sup>70</sup> and adds that previous authorities have established that the commissioners had the right and the duty, in estimating the value of the property within the state, to take into consideration the franchises granted to the company by sister states, the United States and foreign countries. Plainly a valuation of property by reference

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<sup>67</sup> 154 U. S. 421, 438, 14 Sup. Ct. Rep. 1114 (1894).

<sup>68</sup> 154 U. S. 439, 444, 14 Sup. Ct. Rep. 1122 (1894).

<sup>69</sup> 163 U. S. 1, 16 Sup. Ct. Rep. 1054 (1896).

<sup>70</sup> *Ibid.*, 1, 28.



to its earnings includes the value of all the franchises that help to make the earnings possible.

It now seemed to be firmly established that the state could tax receipts from interstate commerce, provided it did so by using those receipts as a measure of the value of property. But the battle royal was yet to come. Before considering the next phase, however, mention should be made of two decisions which have a bearing on later developments. Both were rendered in 1895. *Erie Railroad v. Pennsylvania*<sup>71</sup> allowed a state to tax a railroad on tolls received from other carriers for the use of its line, even though the lessee carrier used the road largely for interstate commerce. The tax was directly on the tolls, but the court held in substance that the tolls were received as rent and not for carriage, and cited for the constitutionality of the exaction the Maine case, the Indiana cases, and *Postal Telegraph Co. v. Adams*,<sup>72</sup> decided four months earlier.

The Postal case sustained a tax on an interstate telegraph company assessed at one dollar for each mile of line, which tax was in lieu of all other state, county, and municipal taxes. The company insisted, and Justices Brewer and Harlan agreed with it, that the tax was on the privilege of doing business, and was therefore void as a regulation of interstate commerce and an interference with a federal instrumentality. But the majority of the court thought that the tax, though called a privilege tax, was in substance one on property, and as such was free from fault. "In marking the distinction between the power over commerce and municipal power," observed Chief Justice Fuller, "literal adherence to particular nomenclature should not be allowed to control construction in arriving at the true intention and effect of state legislation."<sup>73</sup> Since the charge, though in the form of a franchise tax, was "arrived at with reference to the value of its property within the State and in lieu of all other taxes,"<sup>74</sup> it was held not to amount to a regulation of interstate commerce. This case did not involve taxes measured by receipts and is therefore not pertinent to the problem of valuation. Its relevancy to the present discussion lies in its indication that taxes in lieu of property taxes will receive the

<sup>71</sup> 158 U. S. 431, 15 Sup. Ct. Rep. 896 (1895). Mr. Justice Harlan alone dissented.

<sup>72</sup> 155 U. S. 688, 15 Sup. Ct. Rep. 268 (1895).

<sup>73</sup> *Ibid.*, 688, 700.

<sup>74</sup> *Ibid.*

same consideration that is bestowed on taxes directly on property, and that the validity or invalidity of any particular tax complained of may be dependent on the rôle it plays in the entire fiscal system of the state.

### III

In all but one of the cases thus far considered, the property which has been regarded as the subject of taxation consisted of railroad, telephone or telegraph lines and their accoutrements. By far the greater part of such property is indissolubly annexed to the business in which it is engaged. This is true even of the rolling stock of a railroad, if we have in mind the railroad business in its entirety. Nevertheless a practical distinction immediately suggests itself between valuing the tangible property of telephone and telegraph companies on the basis of income, and applying the same rule to the cars of the Pullman Company. If the Pullman company sold its business, but retained its cars, the cars would not become valueless. Undoubtedly they would be worth less than their reproduction cost, if we assume that they have no market as ministers to luxury. They would fall in value to the cost of the less gaudy and expensive coaches which carry the multitude. But the right of way and tracks of a railroad, and the equipment of telegraph and telephone companies would suffer far more from being disassociated from the business which they serve. There is a genuine practical difficulty in valuing this species of property divorced from the profitableness of the uses to which it is put — a difficulty immeasurably greater than that presented by the carriages of the Pullman company.<sup>76</sup> This difference, however, was overlooked by the

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<sup>76</sup> In *Pullman's Palace Car Co. v. Central Transportation Co.*, 171 U. S. 138, 18 Sup. Ct. Rep. 808 (1898) the Supreme Court had comparatively little difficulty in fixing a rule for the valuation of palace cars which excluded from consideration all elements of value derived from the receipts of the business in which they were used. This case was a suit to recover the value of property delivered under an *ultra vires* contract. The court was urged to consider the market value of the shares of the transferring corporation in determining the value of the property transferred, but it refused to do so, Mr. Justice Peckham declaring: "The market price of the shares of stock in a manufacturing corporation includes more than the mere value of the property owned by it, and whatever is included in that price beyond and outside of the value of its property is a factor which in a case like this cannot be taken into consideration in determining the liability of the cross defendant. . . . The probable prospective capacity for earnings also enters largely into market value, and

minority as well as the majority in *Pullman's Palace Car Co. v. Pennsylvania*,<sup>76</sup> in which attention was fixed almost exclusively on the question whether the cars had a taxable situs in the state.

In *Adams Express Co. v. Ohio State Auditor*,<sup>77</sup> however, the matter was more fully threshed out. This case sustained Ohio's application of the unit rule to the taxation of interstate express companies. The real estate of these companies was separately appraised, and this appraised value was deducted from the assessment of the company's "entire property" within the state. The statute set forth no explicit instructions for the appraisal of this "entire property," but the companies were required to report the value of their total capital stock, their entire gross receipts, their gross receipts from business done in Ohio, and the length of the lines of rail and water routes over which they did business in Ohio and elsewhere. From this and other data the board was to "arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said company, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."<sup>78</sup> For the most accurate statement of what the board did we must go to the brief of Mr. Maxwell in behalf of the companies:

"... it is manifest that what the board did ... was not to assess the defendants on the basis of the market value of such of their tangible property as was found within the State of Ohio, and on their moneys and credits within the State, but to treat the companies as owning dividend producing plants, whose value is represented by the market value of their shares, and to assign a portion of that value to the State of Ohio, as being property subject to taxation in that State. The basis of apportionment

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future possible earnings again depend to a great extent upon the skill with which the affairs of the company may be managed. These considerations, while they may enhance the value of the shares in the market, yet do not in fact increase the value of the actual property itself. . . . We must therefore take the property that actually was transferred and determine its value in some other way than by this resort to the market price of the stock" (pages 154-56).

It should be noted that a year before this opinion was rendered, the court [had forsaken the notion that these state taxes measured by the unit rule were imposed on tangible property alone, and had announced the doctrine that it was the intangible property of the company that was thus being valued.

<sup>76</sup> Note 33, *supra*.

<sup>77</sup> 165 U. S. 194, 17 Sup. Ct. Rep. 305 (1897).

<sup>78</sup> *Ibid.*, 194, 197.

made by the board to Ohio is not disclosed; it was evidently hap-hazard and arbitrary." <sup>79</sup>

Or, as was argued later, "the assessments, while purporting to be upon the property of the plaintiffs within the State, are, in fact, levied upon the plaintiffs' business (which is largely interstate commerce), by placing a fictitious and artificial value upon that property." <sup>80</sup> The result was that wagons, horses, pouches, etc., which one of the companies valued at \$23,400, were assessed at \$499,377.60, if that was the property being taxed.

It is difficult to escape from the characterizations of the tax presented in the briefs against its constitutionality. Certainly the value of the horses, wagons, etc., "would be precisely the same" and they "could be bought for the same price — be sold for the same price — be produced and reproduced for the same price — whether the capital stock of the company was 50 per cent below par or 100 per cent above par." <sup>81</sup> It is true also that "under this method of valuation, whether the horses were lame or sound, or old or young, whether the wagons and harness were old or new, was of little consequence." <sup>82</sup> Nor does there seem any valid answer to the position that:

"To say that this sort of detached and fugitive property, simply because it is employed in the business of an organized express company, is unit property, like a railroad or a telegraph, is only another way of attempting to justify an assessment against the business of a company, under the pretense of assessing its property." <sup>83</sup>

As the brief of Mr. James C. Carter puts it: "The property which, according to the notion under criticism, is taxed, is a pure abstraction having no situs, no existence, even, save in intellectual conception, something which can nowhere be seen or handled or made the subject of action." <sup>84</sup> Later Mr. Carter enumerates the elements which determine the market value of the shares, and contends that a tax on those elements is a tax on the occupation itself.

<sup>79</sup> 165 U. S. 194, 204-05, 41 L. Ed. 686-687 (1897).

<sup>80</sup> *Ibid.*, 194, 205, *Ibid.*, 687.

<sup>81</sup> *Ibid.*, 194, 215, *Ibid.*, 692.

<sup>82</sup> *Ibid.*

<sup>83</sup> 41 L. Ed. 687 (1897). This excerpt is not contained in the abstract of Mr. Maxwell's brief given in the official reports.

<sup>84</sup> 41 L. Ed. 693 (1897). Not in the official reports.

These contentions of attorneys for the companies seem incontrovertible. Any realistic approach to the genuine issue must concede their validity. If such a tax is to be sustained, it must be because the states *can* tax interstate commerce, provided they do it in approved ways. But the majority position seems poetical rather than realistic. "Doubtless there is a distinction," says Chief Justice Fuller, "between the property of railroad and telegraph companies and that of express companies."<sup>85</sup> The learned justice recognizes that "the physical unity existing in the former is lacking in the latter"; but he discounts the importance of this difference by saying that "there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use."<sup>86</sup> After pointing out that "the cars of the Pullman Company did not constitute a physical unity, and their value as separate cars did not bear a direct relation to the valuation which was sustained in that case,"<sup>87</sup> he continues:

"No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons and furniture, than that of railroad, telegraph and sleeping car companies, to roadbed, rails and ties, poles and wires, or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches and furniture, the contracts for transportation facilities, the capital necessary to carry on the business, whether represented in tangible or intangible property, in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others."<sup>88</sup>

That such value exists is clear. Whether it should rightfully be recognized as a basis for the assessment of state taxes is a question of policy. No criticism is here directed against the judgment that "the States through which the companies operate ought not to be compelled to content themselves with a valuation of separate pieces of property disconnected from the plant as an entirety, to the proportionate part of which they extend protection, and to the dividends of whose owners their citizens contribute."<sup>89</sup> But when

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<sup>85</sup> 165 U. S. 194, 221, 17 Sup. Ct. Rep. 305 (1897).

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*, 194, 227.

it is insisted that "the taxation is essentially a property tax, and, as such, not an interference with interstate commerce,"<sup>90</sup> the matter is not so clear. This value which the items have in combination and from their use is mainly the value of the combination and the use, and in small part that of the items. And the combination and the use are largely in interstate commerce. The dividends to which Ohio citizens contribute are dividends from interstate as well as intra-state business. The tax is a tax on interstate commerce, and we shall not escape confusion until we recognize it.

The dissenting opinion of Mr. Justice White recognizes the point, but does not dwell upon it. Attention is devoted chiefly to the contention that the tax is on elements of value not located in the state. It is rightly asserted that extra-state values were taken account of in making the assessment. From this is drawn the following conclusion:

"I reiterate, therefore, that the rule which recognizes that for the purpose of assessing tangible property in one State you may take its full worth and then add to the value of such property a proportion of the total capital stock, is a rule whereby it is announced that the sum of all the property, or an arbitrary part thereof, situated in other States, may be joined to the valuation of property in one State for the purpose of increasing the taxation within that State."<sup>91</sup>

This sentence, isolated from its context, has the vice of not recognizing that values in the taxing state were included in the total, and that the total was then divided in proportions according to a plan that assumed to allocate to the taxing state only that part which rightfully belonged to it. The state certainly adds something to the value of the tangible property within the state, but it does not necessarily add extra-state elements by pooling all values in all the states, and then dipping out the portion which it regards as the contribution of the taxing state. It is by neglecting the division which follows the addition that Mr. Justice White is convinced that "it cannot be said that this vast excess does not embrace property situated outside of Ohio, when both the text of the statute of that State and such text as expounded by the Supreme Court of the State clearly show that the sum of the excess is arrived

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<sup>90</sup> 165 U. S. 194, 226, 17 Sup. Ct. Rep. 305 (1897).

<sup>91</sup> *Ibid.*, 194, 240-41.

at by adding to the property in the State the value of property situated outside thereof." <sup>92</sup>

This neglect, however, is logically legitimatized in Mr. Justice White's opinion, because of his insistence that the tangible property of the express companies in Ohio is not part of anything that can be regarded as a unit. If what you add from without the state is unrelated to what you are taxing within the state, the subsequent division, though it may lessen, does not obliterate the evil. The soundness of the dissenting position that Ohio is taxing values in other jurisdictions depends upon the assumption that the Ohio property of express companies is not part of a unit, or upon the fact that more of the whole is assigned to Ohio than rightly belongs to it. Both positions are relied on by the minority. With the second we are not here concerned.<sup>93</sup> The majority recognize fully that there may be an unjustifiable apportionment which serves to draw to Ohio values domesticated elsewhere. Certain kinds of property are not distributable. But the existence of such property, they say, is not to be assumed. "It is for the companies to present any special circumstances which may exist, and, failing their doing so, the presumption is that all their property is directly devoted to their business, which being so, a fair distribution of its aggregate value would be upon the mileage basis." <sup>94</sup> The majority opinion concludes by saying:

"We have said nothing in relation to the contention that these valuations were excessive. The method of appraisement prescribed by the law was pursued and there were no specific charges of fraud. The general rule is well settled that 'whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts, it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined.'" <sup>95</sup>

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<sup>92</sup> 165 U. S. 194, 248, 17 Sup. Ct. Rep. 305 (1897).

<sup>93</sup> This is considered in 31 HARV. L. REV. 772-75. For cases requiring the state to amend the apportionment of interstate values, see *Fargo v. Hart*, 193 U. S. 490, 24 Sup. Ct. Rep. 498 (1904); *Louisville & N. R. Co. v. Greene*, 244 U. S. 522, 37 Sup. Ct. Rep. 683 (1917), and *Illinois Central R. Co. v. Greene*, 244 U. S. 555, 37 Sup. Ct. Rep. 697 (1917).

<sup>94</sup> 165 U. S. 194, 227, 17 Sup. Ct. Rep. 305 (1897).

<sup>95</sup> *Ibid.*, 194, 229.

The major issue in the case was the propriety of the rule of assessment prescribed, rather than the correctness of the particular application. The validity of the rule depends upon a judgment as to the rightfulness of ever including earnings from interstate commerce in assessments for state taxation and upon the subordinate inquiry whether the unit rule is suitable to the property of express companies. The first inquiry had been answered in prior decisions. The second only was novel, and that was novel in form rather than in substance.

Whether the horses and wagons of an express company are integral parts of a larger unit depends upon whether you like to think of them that way. Mr. Justice White does not. "What unity can there be," he asks, "between the horses and wagons of an express company in Ohio with those belonging to the same company situated in the State of New York?"<sup>96</sup> To this, the majority reply that there is a unity of use and management. To the writer, the answer seems a bit of deceptive word painting. Mr. Justice White says that it "in reality declares that a mere metaphysical or intellectual relation between property situated in one State and property found in another creates as between such property a close relation for the purpose of taxation."<sup>97</sup> Though he dislikes the application of the unit rule to railroad and telegraph property, he holds that it "is necessarily predicated upon the physical connection of such property,"<sup>98</sup> and insists that it cannot be extended to situations where the unity is not physical. He denies that the cars of the Pullman Company were regarded as items in a unit, and contends that the issue with respect to them was solely whether they had a taxable situs in Pennsylvania, and that the statement that the method of assessment applied to them was "just and equitable" was made "with reference to the facts held to exist in the case before the court."<sup>99</sup> On those particular facts, he finds that the tax in that case was not excessive.

The discussion of "relations," physical and metaphysical, might easily carry us to realms where flight for a lawyer is precarious. A physicist would hardly abandon the search for a continuum as soon as he lost the nexus of iron rails. We are told by many meta-

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<sup>96</sup> 165 U. S. 194, 250, 17 Sup. Ct. Rep. 305 (1897).

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*



physicians that all relations are intellectual. Whether any posited unity is imaginary or real can provoke endless debate. But these alluring problems can be dismissed as not germane to the present controversy. Since any application of the unit rule which uses as a base the value of total capital stock necessarily imposes taxation on a capitalization of earnings, it seems futile to argue whether a unity of "use and management" differs from a physical unity. The fact that the tangible property of the express companies in Ohio had an independent, easily assessable value makes it less easy to conceal the fact that the express business was being taxed. But the disguise seems apparent enough in the case of railroads and telegraphs. There is no denying that part of Mr. Justice White's opinion which says that it cannot be "contended that the tax here involved is not a tax on interstate commerce, in view of the fact that, from the nature of the criteria of value adopted, an aliquot part of the avails and receipts of the company of every kind is added to the taxing value in the State of Ohio."<sup>100</sup> There is but one answer to the query he propounds:

"How, I submit, can it now be announced that there is an imaginary unity between personal property widely separated because that property has a common owner, without, at the same time, reversing the settled adjudications of this court on the subject of the power of a State to tax the earnings from interstate commerce?"<sup>101</sup>

The answer is that the taxing of such earnings is accomplished in a different way from the ways previously declared unconstitutional. Whether the difference makes a difference is another question. The court's way out of such difficulties is to distinguish between direct and indirect burdens on interstate commerce. But such distinctions have to be fortified by something more than affixing labels. Not infrequently the labels are masks for changed views of policy. Yet in many cases they express substantial differences of effect. Whether they do in the present instance will be considered later.

The opinion of Chief Justice Fuller hardly touches the question. But the case did not end here. The attorneys for the companies presented a petition for a rehearing, fortified by elaborate argu-

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<sup>100</sup> 165 U. S. 194, 248-49, 17 Sup. Ct. Rep. 305 (1897).

<sup>101</sup> *Ibid.*, 194, 251-52.

ment. They concede the propriety of assessing railroad, telephone and telegraph companies by the unit rule, for the reason that there is no other feasible method of finding the value of property of this nature. But horses and wagons, they say, have an easily ascertainable pecuniary value. They are worth no more to an express company than to anyone else. It is improper to impute to them the earnings of the business in which they are used, for they might be dispensed with and the earnings still continue. By hiring others to care for local deliveries, and by renting furniture, etc., instead of owning it, the express companies might divest themselves of all that Ohio purported to tax, and could still carry on the business with substantially equal success. The small amount of the tangible property in Ohio contributes almost nothing to the values which Ohio has assessed against it.<sup>102</sup>

To this, Mr. Justice Brewer, in denying the motion for a reargument,<sup>103</sup> answers that what Ohio was taxing was not alone the tangible property of the company in Ohio, but the intangible as well.<sup>104</sup> He does not appear to insist that the Ohio legislature

<sup>102</sup> The petition for a rehearing is printed, apparently in full, in 166 U. S. 185, 186-217 and 41 L. Ed. 966-76.

<sup>103</sup> *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185, 17 Sup. Ct. Rep. 604 (1897).

<sup>104</sup> Mr. Justice Miller had previously regarded taxes assessed by the unit rule as taxes on intangible property in *State Railroad Tax Cases*, note 23, *supra*. See page 238, 239, *supra*. In these cases, however, the interstate commerce question was not raised. On the same day that the opinion denying a rehearing in the *Adams Express* case was handed down, the court rendered two other decisions involving the same point.

*Adams Express Co. v. Kentucky*, 166 U. S. 171, 17 Sup. Ct. Rep. 527 (1897) sustained what purported to be a tax on the franchises of the company, measured in the same way as the Ohio taxes. Since the *Adams Express Co.* was a joint-stock company without any corporate franchise, the minority contended that, even if the doctrine of the Ohio cases were accepted, it did not apply here, because the only franchise that could be conceived of as the subject of taxation was one to be inferred from the proposition that the right to do interstate commerce in Kentucky resulted from the assent of the state, and that such a proposition was obviously opposed to the settled course of decision. Some reliance, too, was placed on the fact that the Ohio tax was at the rate of \$250 per mile while the Kentucky tax was at the rate of \$764 per mile. The majority, however, called the tax in effect one on intangible property, Chief Justice Fuller observing: "We agree with the Circuit Court that it is evident that the word 'franchise' was not employed in a technical sense, and that the legislative intention is plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and all foreign and domestic companies possessing no franchise, should be valued as an entirety, the value of the tangible property be deducted, and the value

realized the fact. The point is introduced by saying that the argument on behalf of the companies that their horses, wagons, etc., constitute their only property in Ohio "practically ignores the existence of intangible property, or at least denies its liability for taxation."<sup>106</sup> "To ignore this intangible property," continues the opinion, "or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country."<sup>106</sup> The learned justice points out the existence of an excess of value over that of tangible property, and asks: "What gives this excess of value?"<sup>107</sup> The answer is that it is "obviously the franchises, the privileges the company possesses — its intangible property."<sup>108</sup>

This is not to be quarreled with, but what perplexes is the task of reconciling this with the earlier statement that "no state can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce."<sup>109</sup> What Mr. Justice Brewer seems to regard as a resolution of the difficulty seems to the writer nothing but a contradiction of the earlier statement. That statement was given as the repeated affirmation of the court. It is followed by the sentence: "And it has as often been affirmed that such restriction on the power of a State to interfere with interstate commerce does not in the least abridge the right of a State to tax at

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of the intangible property thus ascertained . . . should be assessed on the basis of their lines within and without the State." (166 U. S. 150, 180.) ¶

*Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Sup. Ct. Rep. 532 (1897), sustained a similar tax on that part of the intangible property of a company owning an interstate bridge which was deemed to be within Kentucky. Chief Justice Fuller declared that the tax clearly was not on the interstate business carried on over the bridge, because the bridge company did not transact any such business, it being carried on by others who paid tolls for the use of the bridge, thus bringing the case within *Erie Railroad v. Pennsylvania*, note 71, *supra*. Mr. Justice White distinguished the *Erie* case because the railroad there involved lay wholly within the limits of a single state. The pith of his dissent is as follows: "It being beyond dispute, therefore, that the sum of taxation in this case was fixed almost exclusively by the gross earnings from interstate commerce, who, may I ask, can point out the distinction between taxing the gross earnings derived from interstate commerce and taxing a valuation based on such earnings?" (166 U. S. 150, 165).

The division of opinion in these two cases was the same as that in the Ohio cases.

<sup>106</sup> 166 U. S. 185, 218, 17 Sup. Ct. Rep. 604 (1897.)

<sup>106</sup> *Ibid.*, 185, 219.

<sup>107</sup> *Ibid.*, 185, 220.

<sup>108</sup> *Ibid.*, 185, 218.

<sup>108</sup> *Ibid.*

their full value all the instrumentalities used for such commerce.”<sup>110</sup> The contradiction plainly appears when it is said that intangible property is taxable and that “it matters not in what this intangible property consists — whether privileges, corporate franchises, contracts or obligations.”<sup>111</sup>

The rest of Mr. Justice Brewer’s opinion consists of forceful argument why this intangible property should be taxed for what it is actually worth. “Substance of right demands that whatever be the real value of any property, that value may be accepted by the State for the purpose of taxation, and this ought not to be evaded by any mere confusion of words.”<sup>112</sup> Accumulated wealth, it is said, will laugh at the crudity of tax laws which reach only tangible property and ignore that which is intangible.<sup>113</sup> After pointing out that the tangible property of the Adams Express Company was valued at about \$4,000,000, while its stock would sell for over \$16,000,000, Mr. Justice Brewer continues:

“But what a mockery of substantial justice it would be for a corporation, whose property is worth to its stockholders for the purpose of income and sale \$16,800,000, to be adjudged liable for taxation upon only one fourth of that amount. The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for purposes of sale.”<sup>114</sup>

With this let us cordially agree. Ohio was not venturing into moonshine or dreamland to find the value which it taxed. If its method of apportionment was just, it was not venturing outside of Ohio.<sup>115</sup> But its excursion into the realm of the intangible was an

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<sup>110</sup> 166 U. S. 185, 218, 17 Sup. Ct. Rep. 604 (1897).

<sup>111</sup> *Ibid.*, 185, 219.

<sup>112</sup> *Ibid.*, 185, 221.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*, 185, 222.

<sup>115</sup> On the situs of this property without location, Mr. Justice Brewer said: “Where is the situs of this intangible property? Is it simply where the home office is, where is found the central directing thought which controls the workings of the great machine, or in the State which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter. . . . But the franchise to be is only one of the franchises of a corporation. The franchise to do is an independent franchise, or rather a combina-

entry into the field of interstate commerce, and the Supreme Court would have done well to recognize it more frankly and to find a way to justify it that breathed none of the atmosphere of that moonshine and dreamland which is referred to as the bourne in which business men do not invest.

Such justification is by no means difficult. The brief of Mr. Carter on behalf of the express companies gave the court a clue to the most solid of reasons for sustaining the tax which that brief condemned. For Mr. Carter was a jurist as well as an advocate. And in the present instance he analyzed the problem for us most helpfully. The basis for the general doctrine of the immunity of interstate commerce from state taxation, he states as follows:

"There is no constitutional provision in terms forbidding the States to impose burdens by way of taxation upon interstate commerce. The prohibition is a necessary implication arising from the fact that the subject-matter is one placed exclusively under the sovereign control of Congress, and the imposition of burdens upon it by the States, whether by taxation or otherwise, would be a denial of that sovereignty and false assumption by the States of a power over it, which, if it existed, might be so exercised as to destroy it." <sup>116</sup>

And then he adds the significant qualification:

"There is one necessary exception to the rule that the States cannot tax interstate commerce. Inasmuch as the existence of the States is necessary to the existence of interstate commerce, that ordinary system of taxation which is necessary to the existence of the States, namely, taxation upon all property within them, must be permitted, and the property employed in interstate commerce is not to be exempted. This exception is, indeed, rather apparent than real; for where no burden can be put upon property employed in interstate commerce without being at the same time put upon all other property, interstate commerce is not really burdened. Were it not subject to taxation in this form the effect would be to confer upon it an affirmative advantage equivalent to a pecuniary bounty equal to the amount of the tax from which it is exempted." <sup>117</sup>

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tion of franchises, embracing all things which the corporation is given power to do, and this power to do is as much a thing of value and a part of the intangible property of the corporation as the franchise to be. Franchises to do go wherever the work is done." (166 U. S. 185, 223-24).

<sup>116</sup> 165 U. S. 194, 217, 41 L. Ed. 694 (1897.)

<sup>117</sup> *Ibid.*, 194, 217-18.

Manifestly, what is true of property used in interstate commerce is equally true of business that is interstate commerce. If such business is exempted from burdens which local business has to bear, it is thereby given a bounty to the extent of the exemption. Mr. Carter's point is that a tax is not a burden on interstate commerce unless it discriminates against that commerce. It would probably be safer to say that such burden on interstate commerce as non-discriminatory taxation may impose is not sufficiently serious to be accounted a regulation. Such taxation is forbidden by no explicit language in the Constitution. The exemption of interstate commerce from state taxation arises by implication only, and the implication should not be carried to the point of compelling the states to confer positive benefits on interstate commerce by discriminations in its favor.

Mr. Carter apparently appreciated the applicability of his concession to taxes on business, for he hastens to add that "a tax in any other form [than a tax on property] cannot be thus equalized over all private interests, and, if allowed, would be, or might easily be made to be, an especial burden."<sup>118</sup> Here is the crucial difficulty in the problem. In Ohio, express companies were taxed on the basis of their income-producing capacities, while many other businesses were assessed on a less onerous basis. Was there not therefore necessarily a discrimination against the express companies and the interstate commerce which they carried on? In one sense, of course, there is always discrimination, wherever there is difference of treatment. The requirement of absolute uniformity is, however, utterly impracticable. The rule of "reasonable classification" which the court has been compelled to adopt in applying the equal-protection clause<sup>119</sup> seems necessary also in passing upon issues of alleged discrimination raised under other constitutional clauses. But the Express cases were wisely decided only if they can be brought within the rule of reasonable classification.

The theories of both the majority and the minority avoided explicit analysis of this element in the situation. Chief Justice Fuller quoted a portion of the opinion of the state court which made the point that the earning capacity of real estate determines its assessable

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<sup>118</sup> 165 U. S. 194, 218, 41 L. Ed. 694 (1897).

<sup>119</sup> See *Missouri v. Lewis*, 101 U. S. 22 (1879).

value.<sup>120</sup> But the tax in question was not on the real estate of the express companies, for that was assessed separately, and the assessment then deducted from the value of the "total property" determined by the use of the unit rule. Mr. Justice White's dissenting opinion touches upon what ought to be the determining element in the case, when it points out that if the unit rule is good for express companies, it ought also to be applied to bankers and merchants. But this is adduced in support of the contention that the tax is not confined to tangible property within the state but falls also on all kinds of property without the state. That the assessment on the express companies greatly exceeded "the true value in money" of their tangible chattels within the state was fully recognized in the opinion denying a rehearing, in which this excess was called the intangible property of the company. What should then have been discussed was the question whether the intangible property of the express companies was taxed no more heavily than that of others.

The answer to the question depends upon whether similar business taxes were imposed on other businesses. Only by a general state-wide income tax can differences of treatment be avoided. And Ohio had no general income tax. Certainly the intangibles of the express companies were discriminated against in favor of intangibles enjoyed by many other businesses. But the doctrine of reasonable classification ought to go far enough to say that it is not necessary to treat express companies in the same way as other businesses that come into no competition with them. It can hardly be called a discrimination against interstate commerce to tax express companies more heavily than farmers. On the other hand, express companies may suffer if merchants escape what they must endure. An increase in the cost of interstate transportation by taxation of express companies may well reduce the volume of that kind of interstate commerce to the resulting increase of sales over the counters of local merchants. The Ohio tax on express companies might discriminate against interstate commerce even though similar taxes were imposed on all engaged in any form of transportation, intra-state or interstate. But the court was excused from considering these possibilities in dealing with the Ohio cases, since they were not specifically pressed and supported by evidence.

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<sup>120</sup> 165 U. S. 194, 225, 17 Sup. Ct. Rep. 305 (1897).

It may well insist that the complainants are under the same burden to establish the existence of discrimination as to show flaws in the rule of apportionment. But it does not appear that the materiality of the point was recognized.

This of course does not establish that the cases were unwisely decided. A court cannot insist on an ideal system of state taxation, if such a thing can exist outside the minds of the doctrinaire. A rough approximation to fair treatment of interstate commerce is all that can reasonably be required. It does not appear that the interstate business of express companies was in any way discriminated against in favor of any direct competitor engaged solely in local carriage. Such discrimination against interstate commerce as the entire taxing system of the state may have resulted in, was probably remote, indirect, and practically negligible. The Ohio taxes and others like them seem to have spared the express companies and their interstate business for other foes to devour. What Mr. Justice Brewer has to say about the possibility that the decision may open the door to injustice through the conflicting action of different states applies as well to the possibility that Ohio had laid a heavier hand on some interstate commerce than on some that was local. "Such possibilities," he says, "do not equal the wrong which sustaining the contention of the appellant would at once do."<sup>121</sup> Fine spun theories about possible discrimination may be dismissed in the same way that Mr. Justice Brewer deals with what he calls fine spun theories about situs in the paragraph with which he closed his opinion:

"In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no fine spun theories about situs should interfere to enable these large corporations, whose business is carried on through many States, to escape from bearing in each State such burden of taxation as a fair distribution of the actual value of their property among those States requires."<sup>122</sup>

But a practical age demands not only practical decisions but practical opinions to support them. The distinction between the intangible property of an interstate carrier and its franchises and business and receipts is that the intangible property, as Mr. Justice

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<sup>121</sup> 166 U. S. 185, 225, 17 Sup. Ct. Rep. 604 (1897).

<sup>122</sup> *Ibid.*



Brewer estimates it, is a conception that embraces the economic value of all the elements from which it is distinguished. For all his professed practicality, Mr. Justice Brewer reaches his goal by arbitrary categories and by distinctions in nomenclature which are not distinctions in reality. In escaping from the difficulties inherent in the notion that chattels are necessarily worth a capitalization of what may be earned by their use, even though they are easily divorced from that use and though substitutes for the use are readily available, the learned justice gets into new difficulties by insisting that a tax on the value of an interstate business is any the less a tax on that business because it is called a tax on intangible property. Had the Supreme Court recognized the Ohio tax on express companies for what it really was, and held that Ohio could not apply this method of assessment to any interstate business unless it also applied similar methods to all other businesses, we might not have had to wait so long for the beginnings of the fiscal reform that disregards intangibles as a subject of taxation and looks to income as the best expression of the values thus disregarded, and therefore as the most satisfactory and equitable subject from which to derive the necessary funds for governmental purposes.

*(To be continued.)*

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## ACTIONS AGAINST THE PROPERTY OF SOVEREIGNS

COURTS and text-writers have long been in agreement that a sovereign cannot be sued in his own courts without his consent. It has also been generally accepted as a principle of international law that courts will not entertain a suit against a foreign sovereign if objection to the jurisdiction is made. Out of these two doctrines the rule has been developed that the public property of a sovereign falls within his general immunity. This last rule has become of great importance since governments in recent years have widely extended the scope of their ownership and control.

The immunity accorded the property of sovereigns has not been limited to actions which have as their object an adjudication of title that shall be binding upon the "whole world." The immunity has also attached to actions which attempt to reach simply the interest which particular defendants have in property. The immunity, therefore, covers both actions *in rem*, as that term is used in admiralty, and actions which are sometimes called actions *in rem*, but are perhaps better described as actions *quasi in rem*.

There are some early obscure precedents referred to by Bynkershoek, but the first case of any significance in this subject is *The Exchange*.<sup>1</sup> Marshall, speaking for a unanimous court, refused to take jurisdiction of a libel against an armed ship which was part of the French naval forces. The basis of his decision was the international comity supposed to exist between nations, according to which each sovereign waived a part of his territorial jurisdiction in favor of every other sovereign. The reason given for this custom was the mutual benefit accruing to the several sovereigns from the implied agreement to respect one another's dignity and independence. The waiver of jurisdiction was said to be made in favor of the person of the sovereign, his ambassador, his armies passing by consent through another country, and his armed ships coming into a friendly port.

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<sup>1</sup> 7 Cranch (U. S.) 116 (1812).

Marshall's reasoning was fully indorsed by the English Court of Appeals in *The Parlement Belge*.<sup>2</sup> The case was a libel to recover damages for a collision brought against a ship belonging to the King of Belgium and used not only in carrying the mails, but also in transporting passengers and freight for hire. During the half century since *The Exchange*<sup>3</sup> there had been a great growth in the body of the law. Whereas Marshall could not refer to a single opinion to support his conclusions, Lord Esher was able to state that, "exemption from interference by any process of any Court of some property of every sovereign is admitted to be a part of the law of nations." He decided that the principle upon which this exemption rested was the implied agreement among states to respect one another's absolute independence of every sovereign authority. He held that this principle was applicable to all the property of any state destined to public use. An additional ground of decision was that seizure of property by admiralty process indirectly impleads the owner of the property and, as said by the court,

"The case is, upon this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any court."<sup>4</sup>

The first case to consider carefully the exemption of property of the local sovereign was *Briggs v. Light-Boats*.<sup>5</sup> Three vessels belonging to the United States and stated to be in their possession, and which had been built for use as floating government light-ships, were held not subject to statutory attachment proceedings in a state court. Judge Gray reasoned that a sovereign cannot be sued in his own courts without his consent, not because a sovereign cannot command himself, but because he must be free to perform his governmental functions. His property, likewise, must be free from court control because it is an instrument of government.<sup>6</sup>

<sup>2</sup> 5 P. D. 197 (1880).

<sup>3</sup> *Supra*.

<sup>4</sup> American Courts of Admiralty would probably not accept Lord Esher's second conclusion. The American rule is that a collision gives to the party injured a right *in rem* in the offending ship 'without regard to personal responsibility, the ship itself being considered the wrongdoer. *The Barnstable*, 181 U. S. 464, 467 (1901).

<sup>5</sup> 11 Allen (Mass.) 157 (1865).

<sup>6</sup> Story, J., in *United States v. Wilder*, 3 Sumner (U. S.) 308 (1838), took the view that in cases of salvage or general average the argument *ab inconvenienti* in favor

The property of a republic must be presumed to be intended for the public purposes of government, and courts cannot pass judgment upon the comparative importance of the sovereign powers of the United States.

A few years later the United States Supreme Court held in *The Davis*<sup>7</sup> that cotton of the United States being shipped on a private vessel could be libeled for salvage services rendered in saving it. The court indicated that the reason for the exemption of property of the local sovereign was to "prevent any unseemly conflict between the court and the other departments of the government." Only property in the actual possession of some officer charged on behalf of the government with its control was held to be free from court process. The court cited as its only authority *Briggs v. Light-Boats*.<sup>8</sup> In that case at the time of the attachment all the vessels were still at the builder's wharf and one of them had not received any crew on board. It would therefore appear that this vessel was not in the government's possession within the meaning of *The Davis*.<sup>9</sup> Moreover, the Supreme Court, speaking through Justice Field in *The Siren*,<sup>10</sup> had previously in a strong *dictum* indorsed a different doctrine. The court then said:

"It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. . . .

"The same exemption from judicial process extends to the property of the United States, and for the same reasons."

The decision in *The Davis*<sup>11</sup> might have been reached on other grounds if the court had distinguished between property engaged, and property not engaged, in the public service.<sup>12</sup> Every con-

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of an action *in rem* against government property was stronger than that opposed to it. His *dictum* that such actions could be brought is out of line with the authorities.

<sup>7</sup> 10 Wall. (U. S.) 15 (1869).

<sup>8</sup> *Supra*.

<sup>9</sup> *Supra*.

<sup>10</sup> 7 Wall. (U. S.) 152 (1868).

<sup>11</sup> *Supra*.

<sup>12</sup> The explanation which Waite, C. J., in *The Fidelity*, 16 Blatch. (U. S.) 569 (1879), gave of the decision in *The Davis* was that the property libeled was not devoted to a public use. The cotton had been collected under the Abandoned and Captured Property Act and was being shipped to New York for sale so that the proceeds might go into the Treasury.

stitutional use of property must be conclusively presumed to be public, but government ownership, apart from active use in the business of government, should not necessarily impute to property a public character. In the enforcement of judgments against municipal corporations a distinction is commonly made between property owned for profit and charged with no public trusts or uses, which may be sold on execution; and property used for public purposes, such as hospitals, fire engines, waterworks, and the like, which is exempt from execution.<sup>13</sup> This distinction is applicable to cases against the property of sovereigns, and government use furnishes a more rational and less fortuitous test than government possession.

The English Privy Council has disregarded the rule laid down in *The Davis*.<sup>14</sup> *Young v. S. S. Scotia*<sup>15</sup> was a libel filed against a ship belonging to the Canadian government. It was argued that at the time of the libel the boat was still in the possession of the builders, but the Lord Chancellor said that the question of the possession of the Crown was immaterial.

In an earlier case involving the property of a foreign sovereign the English Court of Appeals did not even notice the question of possession. *Vavasour v. Krupp*<sup>16</sup> was an action for infringement of patent rights, the plaintiff seeking an injunction to prevent the removal of certain shells owned by the Mikado of Japan and in the possession of commercial agents. The court refused to grant an injunction and James, L. J., refers to the plaintiff's action as "one of the boldest I have ever heard of as made in any Court in this country."

The Massachusetts court has taken the same position. In *Mason v. Intercolonial Railway*,<sup>17</sup> in an action by trustee process, trustees were summoned as having in their possession property of the defendant railway, which in turn belonged to the King of England. In holding there was no jurisdiction the opinion quoted from and relied on the leading cases of actions *in rem* against the property of a sovereign.

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<sup>13</sup> 3 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 992; 3 McQUILLEN, MUNICIPAL CORPORATIONS, § 1160.

<sup>14</sup> *Supra*.

<sup>15</sup> [1903] A. C. 501.

<sup>16</sup> 9 Ch. D. 351 (1877).

<sup>17</sup> 197 Mass. 349 (1908).

Two cases of libel for salvage services arising in federal district courts, *Long v. The Tampico*<sup>18</sup> and *The Johnson Lighterage Co., No. 24*,<sup>19</sup> have followed *The Davis*<sup>20</sup> where the property proceeded against belonged to a foreign government. In the latter case the court declared the principle on which immunity is granted is the same whether it is the domestic or a foreign sovereign that is involved. The correctness of this statement needs examination.

It is evident from Marshall's opinion in *The Exchange*<sup>21</sup> that he regarded the various kinds of immunity accorded foreign sovereigns as matters of grace or comity. But in *United States v. Clarke*<sup>22</sup> Marshall stated it as a matter of "common right" that the United States could not be sued. In Lord Esher's time the immunity of foreign sovereigns and their property was recognized as a right, but this right was simply the outgrowth of international practice. It is reasonably clear, therefore, that the courts did not regard the immunity of foreign sovereigns as a mere matter of deduction from the well-settled immunity of the domestic sovereign. The immunity accorded, moreover, has different bounds in the two cases. In the immunity of the local state there can be found nothing analogous to the immunity given under certain circumstances to the private servants of a foreign ambassador.

It is said that the principle governing both cases is the same since immunity is granted out of respect for the "independence of sovereign authority." In so far as this phrase expresses the policy underlying the decisions, it merely cloaks the difference between them. In cases involving the local sovereign it represents the state's need for executive freedom from harassing litigation. In cases involving the foreign sovereign it indicates the desire to avoid international friction by substituting diplomatic negotiations for the decrees of local tribunals.

The decisions of the federal courts based on *The Davis*<sup>23</sup> must be considered *contra* to the current of authority in international law.<sup>24</sup> In view of the fact that the law has always favored salvage

<sup>18</sup> 16 Fed. 491 (1883).

<sup>19</sup> *Supra*.

<sup>20</sup> 8 Pet. (U. S.) 436 (1834).

<sup>21</sup> 231 Fed. 365 (1916).

<sup>22</sup> *Supra*.

<sup>23</sup> *Supra*.

<sup>24</sup> See the statement in HALL, *INTERNATIONAL LAW*, 7 ed., 211: "If in a question with respect to property coming before the courts a foreign state shows the property to be its own, and claims delivery, jurisdiction at once fails, except in so far as it may be needed for the protection of the foreign state."

claims,<sup>26</sup> the way still lies open to the courts to restrict the authority of these cases to salvage claims. In *The Florence H.*,<sup>26</sup> however, Judge Learned Hand expressed the opinion that the same principles apply to every kind of action brought *in invitum* against a sovereign.

The question whether immunity attaches to the ship of a foreign sovereign used for trading purposes was at one time somewhat doubtful. Sir R. Phillimore in *The Charkieh*<sup>27</sup> advanced the view that no immunity would be granted a trading vessel. The case before him was a ship belonging to the Khedive of Egypt. Although the cases do not appear to have made any distinction between personal and governmental sovereigns, it might be urged that property of the former embarked in commercial enterprises was used for private ends, while property of a state engaged in commerce must ordinarily be regarded as vested with a public character.

In *The Parlement Belge*<sup>28</sup> Lord Esher decided that the immunity of a national ship is not lost because of its partial use for trading purposes. In *The Jassy*<sup>29</sup> the court refused to take jurisdiction of an action against a ship belonging to the Roumanian government and used in connection with the state railway. The ship which was held immune in *The Eolo*<sup>30</sup> was carrying a cargo of iron ore to be delivered to private consignees to be made up into war material for the Italian government.

The American cases have also failed to follow Sir R. Phillimore's dictum. In *Mason v. Intercolonial Railway*<sup>31</sup> the Massachusetts court refused to take jurisdiction of an action by trustee process summoning trustees who had in their possession property of a foreign sovereign. In *The Pampa*<sup>32</sup> a United States district court held exempt from arrest an Argentine naval transport employed

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<sup>26</sup> See BENEDICT, ADMIRALTY, 4 ed., § 224: "Salvage service is highly favored in law, in all commercial countries, from motives of clear public policy and a regard to the interests of commerce."

<sup>28</sup> 248 Fed. 1012 (1918).

<sup>27</sup> 4 L. R. A. & E. 59 (1873).

<sup>28</sup> *Supra*.

<sup>29</sup> [1906] P. D. 170.

<sup>30</sup> 2 Ir. 78 (1918).

<sup>31</sup> *Supra*.

<sup>32</sup> 245 Fed. 137 (1917).

in carrying a cargo of general merchandise belonging to private persons. The vessel was to carry on its return voyage material for the use of the Argentine Republic. In *The Attualita* <sup>33</sup> the ship at the time the libel was served was on her way under orders of the Italian government to load a cargo of grain and rails for Italy. No question was made of the public use of the vessel although she was refused immunity on other grounds.

The most recent case on this subject, *The Maipo*,<sup>34</sup> holds immune a Chilean naval transport which the government as the result of public bidding chartered to a private individual for commercial purposes. The court assumed that the foreign government may have retained possession of its ship through its naval captain and crew for the very purpose of keeping the vessel immune in foreign ports. This circumstance was not considered important. The result and effect of holding the vessel immune was treated as the determining factor in the decision. In this connection Judge Mayer said:

"These enterprises may, in some instances, be regarded (technically speaking) as commercial, but may, in substance, be of benefit to the people at large. Time is of vital importance to every ship, of whatever nationality, which sails the seas. . . . Whatever loss or inconvenience, if not safeguarded against, might thus result either to our people when dealing with foreign ships or to foreign peoples when dealing with us, is the price which the individual is paying for the ultimate benefit of his country."

Cases relating to property of the domestic sovereign are equally conclusive. The ship libeled in *Young v. S. S. Scotia* <sup>35</sup> was a ferry-boat in the Canadian government's railway system. The Lord Chancellor treated the property right of the Crown as conclusive of the court's lack of jurisdiction. In *The Florence H.* <sup>36</sup> Judge Learned Hand recognized the public character of a ship which at the time it was libeled was chartered to the Emergency Fleet Corporation and was engaged in loading a cargo of food for the French government. The arrangement between the Fleet Corporation and the French government was assumed to be "no other than the carriage of freight for hire."

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<sup>33</sup> 238 Fed. 909 (1916).

<sup>34</sup> *Supra*.

<sup>35</sup> 252 Fed. 627 (1918).

<sup>36</sup> *Supra*.



Courts could scarcely, consistently with the general principles which have guided them, refuse immunity to the ships of foreign nations used in trade. Sovereign authority would shrink to small proportions if not permitted to determine what uses of its property are public. To inquire into the use of property declared by a foreign sovereign to be public would be to flout the dignity of sovereignty which the courts have declared entitled to respect. In *The Parlement Belge*<sup>37</sup> the sovereign's statement covering the public use of his property was regarded as barring inquiry, and in *The Exchange*<sup>38</sup> the court refused to question the sovereign's statement as to title.

Certain recent English cases have made government use of private property the basis of immunity. *The Broadmayne*<sup>39</sup> was an action *in rem* for salvage services against a ship requisitioned by the English Crown. The requisitioning was a compulsory hiring which left title and possession in the owners. The Court of Appeal made an order forbidding the detention of the ship while under requisition. Swinfen Eady, L. J., speaks of the ship as, "in the service of the Crown, and as such exempt from process of arrest." Pickford, L. J., speaks of "the right of the Crown not to have its prerogative interfered with, and not to have its interest in any way deteriorated." Bankes, L. J., said,

"The vessel whilst the requisition lasts, is . . . *publicis usibus destinata*, and as such not liable to the claims or demands of private persons."

In this case the English court appears to go far toward adopting the principle enunciated by Judge Gray in *Briggs v. Light-Boats*,<sup>40</sup> the necessities of government. As he there said,

"[It] would endanger the performance of the public duties of the sovereign . . . to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on the government in war and peace, and the money in his treasury."

The case on this basis is a logical extension of previous doctrine. During the period that the state employs and controls private property, that property is in the service of the state and must be treated as assimilated with the public property of the state.

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<sup>37</sup> *Supra*.

<sup>38</sup> [1916] P. D. 64.

<sup>39</sup> *Supra*.

<sup>40</sup> 11 Allen (Mass.) 157, 162 (1865).

In *The Messicano*<sup>41</sup> Sir Samuel Evans, following the authority of *The Broadmayne*<sup>42</sup> without discussion, refused to allow the arrest of a private ship requisitioned by a foreign government under a hiring arrangement. *The Eolo*<sup>43</sup> presented similar facts and the ship was released. The chief point argued was whether the vessel had been requisitioned within the meaning of previous cases. On this issue O'Connor, M. R., said, "As I understand these authorities they govern the case of a ship sailing under the order of a sovereign State, for State purposes, and for a limited time."

The United States Circuit Court of Appeals upon similar facts reached a different result. In *The Attualita*,<sup>44</sup> the ship which was libelled had been requisitioned by the Italian Government, but remained in the custody and control of her owners. The court retained jurisdiction of the libel on the ground that the Italian government was not responsible "at law or in morals" for the acts of the libeled ship. The court overlooked the fact that when a foreign government requests the release of a ship from the process of a foreign court, it obligates itself "in morals," as fully as if it were the owner, to answer for the acts of the ship. The case, moreover, is *contra* to the *dictum* of Judge Hough in *The Athanasios*,<sup>45</sup> and the *dictum* of Judge Thompson in *The Luigi*.<sup>46</sup>

The system under which our government is operating the railroads is very similar to the status of requisitioned ships. The same features exist of government rental from private owners and of private management under government direction. President Wilson's proclamation of December 26, 1917, taking possession and control of rail and transportation systems, provided that, except with the prior written assent of the director of railroads, there should be no attachment levied on "any of the property used by any of said transportation systems in the conduct of their business as common carriers." Section 10 of the Act approved March 21, 1918, in which Congress regulated the operation of the transportation systems while under federal control, provided that "no process, mesne or final, shall be levied against any property under such Federal control." In any case involving proceed-

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<sup>41</sup> 32 T. L. R. 519 (1916).

<sup>42</sup> *Supra*.

<sup>43</sup> 228 Fed. 558 (1915).

<sup>44</sup> *Supra*.

<sup>45</sup> *Supra*.

<sup>46</sup> 230 Fed. 493 (1916).

ings against a ship or other property requisitioned for use by our government, these executive and legislative precedents touching the requirements of efficient administration are entitled to great weight.

When a sovereign comes into court as plaintiff, in so far as he seeks relief he is bound by the usual rules governing litigants. He may be required to give security for costs<sup>47</sup> and he may be met by defenses, set-offs or cross-bills<sup>48</sup> incident to the subject matter of the action. But the waiver of immunity is not held to extend to affirmative relief against the sovereign. The Supreme Court has held that the set-offs permitted by statute to be asserted against the United States do not allow any judgment to be rendered against the government, although it may be judicially determined that the government is indebted to the defendant.<sup>49</sup> Foreign sovereigns would probably be accorded the same immunity, for in their aspect as plaintiffs the same principles apply to all sovereigns alike.

In *South African Republic v. Compagnie Franco-Belge*<sup>50</sup> the English Court of Appeal held that a counterclaim based on a transaction independent of that sued on could not be asserted against a plaintiff sovereign. On the other hand, a federal district court held in *Kingdom of Roumania v. Guaranty Trust Co.*,<sup>51</sup> that a sovereign suing to recover a deposit could be interpleaded against his will by one whose claim arose independently of the original deposit. The American decision seems preferable. The courts may well regard themselves as open only to those who impliedly assent to having complete justice done with respect to the property sued for or the defendant proceeded against. As long as no liability beyond the bounds of the litigation is imposed on the sovereign, he cannot complain that his prerogative is interfered with.

A unique case in this subject is that of *Von Hellfeld v. Russian Government*,<sup>52</sup> decided in 1910 by the Prussian Court for the Determination of Jurisdictional Conflicts. Suit was originally brought

<sup>47</sup> *Rothschild v. Queen of Portugal*, 3 Y. & C. 594 (1839).

<sup>48</sup> *Duke of Brunswick v. King of Hanover*, 6 Beav. 1 (1844); *United States v. Proileau*, 13 W. Rep. 1062 (1865).

<sup>49</sup> *United States v. Eckford*, 6 Wall. (U. S.) 484 (1867).

<sup>50</sup> [1898] 1 Ch. 190.

<sup>51</sup> 244 Fed. 195 (1917).

<sup>52</sup> Decision reported in 5 AM. JOUR. OF INT. LAW, 490 (1910).

by Russia in the German court at Kiao-chau, and judgment was rendered against Russia on a counterclaim asserted by the defendant. The case came before the Prussian court on the question whether execution against Russian property in Berlin could issue on this judgment. The court assumed that the Russian government had submitted itself to the jurisdiction of the Kiao-chau court for the purpose of deciding the counterclaim. It held, however, that this submission must be regarded as "limited to the judicial determination of the question of law at issue between the parties" and that it did not extend "to the judicial execution of any resulting judgment." The court said the fact was to be premised that a renunciation of sovereignty would take place only in a definite relation, and it pointed out that even in arbitration treaties nations make no provision for submission to the execution of the arbitral award.

The decision can hardly be questioned. Because a foreign sovereign consents to an adverse judgment, he does not thereby consent to indiscriminate seizure of his property to satisfy that judgment. In fact, Laurent,<sup>88</sup> who makes a distinction between a state's governmental acts (*actes de souveraineté*) and its private acts (*actes d'intérêt-privé*) and who urges that foreign states should be amenable to suit in the latter class of cases, declares that even after adverse judgment the state's property must be free from seizure. It would seem to follow from the views of this writer, although he does not discuss the point, that he would favor a wider immunity for suits against the property of foreign sovereigns than for suits directly against such sovereigns.

In spite of some early criticism the law to-day gives immunity to the property of a sovereign which is used for public purposes; and the wide functions of government are recognized in interpreting what is a public purpose. The distinction which in theory should be made between cases involving the domestic and cases involving a foreign sovereign has been so consistently glossed over that it can scarcely be said to exist as a living principle of law. The English courts have protected every interest which a sovereign may have in property. The American courts have not as yet given immunity to private property employed by a sovereign.

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<sup>88</sup> See his *DRIT CIVIL INTERNATIONAL*, Paris (1880), vol. 3, 75-89.

There is, further, in our cases a limitation, the extent of which has not been settled, dependent upon the possession of the sovereign. The trend of recent decision, however, is probably toward a full recognition of the varied interests of government in property.

With a large part of the world's shipping now owned or requisitioned by sovereign nations, many maritime claims can not be liquidated except through the favor of government, through recourse to foreign courts, or through diplomatic exchanges. This situation is unsatisfactory and will probably require regulation by treaty. It is possible that the peace conference will provide new machinery. An elaborate scheme for an International Court of Appeal in Prize Cases was drawn up by the Hague Conference of 1907. A similar tribunal with either original or appellate jurisdiction might be erected to determine claims asserted in times of peace against ships of foreign sovereigns.

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WASHINGTON, D. C.

# HARVARD LAW REVIEW

Published monthly, during the Academic Year, by Harvard Law Students

SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER

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EQUITABLE SERVITUDES IN CHATTELS. — May agreements of a restrictive character be made to run with chattels in equity as well as with land? In *Werderman v. Société Générale d'Electricité*<sup>1</sup> the Court of Appeal thought that the burden of an agreement made upon sale of a patent would run with the patent as against subsequent purchasers with notice. The whole argument of Jessel, M. R., proceeds on the lines of *Tulk v. Moxhay*<sup>2</sup> and assumes the possibility of an equitable servitude in a patent.<sup>3</sup> But the Court of Appeal subsequently considered the *Werderman* case to be applicable only where the agreement imposes a charge or encumbrance.<sup>4</sup> And the general course of English decision since the *Werderman* case has served to cast doubt upon the possibility of creating equitable servitudes in chattels. It should be observed, however, that the *Werderman* case involved, not an agreement restricting the use of the patent, but an agreement binding the holder of it to pay money to the vendor. Such agreements would not create servitudes in the case of land<sup>5</sup> and *a fortiori* should not do so in the case

<sup>1</sup> 19 Ch. D. 246.

<sup>2</sup> 2 Phil. 774. Thus Jessel, M. R., says: "It is a part of the bargain that the patent shall be worked in a particular way and the profits be disposed of in a particular way and no one taking with notice of that bargain can avoid the liability." (19 Ch. D. 246, 252.) Again: "How . . . it can be argued in a Court of Equity that an assign can take the patent with notice of that arrangement and keep all the profits for himself, I am at a loss to understand." (*Id.*, 253.)

<sup>3</sup> "I think it is tolerably plain that the parties intended certain liabilities to attach to the patent itself." (*Id.*, 251.)

<sup>4</sup> *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. 146.

<sup>5</sup> *Haywood v. Building Society*, 8 Q. B. D. 403; *Smith v. Colbourne*, [1914] 2 Ch. 533; *Miller v. Clary*, 210 N. Y. 127; 103 N. E. 1114. The party wall cases and their analogues (*e.g.*, *Whittenton v. Staples*, 164 Mass. 319, and cases cited on page 327), where covenantee is given an easement to maintain something in part on covenantor's land and the latter covenants to pay his proportion of the cost if and when he uses it, may be explained, as has often been observed, on a theory of preventing unjust enrichment by imposing a charge upon the thing in case it is used, without resorting to

of chattels. The other English cases involved agreements as to the prices to be charged upon resale.<sup>6</sup> Although these might fairly be said to be restrictive agreements restricting the use of the thing sold, they infringe the policy of the law as to freedom of trade in chattels to such extent that equity might well refuse to give them effect as creating equitable servitudes. In *Barker v. Stickney*<sup>7</sup> the purchaser of a copyright covenanted to pay certain royalties. They were not imposed by way of a charge upon the copyright and the court distinguishing the *Werderman* case declined to allow an equitable servitude.

In the United States the courts began by enforcing restrictive agreements with respect to the use of chattels in case of patents and copyrights.<sup>8</sup> But one of the cases<sup>9</sup> involved, along with a restriction on use, a restriction as to price on resale, and the federal courts are now definitely committed to the doctrine, also established in England, that such agreements will not be enforced against third persons who take with notice.<sup>10</sup> In so deciding they have sometimes argued against allowing equitable servitudes in chattels at all.<sup>11</sup> But in *Henry v. Dick Co.*<sup>12</sup> a restriction on use was enforced against third persons who took a patented article with notice, and *Motion Picture Patents Co. v. Universal Film Mfg. Co.*,<sup>13</sup> which purports to overrule *Henry v. Dick Co.*, was a case in which the restriction on use went beyond what was reasonable in order to secure the advantage of the patent on the thing patented and hence was one in which equity, in the case of a restriction upon the use of land, would have refused to allow an equitable servitude.

While Sir George Jessel's doctrine of servitudes in chattels on the analogy of *Tulk v. Moxhay* has appeared to fare hard at the hands of the courts in subsequent cases none of the cases have been such as to present a fair occasion for applying it. If the instinct of common-law lawyers is against such servitudes, the instinct of the mercantile community no less clearly calls for them, and within the recognized limits of the doctrine of equitable servitudes in general the preconceptions of lawyers may yet be found yielding to the exigencies of trade.

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DOCTRINE OF *ULTRA VIRES* AS APPLIED TO BUSINESS CORPORATIONS. — In the case of *Cotman v. Brougham*<sup>1</sup> the memorandum of association of the company in question contained an objects clause with

any theory of equitable servitude. In this respect these cases are analogous to those in which equity imposes a constructive trust to prevent unjust enrichment of one who has promised for a consideration in hand to do something with respect to a thing which is to come into existence in the future. 3 POM. EQ. JUR., § 1288.

<sup>6</sup> *Dunlop Pneumatic Tyre Co. v. Selfridge*, [1915] A. C. 847; *McGruther v. Pitcher*, [1904] 2 Ch. 306; *Taddy v. Sterious*, [1904] 1 Ch. 354.

<sup>7</sup> [1918] 2 K. B. 356.

<sup>8</sup> *New York Bank Note Co. v. Hamilton Bank Note Co.*, 28 App. Div. 411, 50 N. Y. Supp. 1093; *Murphy v. Christian Press Publishing Co.*, 38 App. Div. 426, 56 N. Y. Supp. 597.

<sup>9</sup> *Murphy v. Christian Press Publishing Co.*, *supra*.

<sup>10</sup> *Bauer v. O'Donnell*, 229 U. S. 1; *Bobbs-Merrill v. Straus*, 210 U. S. 339; *Scribners v. Straus*, 210 U. S. 352.

<sup>11</sup> *Dr. Miles Medical Co. v. Park*, 220 U. S. 373; *Park v. Hartman*, 153 Fed. 24.

<sup>12</sup> 224 U. S. 1.

<sup>13</sup> 243 U. S. 502.

<sup>1</sup> [1918] A. C. 514.

thirty subclauses enabling the company to carry on almost every conceivable kind of business which a company could adopt, and provided that "the objects set forth in any sub-clause shall not, except when the context expressly so requires, be in any wise limited or restricted by reference to or inference from the terms of any other sub-clause, or by the name of the company. None of such sub-clauses or the objects therein specified or the powers thereby conferred shall be deemed subsidiary or auxiliary merely to the objects mentioned in the first sub-clause of this clause, but the company shall have full power to exercise all or any of the powers conferred by any part of this clause in any part of the world, and notwithstanding that the business, undertaking, property or acts proposed to be transacted, acquired, dealt with or performed do not fall within the objects of the first sub-clause of this clause." The company sought to escape liability for an act done in its name by its managers on the ground that the act was *ultra vires*. The court held that, under such a memorandum, the act was not *ultra vires*. The circumstances of this case direct attention to the doctrine of *ultra vires*, as applied to business corporations (or companies, if the British word be used).

If exceptional cases are put aside, we may say that a business corporation is predicated upon the association of a number of human beings who have associated to accomplish some business object or objects. In the nature of things, an unchartered association might readily have been recognized by the courts as a legal unit, and incorporation simply gives legal confirmation to the popular conception of a business unit. Statutes relating to the formation of corporations require that the incorporators state the objects, or purposes, or powers of the corporation. The statement of the objects, or purposes, or powers results in a definition of the scope of contemplated corporate activity. Then comes the question: If human beings, in the name of the corporation, do an act outside the scope of contemplated corporate activity, shall corporate significance be given to that act, or shall it be treated simply as the act of the human beings? The courts are very apt to deal with this question as though it were a question at common law, but, it is submitted, it is always a question of statutory construction. The power to create a corporation — to recognize the business unit as a legal unit — is in the legislature, and it is for the legislature to say what legal capacities this legal unit shall have. The legislature might think it wise that no act done outside the scope of contemplated corporate activity should have any corporate significance. Or the legislature might think it wise that some acts done in the name of the corporation by its managers outside the scope of contemplated corporate activity should result in corporate liabilities or rights, even though the doing of such acts would be a wrong as between the corporation and the state, and also would be a wrong as between the managers of the corporation and its stockholders and creditors. The refusal to give any corporate significance to acts done outside the scope of contemplated corporate activity frequently leads to results that are, from the business point of view, shocking; and therefore courts should incline to take the other construction of the legislative intent. But it is to be recognized that, if the legislature shows the intent that no corporate significance shall be given to any acts out-



side the scope of contemplated corporate activity, the courts must give effect to that intent.

In England, corporate significance is given to acts outside the scope of contemplated corporate activity in the case of corporations created by the Crown, pursuant to the common law. See *British South Africa Co. v. De Beers Consolidated Mines, Ltd.*<sup>2</sup> But in *Ashbury Railway Carriage & Iron Co. v. Riche*,<sup>3</sup> decided in 1875, Lord Cairns examined the provisions of the Joint Stock Companies Act of 1862 and concluded that a company formed under that statute had no legal capacity to do an act outside the scope of contemplated corporate activity. Therefore, although a contract made in the name of the company, for its benefit, by its directors, and with the sanction of all its shareholders had not been performed, the company was not exposed to any liability. No corporate significance was given to the act of making the contract. This decision has so long governed later English decisions (and has had such a great influence in this country with judges who did not pause to examine the statutory provisions regulating the corporations before them, and who treated this decision as a decision at the common law) that it is a rash act to criticize it. But it is submitted that the provisions of the Joint Stock Companies Act of 1862 did not show an intent by the legislature thus sharply to limit the legal capacity (as distinguished from the legal authority) of companies formed under its provisions. One would have supposed that the rule of legal capacity applicable to corporations at the common law would have been applied to statutory corporations, unless the legislature had plainly indicated its intent to the contrary.

Such a decision makes it a dangerous matter to enter into a contract which is, in form, with a company. Upon those who propose to contract with companies, a caveat is served, and this reacts upon companies who, of course, wish persons to feel safe in making contracts with them. The effect upon the business of the country is shown by extracts from the opinions in the principal case.

By Lord Parker: "Experience soon showed that persons who transact business with companies do not like having to depend on inference when the validity of a proposed transaction is in question. Even a power to borrow money could not always be safely inferred, much less such a power as that of underwriting shares in another company. Thus arose the practice of specifying powers as objects. . . . But even thus, a person proposing to deal with a company could not be absolutely safe, for powers specified as objects might be read as ancillary to and exercisable only for the purpose of attaining what might be held to be the company's main or paramount object, and on this construction no one could be quite certain whether the Court would not hold any proposed transaction to be *ultra vires*. At any rate, all the surrounding circumstances would require investigation. Fresh clauses were framed to meet this difficulty, and the result is the modern memorandum of association with its multifarious list of objects and powers specified as objects and its clauses designed to prevent any specified object being read as ancillary to some other object."

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<sup>2</sup> [1910] 1 Ch. 354.

<sup>3</sup> L. R. 7 H. L. 653.

By Lord Wrenbury: "It has arrived now at a point at which the fact is that the function of the memorandum is taken to be, not to specify, not to disclose, but to bury beneath a mass of words the real object or objects of the company with the intent that every conceivable form of activity shall be found included somewhere within its terms."

If the contract with a corporation is of such a nature that it would be valid if made with a human being, and if it is made in behalf of the corporation by, or by the authority of, those human beings in whom are vested the powers of corporate management, the corporation should be bound thereby. This rule may perhaps call for some qualifications, particularly in the case of public-service corporations, but it is submitted that it is the wise general rule. With such a rule established by statute, it will then be feasible to insist upon a statement of objects in incorporation papers which will really define the contemplated venture and will, therefore, limit the risks which the managers have, as between themselves and the stockholders, the right to run. On the one hand, it is undesirable that persons should be made timid with regard to contracting with corporations; on the other hand, it is undesirable that stockholders should go into a blind pool. A statute can be drawn so as to avoid both evils, and it is not improbable that the decision in the principal case will be followed by statutory changes.

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COMPENSATION FOR SPECIAL SERVICES RENDERED BY A MUNICIPAL CORPORATION. — If an individual carries on a business which involves a city in extraordinary expense, the city may by ordinance impose the expense upon the individual; thus, where the construction of street railroad tracks increased the difficulty and expense of cleaning the streets it was held permissible for the city to require the railroad to clean the space between its rails.<sup>1</sup> And where a business requires inspection by a city department, the person carrying on the business may be required to take out a license and pay a fee to cover the expense of inspection,<sup>2</sup> though not to impose a fee greater than such cost.<sup>3</sup>

If, however, there is no actual requirement of expense, but the city renders a special service, as, for instance, by guarding premises against disorder or against fire, a problem of another sort is presented. May the city exact compensation for its services? On principle, one would be inclined to say, No, if the service is rendered from a public motive; Yes, if individual benefit is the controlling motive. Taxation covers all public purposes, and should pay for expenses legally incurred on behalf of the public; but taxation to pay for private expenditure is illegal and therefore money raised by taxation should not be used to pay for private service. The few authorities are not at all in agreement. If, for instance, a city by ordinance requires the placing of a policeman at a theatre, the purpose must be a public one, and no compensation should be exacted from the owner; and it was so held in the earliest case.<sup>4</sup> So,

<sup>1</sup> *Chicago Union Traction Co. v. Chicago*, 199 Ill. 259, 65 N. E. 451.

<sup>2</sup> *Fort Smith v. Hunt*, 72 Ark. 556, 82 S. W. 163.

<sup>3</sup> *Wisconsin Telephone Co. v. Milwaukee*, 126 Wis. 1, 104 N. W. 1009.

<sup>4</sup> *Waters v. Leech*, 3 Ark. 110.

if a city ordinance requires a fireman to be stationed at a theatre, it has been properly held that the owner could not be required to pay the expense;<sup>5</sup> but the opposite decision has also been reached.<sup>6</sup>

A somewhat similar question is raised by an ordinance requiring an abutting owner to clear snow off his sidewalk at his own expense. This ordinance has been held valid,<sup>7</sup> but the better view appears to be that the ordinance is unreasonable, since it requires a single class of abutting owners to pay for a purely public benefit.<sup>8</sup>

If, however, a landowner desires and asks for special protection, not required for the public interest, it is common practice, and it would seem theoretically sound to require payment.

A recent English case, *Grays Urban District Council v. Grays Chemical Works, Limited*,<sup>9</sup> seems to be decided upon this correct distinction. The defendant was owner of an acid plant, of which the roof had caved in; there was danger that the premises would catch fire from acid flowing out of broken carboys. He accordingly called the fire department of plaintiff District Council, and the department remained until the immediate danger of fire was over. He then asked that firemen be supplied to watch the premises during the removal of the debris, and four firemen remained for several days. Plaintiff having sued for compensation for services of the firemen on the first day, and also for the services of the four left to watch the premises, it was held that the defendant could not be called upon to pay for the services of the department, but that he must pay for the time of the four men who were left to watch the debris.

**MISTAKE OF LAW IN EQUITY AND AT LAW.** — American courts in their latest decisions have clearly displayed the tendency to confine the mistake of law doctrine within even narrower limits than heretofore. They still sternly declare that *ignorantia legis non excusat*, but we find them nevertheless granting relief in the particular cases under the guise of some exception to the rule. With respect to reformation of instruments the greatest liberality has been evidenced, while with cases involving recovery of money paid under mistake, occurring as they do, chiefly at law, the rule has been relaxed to a less degree. In many cases where relief for a mistake of law has been refused, the court would have reached a like result even if the mistake had been one of fact.<sup>1</sup> On the other hand, some jurisdictions have refused to subscribe to the progressive tendency and have of late applied the doctrine in all its rigor.<sup>2</sup>

<sup>5</sup> *Chicago v. Weber*, 246 Ill. 304, 92 N. E. 859.

<sup>6</sup> *Tannenbaum v. Rehm*, 152 Ala. 494, 44 So. 532.

<sup>7</sup> *Goddard, Petitioner*, 16 Pick. (Mass.) 504.

<sup>8</sup> *Gridley v. Bloomington*, 88 Ill. 554.

<sup>9</sup> [1918] 2 K. B. 461.

<sup>1</sup> See *Jacobson v. Mohall Telephone Co.*, 34 N. D. 213, 157 N. W. 1033; *Traweck v. Hagler*, 75 So. 152 (Ala.); *Porter v. Wright*, 145 Ga. 787, 89 S. E. 838; *Johnson v. Hernig*, 53 Pa. Sup. Ct. 179; *Diebel v. Diebel*, 116 Minn. 168, 133 N. W. 463; *Houlehan v. Inhabitants of Kennebec County*, 108 Me. 397, 81 Atl. 449.

<sup>2</sup> *Tilton v. Fairmont Lodge*, 244 Ill. 617, 91 N. E. 644; *Baker v. Pierce*, 197 Ill. App. 158; *Shields v. Hitchman*, 251 Pa. 455, 96 Atl. 1039; *Clark v. Lehigh Coal Co.*,

The law on the subject, despite the increasingly liberal view taken by the majority of courts, is in a very unsatisfactory state. The rule is declared to exist in full force, yet so many arbitrary exceptions have been grafted on it that, in fact, nothing remains thereof. Thus far, at least ten well-defined exceptions have been established. (1) A mistake of foreign law has been dealt with practically everywhere, as a mistake of fact;<sup>3</sup> and so, with a foreigner mistaking the law of the forum.<sup>4</sup> (2) Public moneys erroneously disbursed are recoverable;<sup>5</sup> (3) money paid to trustees or court officers under mistake may not be retained;<sup>6</sup> and (4) payments made under a void statute<sup>7</sup> or on reliance of a decision later overruled<sup>8</sup> must, in some jurisdictions, be returned. (5) Where a court officer in administering a fund makes erroneous payments as between the beneficiaries, the court will allow a set-off against future claims or will order repayment, as the case may require.<sup>9</sup> (6) The courts have everywhere laid hold of an accompanying mistake of fact and have accorded the adequate remedy;<sup>10</sup> (7) and likewise with an equity present in the case, such as fraud,<sup>11</sup> superior knowledge of a party,<sup>12</sup> or a fiduciary relationship.<sup>13</sup> (8) A mistake as to legal title or another antecedent right is a well-established exception in England and one growing in favor in this country.<sup>14</sup> (9) Where the parties in reducing an oral agreement to writing have failed to express the intent of all concerned through the technical use of language or otherwise, the courts have almost universally granted reformation,<sup>15</sup> though it is difficult to perceive why a

250 Pa. 304, 95 Atl. 462; Penn. Stave Co.'s Appeal, 225 Pa. 178, 73 Atl. 1107; *Godwin v. Da Conturbia*, 115 Md. 488, 80 Atl. 1016; *Euler v. Schroeder*, 112 Md. 155, 76 Atl. 164.

But in Connecticut and Kentucky the distinction between a mistake of law and one of fact is disregarded both in equity and at law. *Bronson v. Liebold*, 87 Conn. 293, 87 Atl. 979; *Park Bros. v. Blodgett and Clapp Co.*, 64 Conn. 28, 29 Atl. 133; *Supreme Council Catholic Knights v. Fenwick*, 169 Ky. 269, 183 S. W. 906; *Blakemore v. Blakemore*, 19 Ky. L. Rep. 1619, 44 S. W. 96.

<sup>3</sup> *Sampson v. Mudge*, 13 Fed. 260; *Rosenbaum v. U. S. Credit System Co.*, 64 N. J. L. 34, 44 Atl. 966. By statute in California a mistake of foreign law is a mistake of fact. CAL. CIV. CODE, § 1579. Similarly in North Dakota, South Dakota, Montana, and Oklahoma.

<sup>4</sup> *Osincup v. Henthorn*, 89 Kan. 58, 130 Pac. 652.

<sup>5</sup> *State v. Young*, 134 Ia. 505, 110 N. W. 292; *Wisconsin & Central R. R. Co. v. United States*, 164 U. S. 190. *Contra*, *People v. Foster*, 133 Ill. 496, 23 N. E. 615.

<sup>6</sup> *Ex parte James*, L. R. 9 Ch. 609; *Gillig v. Grant*, 23 App. Div. (N. Y.) 596, 49 N. Y. Supp. 78.

<sup>7</sup> *Spalding v. City of Lebanon*, 156 Ky. 37, 160 S. W. 751. *Contra*, *Yates v. Royal Ins. Co.*, 200 Ill. 202, 65 N. E. 726.

<sup>8</sup> *Centre School Township v. State*, 150 Ind. 168, 49 N. E. 961. *Contra*, *Kenyon v. Welty*, 20 Cal. 637.

<sup>9</sup> *Finch v. Smith*, [1915] 2 Ch. 96; *In re Birkbeck, etc. Society*, [1915] 1 Ch. 91; *Hemphill v. Moody*, 64 Ala. 468.

<sup>10</sup> *Freeman v. Curtis*, 51 Me. 140; *Ray & Thornton v. Bank of Kentucky*, 3 B. Monroe (Ky.) 510.

<sup>11</sup> *Chelsea Nat. Bank v. Smith*, 74 N. J. Eq. 275, 69 Atl. 533; *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811.

<sup>12</sup> *Moreland v. Atchison*, 19 Tex. 303; *Jordan v. Stevens*, 51 Me. 78.

<sup>13</sup> *Tompkins v. Hollister*, 60 Mich. 470, 27 N. W. 651.

<sup>14</sup> *Cooper v. Phibbs*, L. R. 2 Eng. & Ir. App. 149; *Stoeckle v. Rosenheim*, 10 Del. Ch. 195, 87 Atl. 1006; *Burton v. Haden*, 108 Va. 51, 60 S. E. 736; *McIntyre v. Casey*, 182 S. W. 966 (Mo.).

<sup>15</sup> *Griswold v. Hazard*, 141 U. S. 260; *Gross Construction Co. v. Hales*, 37 Okla. 131,

court of equity should distinguish such a case from one where the written contract represents the agreement of the parties and the error occurs as to its legal effect.<sup>16</sup> (10) Two states have succeeded in drawing a metaphysical distinction between mistake and ignorance of law, allowing relief in the former case only.<sup>17</sup> In all other cases — if any — the maxim remains intact.

The continued lack of frankness on the part of the courts, obvious from the presence of this formidable array of exceptions, makes it clear that relief from the confusion can hardly be expected from that source. Nor are attempts by writers to provide criteria for reconciling old cases and for granting relief in new ones of much value. Such criteria have in the past been attempted,<sup>18</sup> and those which have not been wholly discarded have served only to establish additional exceptions and thus to increase further the confusion. In fact, no criterion is possible, much less, desirable. It can result only in an effort to save the last vestige of a decrepit doctrine unsupportable on principle, and unjust in its operation. Legislative action, abolishing the maxim and establishing a mistake of law on an equal footing with one of fact, seems to be the only solution. Yet relief even from that source is un hoped for, if the judiciary adopts the attitude recently taken toward such legislation in Oklahoma.<sup>19</sup> There the court, by construing statutes less narrowly, could have given them the effect of banishing the maxim entirely from its operation in civil cases, where it properly has no application; but instead, the court stood strictly on precedent and practically negated the true purpose of the legislation.<sup>20</sup> However, statutes more clearly defined in terms and scope than those thus far passed<sup>21</sup> would make the recurrence of such judicial obstruction impossible.

## RECENT CASES

**ADMIRALTY — PRACTICE — SUIT AGAINST NONRESIDENT ENEMY ALIEN.** — A British company sued an Austrian corporation *in personam* in a United States admiralty court after England declared war on Austria. The defendant appeared and gave a bond releasing an attachment placed on one of its ships; but the District Court dismissed the libel, and by the time the case reached the Supreme Court, the United States also had declared war on Austria, and had prohibited all intercourse with Austrian subjects. The supervening

129 Pac. 28; *Good Milking Machine Co. v. Galloway*, 168 Ia. 550, 150 N. W. 710; *Philippine Sugar, etc. Co. v. Philippine Islands*, 247 U. S. 385.

<sup>16</sup> See 1 STORY, EQUITY JURISPRUDENCE, 13 ed., 113, note.

<sup>17</sup> *Culbreath v. Culbreath*, 7 Ga. 64; *Lawrence v. Beaubien*, 2 Bailey (S. C.), 623.

<sup>18</sup> See *Cooper v. Phibbs*, *supra*; KERR, FRAUD AND MISTAKE, 3 ed., 431; STORY, EQUITY JURISPRUDENCE, 13 ed., § 121, 1 L. QUART. REV. 298; 17 CENT. L. JOUR. 12; 18 CENT. L. JOUR. 7; 2 POMEROY, EQUITY, 3 ed., § 849; 5 COL. L. REV. 366.

<sup>19</sup> *Campbell v. Newman*, 51 Okla. 121, 151 Pac. 602.

<sup>20</sup> But see *Gregory v. Clabrough's Executors*, 129 Cal. 475, 62 Pac. 72. The statutes in California and Oklahoma are the same, but the California court construed them as including recovery for money paid by mistake as well as reformation of contracts.

<sup>21</sup> See CAL. CIVIL CODE, § 1578; N. DAK. CIV. CODE, 1913, § 5855; SO. DAK. CIV. CODE, § 1207; OKLA. REV. LAWS, 1910, § 909; MONT. REV. CODE, 1907, § 4984.

charges in fact and in law were considered by the Supreme Court as is the practice in an admiralty case. *Held*, that the case be remanded for further proceedings, but no action, except to preserve the security, to be taken until the defendant can present his defense adequately. *Watts, Watts & Co., Ltd. v. Unione Austriaca di Navigazione, etc.*, U. S. Sup. Ct. Off., October Term (1918), No. 25.

Since the proceeding is *in personam*, the Austrian corporation is to be treated as an enemy alien defendant, for the admiralty doctrine that a personal defendant is a claimant is applicable only to proceedings *in rem*, where the right to appear is based on a claim to the property. See BENEDICT, ADMIRALTY, 4 ed., § 296. Where a suit against a nonresident alien enemy is entertained, he is permitted to defend. *Seymour v. Bailey*, 66 Ill. 288 (1872); *McVeigh v. United States*, 11 Wall. (U. S.) 259 (1870); *Robinson v. Continental Insurance Co.*, [1915] 1 K. B. 155. Still, if the defense cannot be adequately presented it is not fatal, where there has been an appearance or the proceeding is *quasi-in-rem*. *Porter v. Freudenberg*, [1915] 1 K. B. 857; *Dorsey v. Dorsey*, 30 Md. 522 (1869). See 31 HARV. L. REV. 471, 475. The delicate problem is to afford the plaintiff, an ally, as effective a remedy as he would have if suing a loyal citizen, since otherwise the enemy is really protected; and yet allow the defendant a fair hearing. The solution is often in the form of a postponement within the discretion of the court. See *Porter v. Freudenberg*, [1915] 1 K. B. 857, 892; *Robinson v. Continental Insurance Co.*, [1915] 1 K. B. 155, 162. When the plaintiff is amply protected by a bond such a practice is commendable, but it might be a hardship on the plaintiff to insist that he shall wait. See *In re Amsinck's Estate*, 169 N. Y. Supp. 336. The more flexible practice of allowing the lower court to grant a continuance in court in its discretion is to be favored, especially in admiralty. See *The Kaiser Wilhelm II*, 246 Fed. 786.

**BANKRUPTCY — PREFERENCES — PAYMENT TO THE HOLDER OF A NOTE AS A PREFERENCE TO THE INDORSER OR SURETY.** — Within four months of the petition to have him adjudged a bankrupt, the maker of a note paid the holder. His trustee in bankruptcy sues the accommodation indorser alleging the payment was a preference to the indorser which he had reasonable cause to believe would be effected. *Held*, on a motion to dismiss the bill, the trustee may recover. *Cohen v. Goldman*, 42 Am. B. Rep. 85 (C. C. A., 1st Circ.).

There is no question that a surety or indorser is a creditor of the principal debtor. *Stern v. Paper*, 183 Fed. 228. It is also clear that a creditor may receive a preference by a transfer to a third person. *Western Timber Co. v. Brown*, 129 Fed. 728. If the surety solicits the payment of a note by the maker to the holder, many courts compel the surety to surrender that amount. *Kobusch v. Hand*, 156 Fed. 660; *In re Sanderson*, 149 Fed. 273; *Brown v. Streicher*, 177 Fed. 473; *Atherton v. Emerson*, 199 Mass. 199, 85 N. E. 530. The surety has been compelled, as in the principal case, to surrender such payment even when he did not participate in the transfer. *Paper v. Stern*, 198 Fed. 642. *Contra*, *Reber v. Shulman*, 183 Fed. 564. As a necessary construction of the Bankruptcy Act, the view of the principal case is sound, though one's first impression is that it is severe on the surety. Generally, the holder of a note, who has surrendered a payment by the maker as a fraudulent preference, may still hold the sureties. *Harner v. Batford*, 35 Ohio St. 113; *Hooker v. Blount*, 44 Tex. Civ. App. 162, 97 S. W. 1083; *Perry v. Van Norden Trust Co.*, 118 App. Div. 288, 103 N. Y. Supp. 543. *Contra*, *Re Ayers*, 6 Biss. 48. The surety may, however, prove in bankruptcy his right of subrogation. **BANKRUPTCY ACT, § 57 i.** If the holder of the note retains the payment, the surety suffers no greater hardship by surrendering that amount, for he now may prove in bankruptcy his claim for reimbursement. **BANKRUPTCY ACT, § 57 g**; *Keppel v. Tiffin Bank*, 197 U. S. 356.

**BILLS AND NOTES — FORGED CHECKS — NEGLIGENCE OF DEPOSITOR.** A depositor had a special employee whose duty it was to check up his bank statements but by whose neglect of duty another employee was enabled to make a series of forgeries before being detected. The forgeries would have been obvious on a simple checking of the account. *Held*, the bank is not liable for the payment of forged checks which could have been prevented by the depositor's use of due care. *California Vegetable Union v. Crocker National Bank*, 174 Pac. 920 (Cal.).

A payment by a bank of a forged check can not in general be charged to a depositor's account. *Morgan v. U. S. Mortgage & Trust Co.*, 208 N. Y. 218, 101 N. E. 871; *Shipman v. The Bank of the State of N. Y.* 126 N. Y. 318, 15 N. Y. S. 475. In England it is held that when a pass book is taken out of the bank by the customer or some clerk of his and returned without objection there is no settled account between the bank and customer by which both are bound. *The Kepitigalla Rubber Estates, Limited v. National Bank of India, Limited*, (1909), 2 K. B. 1010, 1027. But in the United States the great weight of authority requires some examination of the bank's statement. *Leather Manufacturer's Bank v. Morgan, supra*; *First National Bank v. Allen*, 100 Ala. 476, 14 So. 335; *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 87 N. E. 740. Some courts hold that a depositor may by his course of conduct, negligence or laches create an estoppel which prevents recovery. *Denbigh v. First National Bank*, 174 Pac. 475 (Wash.). Others reach the same result on grounds of contractual obligation. *Morgan v. U. S. Mortgage & Trust Co., supra*. It is generally conceded, however, that the duty of the depositor does not extend the discovery of forged signatures. *Critten v. Chemical National Bank*, 171 N. Y. 219, 228, 63 N. E. 969; *Prudential Insurance Co. v. National Bank of Commerce*, 177 N. Y. App. 438, 164 N. Y. S. 269. It is, however, agreed that where a forgery is discovered by the depositor it becomes his duty to report it immediately. *Pratt v. Union National Bank*, 79 N. J. L. 117, 75 Atl. 313; *McNeely Co. v. Bank of North America, supra*; *Findley v. Corn Exch. National Bank*, 166 Atl. 57. Even where the clerk of the depositor has done the forging and cleverly concealed the same the depositor has been held liable for injury caused the bank. *Meyers v. Southwestern Bank*, 193 Pa. 1, 44 Atl. 280; 13 HARV. L. REV. 304. *A fortiori*, the American cases would hold the depositor liable for injury to the bank caused by lack of due care in checking the account. The effect of decisions like the principal one is to recognize the business sense of an implied contractual obligation on the part of the depositor.

**CARRIERS — INJURIES TO PASSENGERS — EVIDENCE OF NEGLIGENCE.** — The defendant's ship was anchored in Havana harbor, and the passengers were to go ashore in lifeboats on an excursion. A seaman offered his arm to the libellant to assist her in entering the boat. While she was relying on his aid, he took away his arm, and the libellant fell and was injured. *Held*, there was no evidence of negligence to go to the jury. *Goode v. Oceanic Steam Navigation Co.*, 251 Fed. 556, C. C. A., 2d Co.

As a general rule, a carrier owes no duty to give personal assistance to a passenger in entering or leaving the conveyance. *Hurt v. St. Louis, Iron Mountain & So. R.*, 94 Mo. 255, 7 S. W. 1. If there are unusual dangers or obstacles, however, the carrier must render assistance. *Alexandria Ry. v. Herndon*, 87 Va. 193. *Cf. New York, Chicago, & St. Louis Ry. Co. v. Doane*, 115 Ind. 435, 17 N. E. 913. The same is true if the carrier has accepted as a passenger one obviously infirm. *Southern Ry. Co. v. Mitchell*, 98 Tenn. 77, 40 S. W. 72. And while a carrier is not ordinarily liable for the failure of its servant to perform what under ordinary circumstances would be an act of courtesy on his part, it is liable if on account of exceptional circumstances it would also become a duty instead of a mere courtesy. *Weightman v. Louisville, New*

*Orleans & Texas Ry. Co.*, 70 Miss. 563, 12 So. 586. In the principal case the question whether the courtesy had become a duty, owing to exceptional circumstances, should have been left to the jury. *Citizens Street Ry. Co. v. Shepherd*, 29 Ind. App. 412, 62 N. E. 300. If it had been answered in the affirmative, the carrier would have been liable for failing to perform such duty with due care.

**CARRIERS — WHO ARE COMMON CARRIERS — EXCLUSIVE SERVICE TO COKE PLANT.** — The defendant, an independent company organized under a general railroad act, operated a network of switch tracks wholly within the premises of a coke corporation. Its sole business consisted in shifting cars for the coke corporation between the plant and two connecting belt lines, such cars coming from and going to places in different states. The plaintiff seeks damages for injuries received in the defendant's employ, charging the latter with violation of the federal Safety Appliance Act. *Held*, that the defendant is a common carrier engaged in interstate commerce and liable for violation of the federal Safety Appliance Act. *Kenna v. Calumet, H. & S. E. R. Co.*, 120 N. E. 259 (Ill.).

A common carrier is defined as one who undertakes for hire to transport from place to place the goods of such as choose to employ him. *Illinois Central R. R. v. Frankenberg*, 54 Ill. 88; *Lloyd v. Haugh, etc. Storage, etc. Co.*, 223 Pa. 148, 72 Atl. 516. See 1 HUTCHINSON, CARRIERS, 3 ed., § 47; STORY, BAILMENTS, 7 ed., § 495. Whether the one charged as a common carrier is within this definition is a question of fact for the jury. *Schloss v. Wood*, 11 Colo. 287, 17 Pac. 910; *Collier v. Langan, etc. Storage, etc. Co.*, 147 Mo. App. 700, 127 S. W. 435; *Avinger v. South Carolina R. R. Co.*, 29 S. C. 265, 7 S. E. 493; *The Tap Line Case*, 23 I. C. C. 277. In the principal case, it does not appear that the defendant held itself out for purposes of general transportation. Its only business consisted in switching cars for the coke corporation between the plant and the belt railroads. If this system of internal trackage had been operated by the coke corporation itself, such system, as the court admits, would have constituted a mere plant facility. *Wade v. Lulcher & Moore Cypress Lumber Co.*, 20 C. C. A. 515, 74 Fed. 517; *Taenzer & Co. v. Chicago, R. I. & P. R. Co.*, 95 C. C. A. 436, 170 Fed. 240; *General Electric Co. v. N. Y. C. & H. R. R. Co.*, 14 I. C. C. 237. The fact that the system was operated by an independent corporation does not alter its character. *Crane Iron Works v. U. S.*, 1 U. S. Com. Ct. 453, 209 Fed. 238; *In re Muncie & Western R. Co.*, 30 I. C. C. 434. Furthermore, the railroad was not even a public utility, for since its lines were wholly within the premises of the coke corporation it was not accessible to the general public. *Cf. Matter of the Split Rock Cable Road*, 128 N. Y. 408, 28 N. E. 506; *Weidensfeld v. Sugar Run R. Co.*, 48 Fed. 615 (U. S. C. C., Pa.). Nor could organization under the general railroad act clothe the business with a public interest; the facts alone could give it that character. *Munn v. Illinois*, 94 U. S. 113; *People v. Budd*, 117 N. Y. 1, 22 N. E. 670; *Brass v. North Dakota*, 153 U. S. 391. Unless by accepting the benefits of the act, the defendant was estopped to show that it was not a common carrier, the decision seems wrong. See *Turnpike Co. v. News Co.*, 43 N. J. L. 381; *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179.

**CONFLICT OF LAWS — WILLS — EQUITABLE ELECTION.** — Testatrix died domiciled in England, having devised realty in Paraguay upon trust for charity. By the law of Paraguay this devise was valid only as to one-fifth, four-fifths being the legal portion of the obligatory heirs. These heirs were also legatees of property situated in England. Though under the Paraguayan law the obligatory heirs took both under and against the will and were not required to elect, yet, *held*, that they must elect. *In re Ogilvie*, [1918] 1 Ch. 492.

When A makes B, his heir, and C legatees under his will, and the legacy to



C is such that B, as heir, would be entitled thereto, B cannot take both his legacy and C's intended portion, but must elect between the two. *Van Dyke's Appeal*, 60 Pa. St. 481. See 23 HARV. L. REV. 138. Where the gift to C is invalid, by the *lex domicilii*, there is no will and consequently no election. *Hearle v. Greenbank*, 1 Ves. Sen. 298, 306; *Sheddon v. Goodrich*, 8 Ves. Jr. 481. See *Boughton v. Boughton*, 2 Ves. Sen. 12, 14. If, however, there is an express condition to elect, it is enforced. *Boughton v. Boughton*, *supra*. But where it is inoperative because of *lex rei sitae* of a foreign jurisdiction election is applied. *Dundas v. Dundas*, 2 Dow & Cl. 349; *Brodie v. Barry*, 2 Ves. & Beav. 127; *Van Dyke's Appeal*, *supra*. See 2 DICEY, CONFLICT OF LAWS, 2 ed., 778, 779. The election, however, when made, does not affect the title to the foreign realty. *Bolton v. Bolton*, 29 Ark. 418; *Ramels v. Rowe*, 92 C. C. A. 177, 166 Fed. 425; *Palmer v. Voorhis*, 35 Barb. (N. Y.) 479. See STORY, CONFLICT OF LAWS, 8 ed., § 448. Yet it is generally enforced by the jurisdiction of the situs. *Van Steenwyck v. Washburn*, 59 Wis. 483, 17 N. W. 289; *Martin v. Batley*, 87 Kan. 582, 125 Pac. 88; *Wilson v. Cox*, 49 Miss. 538. *Contra*, *Ramels v. Rowe*, *supra*. Some suggest that the doctrine rests simply on equitable principles. See 30 HARV. L. REV. 649; 1 JARMAN, WILLS, 6 ed., 534; 1 POMEROY, EQUITY, 3 ed., § 465. But see *Cooper v. Cooper*, L. R. 7 H. L. 53, 70. This view would not change the result in the principal case, for in an analogous situation, where B's property was given to C, B had to elect. *Noys v. Mor-dant*, 2 Vern. 581; *Cooper v. Cooper*, *supra*; *Havens v. Sackett*, 15 N. Y. 365. But the prevailing view is that it is based on the presumed intention of the testator. *Whistler v. Webster*, 2 Ves. Jr. 366; *Jackson v. Bevins*, 74 Conn. 96, 49 Atl. 899; *Cooper v. Cooper*, *supra*; *Havens v. Sackett*, *supra*; *Martin v. Batley*, *supra*. See Haynes, "Outlines of Equity," 262 *et seq.*, 23 HARV. L. REV. 138. And it seems, as is said in the principal case, that election is merely the application of the *lex domicilii* imposing conditions on the receipt of the legacy over which it has power. Thus it is a mere rule of construction, enforcing the presumed intention of the testator.

CONTRACTS — CONTRACTS FOR THE BENEFIT OF A THIRD PERSON — CHARTERPARTIES — RIGHT OF CHARTERERS TO RECOVER COMMISSION FROM SHIP-OWNERS AS TRUSTEES FOR BROKERS. — A clause in a charterparty provided that a three per cent commission on the amount of hire should be paid to the brokers, "ship lost or not lost." No hire was earned, since the vessel was taken over by the French government. *Held*, that the charterers could recover the commission as trustees for the brokers. *Walford v. Les Affrèleurs Réunis Société Anonyme*, [1918] 2 K. B. 498.

The English courts have in the past been obliged to stretch the law of trusts in order to avoid the consequences of their doctrine, which prevails in a small minority of American jurisdictions; that a person not a party to a contract cannot sue on a promise made for his benefit. *Moore v. Darton*, 4 DeG. & S. 517. See 15 HARV. L. REV. 767, 775. Various efforts have been made to evade the rule. See *Mellen v. Whipple*, 1 Gray (Mass.) 317, 323. The device of an implied trust has been employed in a number of cases. *Swan v. Snow*, 11 Allen (Mass.) 224; *Munroe v. Fireman's Relief Association*, 19 R. I. 363, 34 Atl. 149; *Lloyds v. Harper*, 16 Ch. D. 290; *In re Flavell*, 25 Ch. D. 89; *contra*, *West v. Houghton*, 4 C. P. D. 197. See *Cleaver v. Mutual Reserve Fund*, [1892] 1 Q. B. 147, 152. The principal case follows a similar decision in regard to charter parties handed down without opinion in 1853. *Robertson v. Wait*, 8 Exch. 299. Perhaps most of the English cases can be reconciled in result, if not on principle, on the ground that where a business relation exists between promisee and beneficiary an agreement by the promisee to act as trustee of his technical right of action can be implied, but not in cases of pure gifts. Certainly there is strong reason in business contracts to find some way of enforcement. The whole

machinery, however, is obviously fictitious. If the fiction is to be employed, there seems to be no good reason why it should not be applied to all contracts for the sole benefit of a third person. The correct and frank method would be to give the sole beneficiary a right of action in his own name. The New York court recently threw off the old shackles. *Seaver v. Ransom*, Ct. App. (N. Y.), October 1, 1918. See 32 HARV. L. REV. 82. It is hoped that the English courts will have the courage to do as much.

**CORPORATIONS—*Ultra Vires*: WHAT ACTS ARE *Ultra Vires*—ILL-DEFINED OBJECTS OF INCORPORATION.**—The memorandum of association of a company contained an objects clause enabling the company to carry on almost every conceivable kind of business which such an organization could adopt. Escape from liability was sought for an act done in the name of the company by its managers on the ground that the act was *ultra vires*. Held, that, under such a memorandum, the act was not *ultra vires*. *Cotman v. Brougham*, [1918] A. C. 514.

For a discussion of this case, see NOTES, page 279.

**EQUITABLE SERVITUDES—COVENANT BY ASSIGNEE OF COPYRIGHT TO PAY ROYALTIES—VENDOR'S LIEN.**—Assignee of a copyright covenanted to pay certain royalties and to assign only to successors in business subject to the terms of the deed assigning the copyright. In an action by the covenantee against a subsequent assignee of the copyright with notice of the covenant, held, that the subsequent assignee was under no contractual liability to pay royalties; that the original assignment and covenant therein did not make the royalties a charge upon the copyright, and that as the original deed of assignment did not make the royalties a part of the purchase money it did not have the effect of reserving a vendor's lien for unpaid royalties. *Barker v. Stickney*, [1918] 2 K. B. 356.

For further discussion of the principles involved, see NOTES, page 278.

**EVIDENCE—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT—COMMUNICATION MADE UNDER MISTAKE TO ATTORNEY OF OPPOSITE PARTY.**—Shortly after a highway accident, the solicitor of the prospective defendant called on the injured party and secured from her a signed statement in regard to the collision. Although there was no fraud, the plaintiff signed in the belief that she was making the statement to her own solicitor. Plaintiff applied for discovery. Held, that the document was privileged. *Feuerheerd v. London Omnibus Co.*, [1918] 2 K. B. 565; 53 L. J. 332.

Communications between attorneys and their clients in relation to legal interests have long been privileged. *Minet v. Morgan*, L. R. 8 Ch. 361; *Crosby v. Berger*, 4 Edw. (N. Y.) 254 (affirmed in 11 Paige, 377). This means that the communication cannot be used as evidence without the consent of the client. See 4 WIGMORE, EVIDENCE, § 2324. The modern ground for the rule is the need of freedom in consultation with attorneys. *Halton v. Robinson*, 14 Pick. (Mass.) 416; *Wade v. Ridley*, 87 Me. 368, 32 Atl. 975. See 4 WIGMORE, EVIDENCE, § 2291. On the same principle the client should not bear the dangerous burden of using more than a due precaution in selecting his attorney. Hence the privilege has been properly extended to cases of *bona fide* belief in the alleged attorney's professional status. *People v. Barker*, 60 Mich. 277, 27 N. W. 539; *State v. Russell*, 83 Wis. 330, 53 N. W. 441; *Rex v. Choney*, 17 Manitoba, 467. See 4 WIGMORE, EVIDENCE, §§ 2302, 2310. However, a communication made to a solicitor known to be acting as counsel for the opposite party has been rightly held not privileged. *Tobakin v. Dublin Tramways Co.*, [1905] 2 Ir. Rep. 58. In former cases the communication was procured

by the fraud of the opposing counsel, but the policy of the privilege clearly extends to the principal case. By the denial of discovery on the ground of privilege the plaintiff is assured that the statement cannot be used as evidence against her and is thus given all needed protection.

**EVIDENCE — RES GESTÆ — DECLARATIONS OF AGENT — ADMISSIBILITY IN CORROBORATION.** — The defendant's chauffeur struck and killed plaintiff's son. Ten or fifteen minutes later, apart from the scene of the accident, the chauffeur, in reply to a question, said he was driving on a mission for his employer. This declaration was admitted in evidence. *Held*, the declaration should have been excluded. *Frank v. Wright*, 205 S. W. 434 (Tenn.).

Declarations of an alleged agent are not competent against the alleged principal to prove the fact of agency, because there is no authority to make such admissions. *Yoshimi & Co. v. U. S. Express Co.*, 78 N. J. L. 281, 73 Atl. 45; *Ennis v. Wright*, 217 Mass. 40, 104 N. E. 430. But if the agency is otherwise *prima facie* proved, they become admissible in corroboration. *Mullen v. Quinlan & Co.*, 195 N. Y. 109, 87 N. E. 1078; *Lemcke v. Funk & Co.*, 78 Wash. 460, 139 Pac. 234. As in the principal case, where the defendant owned the automobile, and where the driver was regularly employed as a chauffeur, the fact of agency on this occasion is presumed. *Stewart v. Baruch*, 103 App. Div. 577, 93 N. Y. Supp. 161; *Marshall v. Taylor*, 168 Mo. App. 240, 153 S. W. 527. See *Ludberg v. Barghoorn*, 73 Wash. 476, 481, 131 Pac. 1165, 1167. But even if the agency is otherwise *prima facie* proved, the declarations are admissible only when they constitute a part of the *res gestæ*. *Lowden v. Wilson*, 233 Ill. 340, 84 N. E. 245; *U. S. Express Co. v. Rawson*, 106 Ind. 215, 6 N. E. 337. By the better view statements are considered part of the *res gestæ* if they are spontaneous utterances and made so soon after the act in issue as to negative deliberation and design. See 31 HARV. L. REV. 801. On this point the instant case is sound.

**INSURANCE — WAIVER OF PRESUMPTION OF DEATH.** — A by-law of the defendant insurance company provided that long-continued absence would not be regarded as evidence of death or raise a presumption thereof. Plaintiff relied on the presumption raised by seven years' absence. *Held*, the effort to force new rules of evidence on the court was void. *Gaffney v. Royal Neighbors of America*, 174 Pac. 1014 (Idaho).

Formerly courts held invalid agreements that tended to deprive them of their jurisdiction. *Horton v. Sayer*, 4 H. & N. 643; *Hall v. People's Mutual Fire Insurance Co.*, 6 Gray (Mass.) 185; *Muldrow v. Norris*, 2 Cal. 74. Though such is no longer true, present-day courts do hold certain contracts invalid on the grounds, that where there is a relationship between parties, one of whom is not an absolutely free agent under nineteenth-century economic theory, the courts should protect the weaker party by limiting the freedom of contract with the stronger. Thus, an agreement in a lease giving the landlord power to confess judgment in an action of forcible detainer is void. *French v. Willer*, 126 Ill. 611, 18 N. E. 811. On similar principles the law limits the defenses of surety companies. *Segari v. Messeri*, 116 La. 1026, 41 So. 245. Legislatures, with due regard to corporate interests, have prescribed such rules for the conduct of the business of insurance as will best protect the interests of the insured. *Commonwealth v. Vrooman*, 164 Pa. St. 306, 30 Atl. 217; *N. Y. Life Insurance Co. v. Hardison*, 199 Mass. 190, 198, 85 N. E. 410, 413; *Equitable Insurance Co. v. Commonwealth*, 113 Ky. 126, 67 S. W. 388; *Orient Insurance Co. v. Daggs*, 172 U. S. 557. It is doubtful, however, whether contracts made in accord with the by-law in the principal case give the insurance companies such undue advantages over individuals as to render the by-law void as against public policy.

**MUNICIPAL CORPORATIONS — APPOINTMENT TO OFFICE — APPROVAL — RE-CONSIDERATION.** — A statute provided that the members of the Board of Education were to be appointed by the mayor, with the approval of the city council. Pursuant to this provision the mayor appointed, and the city council approved, certain persons as members. Subsequently, the city council, reconsidering its vote of approval, disapproved the appointments. *Held*, that there had been no valid appointment to office as the ordinary parliamentary rules, allowing the city council to reconsider its action, applied. *People v. Davis*, 120 N. E. 326 (Ill.).

An appointment to office is completed when the last act required has been performed. *State v. Barbour*, 53 Conn. 76, 22 Atl. 686; *Draper v. State*, 175 Ala. 547, 57 So. 772; *Marbury v. Madison*, 1 Cranch (U. S.) 137. In the principal case the last act was the approval by the city council. *People v. Bissel*, 49 Cal. 407. An appointment to office by whomsoever made is intrinsically an executive act, and the city council in appointing acts in an executive capacity. *State v. Wagner*, 170 Ind. 144, 82 N. E. 466; *State v. Longdon*, 68 Conn. 519, 37 Atl. 383; *Haight v. Love*, 39 N. J. L. 14; *Achley's Case*, 4 Abb. Pr. (N. Y.) 35; *State v. Barbour*, 53 Conn. 76, 22 Atl. 686. And it is submitted that approval of an appointment, though by a legislative body, being but one of the steps required for a valid appointment, is also an executive act. Accordingly, by approving the appointment the city council has exercised and exhausted its power, and the appointee is seised of the office. *In re Fitzgerald*, 88 App. Div. (N. Y.) 434, 82 N. Y. S. 811. *Contra*, *Dust v. Oakman*, 126 Mich. 717, 86 N. W. 151. Thus, being vested with the office, reconsideration of the approval is ineffectual, and the appointee remains seised of the office until removed by a body having the power of removal. *In re Fitzgerald*, *supra*; *Achley's Case*, *supra*; *Haight v. Love*, *supra*; *Marbury v. Madison*, 1 Cranch (U. S.) 137, 162. See 2 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 466.

**MUNICIPAL CORPORATIONS — COMPENSATION FOR SPECIAL SERVICES.** — The plaintiff's fire-department was summoned to prevent the outbreak of fire in defendant's acid plant, the roof of which had caved in. The immediate danger passed, defendant requested that several men be supplied to watch the premises temporarily. Plaintiff sues for compensation for the services of the fire-department and of the special watchmen. *Held*, it may recover for the latter, but not the former. *Grays Urban District Council v. Grays Chemical Works, Limited*, [1918] 2 K. B. 461.

For a discussion of this case, see NOTES, page 282.

**MUNICIPAL CORPORATIONS — MAINTENANCE OF RAILWAY CROSSINGS — SURRENDER OF POLICE POWER.** — The complainant railway, being the owner of a right of way in the city, granted to the city the right to extend a street over the complainant's tracks, in consideration of which the city agreed that a crossing should be maintained without expense to the railway company. Subsequently, the city passed an ordinance requiring the railway company to bear the expense by operating safety gates at this crossing. To a bill by the complainant which seeks to enjoin the enforcement of this ordinance, the city demurs, alleging that the contract amounts to a surrender of the city's police power and so is not binding. *Held*, that the demurrer be overruled. *Florida East Coast R. Co. v. City of Miami*, 79 So. 682 (Fla.).

It is well settled that a city cannot by contract limit or give up the exercise of any police power delegated to it by the state. *Jacksonville v. Ledwith*, 26 Fla. 163, 7 So. 885; *State v. Laclede Gaslight Co.*, 102 Mo. 472, 14 S. W. 974; *City of Chicago v. Chicago Union Traction Co.*, 199 Ill. 259, 65 N. E. 243. See 16 HARV. L. REV. 436. A common illustration of the exercise of such power is found in enactments by city legislative bodies requiring that railway com-

panies shall without compensation provide safety appliances at street crossings. *Delaware, etc. R. Co. v. East Orange*, 41 N. J. L. 127; *Village of Clara City v. Great Northern R. Co.*, 130 Minn. 480, 153 N. W. 879; *Cincinnati, I. & W. R. Co. v. City of Connersville*, 218 U. S. 336. See 3 ABBOTT, MUNICIPAL CORPORATIONS, § 854. If at the time in question there is a preëxisting right on the part of the city to require the railway company to maintain the crossing without compensation, an agreement by which the city gives up that right is obviously invalid. *State v. Great Northern R. Co.*, 134 Minn. 249, 158 N. W. 972; *Northern Pacific R. Co. v. Minnesota*, 208 U. S. 583. But in the principal case the city had no preëxisting right to give up. The railroad owned the land and there was no street over it. Not until the railroad granted to the city the right to open a street over its property did the city acquire any police power over the crossing. *State v. Chicago, St. P., M. & O. R. Co.*, 85 Minn. 416, 89 N. W. 1. Since, therefore, the contract with the railway company was not a surrender of the city's police power, the subsequent ordinance in violation thereof was null and void.

NEGLECT — CHARITABLE CORPORATION — LIABILITY OF HOSPITAL TO PAY PATIENT FOR NEGLIGENCE OF ITS SERVANTS. — Plaintiff's intestate was confined in the hospital of defendant, a charitable corporation without capital stock and paying no dividends. Owing to insufficient guarding, he jumped from a window in a delirium and was killed. He paid fifteen dollars a week for his care. Held, that defendant was not liable for the negligence of its servants. *Mikota v. Sisters of Mercy*, 168 N. W. (Iowa) 219.

Where the injured person was wholly a recipient of the charity, the charitable funds are generally not chargeable with damages for the torts of servants. *Abston v. Waldon Academy*, 118 Tenn. 25, 102 S. W. 351. *Contra, Donaldson v. General Public Hospital*, 30 New Bruns. 279. Where the injured person paid for his care the institution is still immune. *Downes v. Harper Hospital*, 101 Mich. 555, 60 N. W. 42; *Thornton v. Franklin Square House*, 200 Mass. 465, 86 N. E. 909. *Contra, Mersey Docks v. Gibbs*, 1 H. L. 93; *Glavin v. Rhode Island Hospital*, 12 R. I. 411. But where the plaintiff was not a recipient of the charitable services, liability has often been imposed. *Bruce v. Central Methodist Episcopal Church*, 147 Mich. 230, 110 N. W. 951; *Gamble v. Vanderbilt University*, 138 Tenn. 616; 200 S. W. 510 (1918). In support of the rule of non-liability it is said that the trust funds must not be diverted to pay such claims. See *Fire Insurance Patrol v. Boyd*, 120 Pa. 624, 647, 15 Atl. 553, 557. But see 31 HARV. L. REV. 481. The cases imposing liability in favor of persons not recipients of the charity are inconsistent with this reasoning. Some courts base non-liability on an implied agreement not to hold the institution liable. See *Powers v. Mass. Homeopathic Hospital*, 109 Fed. 294, 303. This seems fictitious, especially where the patient pays. The question turns upon the policy behind the rule of *respondeat superior*. It is said that one who employs another to do an act for his benefit should bear the risk of injury therefrom to third persons. See *Hall v. Smith*, 2 Bing. 156, 160; *Hearns v. Waterbury Hospital*, 66 Conn. 93, 125, 33 Atl. 595, 604. But "benefit" here should mean the furtherance of an enterprise in which one is engaged. A strong additional reason lies in the need of liability in order to secure careful management. See 31 HARV. L. REV. 482. Charitable institutions form no exception.

NEGLECT — PROXIMATE CAUSATION — THE INTERVENTION OF AN ILLEGAL ACT — THE *LUSITANIA*. — The British passenger-carrying merchantman, *Lusitania*, sailed from New York for Liverpool with the knowledge that Germany had declared a submarine blockade of the waters surrounding England and Ireland. While at sea numerous wireless advices were received from the British Admiralty as to the activities and location of submarines,

as to the best course to pursue, and a warning to reach port at dawn. These advices were followed or disregarded by the captain as he saw fit. The ship was sunk without warning by a submarine and in a petition to determine liability, *held*, that the petitioner was not liable as not negligent, or if negligent, such negligence was not the proximate cause of the injury. *The Lusitania*, 251 Fed. 715.

As the existence of the submarine zone was known to all, the passengers could expect no more of the petitioner than that he use due care under the circumstances, the submarine menace being a circumstance. See 31 HARV. L. REV. 306. The disregard of the advices, based on observations and submarine activities, can scarcely be justified on the grounds that the commanding officer of a merchantman be left free to exercise his own judgment. The advices and previous sinkings showed the menace to be at its height off the immediate south coast of Ireland, and the reasonableness of a course around the north of Ireland or one farther south, putting in at a different port, seems to have been overlooked. See *Express Co. v. Kountze Bros.*, 8 Wall. (U.S.) 342; *The George Nicholas*, Fed. Cas., No. 13,578; *The Union Insurance Co. v. Dexter*, 52 Fed. 152. In order to reach port at dawn, why slacken speed in the danger zone instead of farther out at sea? Again it is not so clear that the crew was free from negligence, as negligence is not to be measured by poise of temperament, excitability, or the reverse. See *Bessemer Land Co. v. Campbell*, 121 Ala. 50, 60. The illegal intervening act, as any other intervening act, would break the chain of causation only if it could not have been anticipated. *Filson v. Pacific Express Co.*, 84 Kan. 614, 114 Pac. 863, 29 HARV. L. REV. 453. See J. SMITH, "Legal Cause in Actions of Tort," 25 HARV. L. REV. 103, 121. That the *Lusitania* did not anticipate the sinking is not so clear as the court seems to think. On the two previous voyages, the *Lusitania* hoisted the American flag and their act was justified on the grounds that Germany had announced her intention to sink British merchantmen on sight. It is unfortunate that the decision was not confined more strictly to the facts and a proper application of the law thereto.

#### REFORMATION OF INSTRUMENTS — REFORMATION FOR MISTAKE OF LAW. —

A written contract contained, after the description of the estates and specified properties to be conveyed, the words, "and all other improvements." The parties had previously agreed, orally, that certain sugar mills and machinery should be excepted, but no mention of this was made in the contract. The defendant by his answer, in effect a bill in equity, seeks reformation of the contract. *Held*, that equity will reform for mutual mistake of law where the contract fails to express the intention of the parties. *Philippine Sugar, etc. Co. v. Philippine Islands*, 247 U. S. 385.

For a general discussion of the principles involved, see NOTES, page 283.

#### SALES — CONDITIONAL SALES — RIGHT OF VENDOR Versus SUBVENDEE. —

Plaintiff sold an automobile to X. The title thereto was to remain in the plaintiff until the note, given for the residue of the purchase price, had been paid. X sold the automobile to the defendant, a *bond fide* purchaser without notice. Plaintiff sues the defendant in replevin. *Held*, the plaintiff can recover. *Gamble v. Shingler*, 96 S. W. 705 (Ga.).

If a vendor transfers possession of the goods to the vendee, but retains legal title as security, the sale is conditional. *Sumner v. Woods*, 67 Ala. 139; WILLISTON, SALES, § 7. The vendee may transfer his beneficial interest to a third person. *Nat'l Cash Register Co. v. Wapples*, 52 Wash. 657, 101 Pac. 227. If he assumes to transfer more, it is a conversion, and the vendor, at common law, is not estopped, despite the deceptive situation created by conditional sales, from immediately pursuing his rights against a *bond fide* subvendee.

*Lorain Steel Co. v. Norfolk & Bristol Street Ry. Co.*, 187 Mass. 500, 73 N. E. 646; *Riley v. Dillon*, 148 Ala. 283, 41 So. 768. At the present time Factors' Acts, Recording Statutes, or judicial legislation operate to give a *bond fide* subvendee an absolute title if the conditional sale is not recorded. *Lee v. Butler*, (1893) 2 Q. B. 318; *Gartrell v. Clay*, 81 Ga. 327, 7 S. E. 161; *Lincoln v. Quynn*, 68 Md. 299. In these jurisdictions if the conditional sale is recorded, and if there is a tortious resale, the vendor's right of action, as at common law, comes into being the instant the vendee assumes to treat the property as his own.

**VENDOR AND PURCHASER — RIGHTS AND LIABILITIES — FORFEITURE OF PAYMENTS — DEFECTIVE NOTICE OF INTENT TO FORFEIT.** — A statute allowed a vendor of land to take advantage of a provision in a contract providing for a forfeiture of all money paid, on default of the vendee. A notice to the vendee indicating an intent to forfeit the contract in thirty days was required. Though the parties had agreed on the land to be sold, the contract misdescribed the location of the land, and the notice to forfeit after the default of the vendee contained the same mistake. *Held*, that the notice is ineffectual to forfeit the payments. *Lieuen v. Blau*, 168 N. W. 811 (Ia.).

The vendee in a contract to purchase land on which part of the price has been paid is, by virtue of his equitable ownership, practically in the position of a mortgagor, the vendor holding the legal title as security only for the payment of the balance. See POMEROY, EQUITY, 3 ed., § 1260, note 3; 29 HARV. L. REV. 791. After a default by the vendee, a foreclosure, strict or by sale, is usually necessary to deprive the vendee of his equitable ownership. *Bruce v. Tilson*, 25 N. Y. 194; *Bulton v. Schroyer*, 5 Wis. 598. See 28 HARV. L. REV. 641. Where a power is given to the vendor to forfeit the equitable ownership, the situation resembles that of a mortgagee with a power of sale. In the exercise of a power of sale, a material misdescription in the notice is fatal. See 2 JONES, MORTGAGES, 6 ed., § 1840. Further, there will be no reformation of the defective exercise of the power. *Haly v. Bagley*, 37 Mo. 363. The principal case follows out the analogy to the mortgage, and is another indication that the vendee has a property interest as a consequence of his right to specific performance.

**WAR — PRIZE COURT — NEUTRAL OR ENEMY CHARACTER — ORDER IN COUNCIL.** — An Order in Council adopting Article 57 of the Declaration of London provided that "the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly." A vessel, in fact, owned by the German government, but entitled to fly the Greek flag, was claimed by her registered owner, a Greek. *Held*, that the registered owner was not entitled to the vessel, the prize court not being bound by the Order in Council. *The Proton*, [1918] A. C. 578.

Prize courts ordinarily proceed in accordance with the principles of international law. *The Divina Pastora*, 4 Wheat. (U. S.) 52; *Mitchell v. Rodney*, 2 Bro. P. C. 423. See LAWRENCE, PRINCIPLES OF INTERNATIONAL LAW, 4 ed., 478; 7 MOORE, INTERNATIONAL LAW DIGEST, § 1229. But, where municipal law clearly conflicts with international law, prize courts are bound by municipal law. *The Amy Warwick*, 2 Sprague, 123; *Mortensen v. Peters*, 14 Scots. L. T. R. 227. See *The Queen v. Keyn*, [1876] 2 Ex. D. 63, 160; PICCIOTTO, RELATION OF INTERNATIONAL LAW TO THE LAW OF ENGLAND AND OF THE UNITED STATES, 48-58. According to international law the neutral or enemy character of a vessel is determined by an examination of all the relevant circumstances. *Rogers v. The Amado*, 20 Fed. Cas. No. 12005; *Batten v. The Queen*, 11 Moore P. C. 271. See WHEATON, INTERNATIONAL LAW, 8 ed., 425, note; LUSHINGTON, MANUAL OF NAVAL PRIZE LAW, 54; 7 MOORE, INTER-

NATIONAL LAW DIGEST, §§ 1237, 1238. By limiting such determination to the single circumstance of the flag she is entitled to fly, Article 57 of the Declaration of London, therefore, purported to change the law of nations; but the neutral and belligerent powers in the present war have not considered that declaration as binding. See "Diplomatic Correspondence between the United States and the Belligerent Governments" in SUP. TO 9 AMER. JOUR. OF INT. LAW, July, 1915, 1-8; Declaration of London Order in Council, No. 2, 1914, *Ibid.*, 14. However, the Order in Council adopting Article 57 itself purported to preclude the prize court from going behind the flag a vessel is entitled to fly to ascertain its actual ownership. But an Order in Council is executive not legislative in character and so, unlike an Act of Parliament, cannot change municipal law. *The Zamora*, [1916] 2 A. C. 77. See 3 PHILLIMORE, INTERNATIONAL LAW, 3 ed., 654. In holding the prize court not bound by the Order in Council and in adhering rather to international law, the decision in the principal case, therefore, seems sound.

WILLS — REVOCABILITY OF JOINT WILLS. — Husband and wife made a joint will. The property devised was certain land of the husband's, certain land of the wife's and ten acres in which each owned a moiety. All of the wife's interest was devised to the defendants, — the grandchildren; while all of the husband's interest, excepting a small fraction, was devised to the complainant and another daughter. The wife died and her devises were probated. The husband then conveyed his interest, contrary to the will, to the grandchildren by deed to take effect upon his death. On the death of the husband, complainant brings suit in the nature of specific performance to enforce the provisions in her favor. *Held*, equity will grant the relief. *Williams et al. v. Williams*, 96 S. E. 749 (Va.).

A joint will is revocable by either party as to that respective party's disposition. See SCHOULER, WILLS, 5 ed., 458 a. But equity will act to prevent the surviving testator of a joint or a mutual will from defeating the object of the will, providing there was a contractual relation and sufficient consideration between the cotestators. *Dufour v. Pareia*, 1 Dick. 419; *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265; *Deseumeur v. Rondel*, 76 N. J. Eq. 394, 74 Atl. 703. See 28 HARV. L. REV. 248-50. Such prevention is, however, purely an equitable defense and does not affect the legal relationship. See *Sumner v. Crane*, 155 Mass. 483, 29 N. E. 1151; *Albery v. Sessions*, 2 Ohio N. P. 237; *Peoria Humane Society v. McMurtrie*, 229 Ill. 519, 82 N. E. 319; *Buchanan v. Anderson*, 70 S. C. 454, 50 S. E. 12. See also 28 HARV. L. REV. 248. The test of consideration is no different from that of ordinary contracts. The question, however, often arises as to what evidence is necessary to establish the contractual relation between the testators. As shown by the principal case direct evidence is unnecessary. The instrument itself presumptively favors this view inasmuch as it has all the earmarks of a contract. And where a husband and wife devise to near of kin, the devise of itself may be sufficiently indicative since the co-testators have an obviously mutual interest in such reciprocal or joint devises. *Frazier v. Patterson*, 243 Ill. 80, 90 N. E. 216. See *Bower v. Daniel*, 198 Mo. 289, 95 S. W. 347, 359; *Campbell v. Dunkelberger*, 153 N. W. 56, 58 (Ia.). See *contra*, *Ginn v. Edmundson*, 173 N. C. 85, 91 S. E. 696.



## BOOK REVIEWS

**A MANUAL ON LAND REGISTRATION.** With a full, complete annotated copy of the Land Registration Act of the state of Georgia. By Arthur Gray Powell. Atlanta: The Harrison Company. 1917. pp. xv, 449. 8vo.

The Torrens System of land registration would seem to be an ideal method of securing stability in ownership of realty. The old system of recording merely transfers left, as every conveyancer knows, the security of land transactions often in doubt, and the purchaser at the mercy of some forgotten heir or neglected dower interest. All this is done away with by the decree of court, after due notice and other formalities, declaring title to be in the registrant, and all other claims barred forever. The state, to be sure, ordinarily guarantees out of funds supplied by fees that claimants barred through negligence or omission of the registrar shall be indemnified. But such mistakes do not affect the title.

The expense of the system, however, renders resort to it by no means universal, and indeed for many titles it is unnecessary. It seems to be most serviceable in three classes of cases. *First:* Certain classes of city property which change hands frequently or are often mortgaged. The registered title passes easily from hand to hand, and also may be as liquid a security as a stock certificate. These titles it is cheaper and more expedient to register, and thus to avoid the expense and delay of a new search by each careful purchaser who is unwilling to rely on any lawyer but his own. *Second:* Land constantly the prey of vague, shadowy claims of easements, such as the familiar local assertion of rights of way over seashore property to the ocean. By registration these incumbrances are dismissed or at least well defined. *Third:* Certain country property where it is desirable accurately to fix boundaries. Much of the work of the registrar lies here where, owing to the introduction of new lines of street railways or other improvements, land hitherto vacant and of little value has begun to sell by the foot instead of by the acre. Nevertheless, much land will not find its way to the registrar, — for instance, residential rural or urban property which seldom changes hands. Here it is cheaper and often as safe to rely on one's own lawyer.

As late as 1917 fifteen states, Hawaii, and the Philippine Islands had acts based on the Torrens System. The Georgia act of that year has called forth the present volume by one mainly responsible for it. The book is purely local, except for the reprinting of the Uniform Land Registration Act with the notes of the commission. To Georgia lawyers Judge Powell has rendered a valuable service. The divergences in practice between the states, although the same spirit underlies all the statutes, renders it desirable that an equally public-spirited lawyer in each jurisdiction should emulate his example, rather than each bar should be obliged to wait for a *magnum opus*. Especially is this true in view of the limited acceptance of the Uniform Act.

JOSEPH WARREN.

**THE LAW AND PRACTICE OF RECEIVERS.** By Ralph E. Clark. Cincinnati: W. H. Anderson Company. 1918. Two volumes. pp. lxxv, 2176.

This is unquestionably the most satisfactory work for the practitioner's use at the present day on the subject with which it deals. Volume one treats of the law of receivers as laid down by the courts, from time to time. The opening chapter is devoted to the origin of receivers and the concluding chapter discusses the duration of receiverships, the removal and discharge of receivers. The various phases and subdivisions of the law of receivers as laid down by the courts are treated in the intervening chapters.

Volume two presents the law of receivers so far as it is controlled by statutes. Those which affect the procedure in receiverships are considered, and a chapter is devoted to those which affect not only the procedure in receivership cases, but also the substantive rights of litigants, claimants and receivers themselves; though limitations of space make it impossible to print the text of the numerous state statutes in full. Volume two also contains the important feature of a collection of about two hundred practical forms, which have been gathered from actual cases pending or adjudicated in the highest courts. A chapter is added on the subject of "Custodians of Alien Enemy Property"; and, in order to present the subject intelligently, the author has touched generally upon the subject of "Trading with the Enemy." He has printed and commented on the United States Trading with the Enemy Act, and referred to the several English Trading with the Enemy Acts, with the decisions under them.

The author's work has, on the whole, been well and thoroughly done, but the book does not entirely escape the besetting sins of modern American law writing, of which we can give only one illustration. At the end of section 507, speaking of contracts of service, the author says: "A specific performance by the receiver would be a form of satisfaction or payment which the receiver cannot be required to make. As well might he be decreed to satisfy the demand for specific performance by money as by the service sought to be enforced." These identical words are repeated as true of contracts generally, in section 517. A different authority is cited for the proposition in the two places where the statement occurs, and there is no cross-reference. The statement which is taken from a decision of the Supreme Court cited by the author under section 517, while true under the particular facts of that case, is not true as a general proposition, and was not stated as such by the court. There seems no doubt that a court might order its receiver to continue performance even of a contract to employ another; and if the contract in question related to property in the receiver's hands, and had created an equitable right therein, as in the typical case of a contract to sell land, it seems clear that it would be the duty of the court to order its receiver specifically to perform the contract.

The mechanical execution of the book leaves nothing to be desired.

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A BIBLIOGRAPHY OF MUNICIPAL UTILITY REGULATION AND MUNICIPAL OWNERSHIP. By Don Lorenzo Stevens, M.B.A. Being Volume IV of "Harvard Business Studies." Cambridge: Harvard University Press. 1918. pp. viii, 410.

This is an elaborate and thorough bibliography of a topic of the greatest contemporary interest. The regulation of public utilities and, as the only alternative, public ownership are the rival palliatives of high charges and poor service; and the considerations are much the same whether the contest is staged in nation or in city. The references here given will enable one to study the entire subject or any aspect of it from every point of view. To the statesman, the author, and the debator it will be invaluable; and to the lawyer it is indispensable, since his practice must sooner or later bring him into the thick of the discussion. That this is the case is shown by the large proportion of the titles here enumerated which represent the professional work of lawyers.

The compiler has wisely decided to omit the merely ephemeral literature of the subject; and his principle of exclusion has been conservatively administered. He has appended pithy judicious annotations to each title, a practice which enormously increases the value of the work. The scope of the bibliography is shown by the chapter-headings: General Works, History of Utilities and of Regulation, Franchises, Public Service Commissions, Valuation, Rates, Taxation, Holding Companies, Municipal Ownership. There is an excellent index.

# HARVARD LAW REVIEW

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VOL. XXXII

FEBRUARY, 1919

No. 4

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## STATE POWER OVER INTRASTATE RAILROAD RATES DURING FEDERAL CONTROL

IT is not proposed to discuss in this article the constitutional warrant for congressional legislation regulating intrastate railroad rates. The Federal Control Act <sup>1</sup> has been passed in the exercise of the war power and it is difficult to discover any substance in the suggestion that legislation under this power meets an insuperable barrier when it confronts intrastate rates. Since Congress may regulate intrastate railroad rates when this is necessary to the proper regulation of commerce among the states <sup>2</sup> it is clearly justified in regulating these same rates when to do so enables it the more effectually to carry out another of the great powers expressly conferred upon it by the Constitution.

That the war power is of sufficient scope to enable Congress to take over the transportation systems of the country is manifest; and since the effective operation of these systems requires that the government shall control all transportation thereon, and not merely the transportation of men and materials needed primarily for war purposes, it follows that the government must charge for the service rendered; and the conclusion is inescapable that it is entitled to determine for itself what that charge shall be. For it is elemen-

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<sup>1</sup> Act of Congress of March 21, 1918.

<sup>2</sup> *Houston East & West Texas Ry. Co. v. United States*, 234 U. S. 342 (1914); *American Express Co. v. Caldwell*, 244 U. S. 617 (1917); *Illinois Central R. R. v. Illinois*, 245 U. S. 493 (1918); Henry Wolf Bickl , "Federal Control of Intrastate Railroad Rates," 63 *UNIV. OF PENN. L. REV.* 69.

tary that the federal government in the exercise of its powers is not dependent upon, nor obliged to defer to, state authority.<sup>3</sup>

But in certain instances the United States may, under the Constitution, permit the continued operation of state authority even in a field which the national government is entitled to occupy and in which it has exerted its activity. Familiar instances of this class of cases are found in the permitted taxation by the states of national banks and railroads incorporated by Congress.<sup>4</sup>

Passing, therefore, the constitutional aspect of the matter — since this seems too clear to require extended discussion — this article will be confined to an examination of the question whether the Federal Control Act has deprived the states of such power as otherwise they might have had to continue the regulation of intrastate railroad rates, or, while establishing federal possession and operation of the railroads, has permitted the continued exercise of state authority in connection with such rates.

The answer to this question is to be found, it is believed, in sections 10 and 15 of the Federal Control Act, the text of which is printed in the margin.<sup>5</sup> At the outset it is to be noted that the

<sup>3</sup> *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316, 424 (1819); *Ex parte Siebold*, 100 U. S. 371 (1879). *In re Debs*, 158 U. S. 564, 578 (1895).

<sup>4</sup> See, for example, *Van Allen v. Assessors*, 3 Wall. (U. S.) 573 (1865); *Railroad Co. v. Peniston*, 18 Wall. (U. S.) 5 (1873).

<sup>5</sup> "Sec. 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control.

"That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

"Said rates, fares, charges, classifications, regulations, and practices shall be rea-

President is authorized to initiate rates, and it necessarily follows that the question of state power may arise either with respect to rates so initiated or with respect to rates which have been left unchanged by the Railroad Administration. But the Director-General of Railroads, by his General Order No. 28,<sup>6</sup> advanced substantially all transportation rates and fares of railroads under federal control, so that the important issue from the practical viewpoint is as to the power of the states to control rates initiated by the President. And consideration will first be given to this question.

It is to be noted first, that the authority devolved upon the President to initiate rates is not restricted by the terms of the act to interstate rates; in fact, there is no reason why it should be so restricted. The act is passed, not under the power to regulate commerce, but under the war power, and if it is desirable that the President initiate rates — an obvious necessity — no reason can be suggested which makes the exertion of this power less necessary

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sonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition.

"After full hearing the commission may make such findings and orders as are authorized by the act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said act: *Provided, however,* That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make."

"Sec. 15. That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

<sup>6</sup> Issued under date of May 25, 1918.

in the case of intrastate movements than in the case of those which are interstate.

A certain degree of confusion of thought seems to be engendered by the affirmative grant to Congress of the power to regulate commerce among the states, and the resulting habit of mind to attribute control over intrastate commerce to the states. But assume for the moment that the Constitution contained no grant of power to Congress with respect to commerce. Clearly, it would nevertheless be able, under the war power, to do just what it has done with respect to the transportation systems of the country. And from what source then would be derived the contention that the federal power is restricted to dealing with interstate rates? In any event, the President is authorized in section 10, "whenever in his opinion the public interest requires," to "initiate rates, fares, charges, classifications, regulations, and practices," and this power, granted without qualification or limitation, cannot be restricted by the courts to the field of interstate commerce.

This proposition is amply supported by the authorities.<sup>7</sup> In the Trade-Mark cases,<sup>8</sup> the court, dealing with the general language of the act of Congress there under consideration, said:

"It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases, if no further. To this there are two objections: First, the indictments in these cases do not show that the trade-marks which are wrongfully used were trade-marks used in that kind of commerce. Secondly, while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so [that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body."

And it is highly significant that in the three cases cited in the note the Supreme Court refused to limit the general language

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<sup>7</sup> *United States v. Reese*, 92 U. S. 214, 220-21 (1875); *Trade-Mark Cases*, 100 U. S. 82, 98 (1880); *Employers' Liability Cases*, 207 U. S. 463, 500-01 (1908).

<sup>8</sup> 100 U. S. 98.

used by Congress even to save the legislation. In view of the well-settled rule to interpret legislation so as, if possible, to enable it to stand the test of conformity with the Constitution, it is clearly proper, *a fortiori*, to give general language its natural meaning when the constitutionality of the statute is not at stake. And, as has been pointed out, there is no constitutional reason for limiting the power of the President to interstate rates, since he is here acting under the war power which knows no such limitation.

Furthermore, there is abundant reason, from the practical standpoint, for giving this general language its natural meaning, since the President could not effectively or justly exercise the rate-making power with respect to interstate rates if he were without power to deal also with intrastate rates. Apart from the discrimination which would result, there would be innumerable instances where the intrastate movement constituted a movement of the utmost consequence to the military situation.

In addition, it is of no little consequence that the President, through the Director-General, has assumed to initiate intrastate rates, as well as interstate rates. Under the well-settled rule, the action of the executive department is entitled to great respect from the judiciary.<sup>9</sup> And, though it may not be possible to cite authorities to the point, it is not without significance that the entire country has acquiesced in the interpretation of the act adopted by the executive.

There being, therefore, no sufficient ground for doubting the President's authority to initiate rates, etc., the question arises whether, under the present act, rates, etc., so initiated are subject to the control of the states through the medium of their various regulating bodies.

Before proceeding to a consideration of this question it should be noted that the government is not operating the railroads under federal control through the medium of their corporation owners but directly and in the name of the Director-General. Bills of lading, passenger tickets, and other transportation contracts are issued in his name; the wages of employees are fixed and paid directly by him and his representatives; and actions at law and suits in equity must be brought against him and not otherwise.<sup>10</sup>

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<sup>9</sup> *Logan v. Davis*, 233 U. S. 613, 627 (1914), and cases there cited.

<sup>10</sup> General Order, No. 50.

So also tariffs establishing rates and fares are issued by the Director-General and not by the corporations owning the transportation systems, and these tariffs are filed only with the Interstate Commerce Commission and not with the state commissions.

This mode of filing is, of course, in conformity with the Federal Control Act, since, if it be correct to say that the paragraph of section 10 which gives the President authority to initiate rates, etc., includes all rates, intrastate as well as interstate, it necessarily follows that the next clause which designates the manner of making "said rates," etc., effective, *viz.*, "by filing the same with the Interstate Commerce Commission" is operative with respect to intrastate rates as well as with respect to interstate rates. Clearly since no other procedure is specified in order to make such rates, etc., effective, it is not necessary to file such tariffs with state commissions. To require this would be to add to the conditions prescribed by Congress — for which, of course, there would be no justification.

The significance of this conclusion is manifest, for it means that intrastate rates, etc., now become effective by filing with the Interstate Commerce Commission, irrespective of the requirements of state statutes; and although such statutes may provide for a thirty days' publication before they may be changed, or even for a specific permission from the state commission, they may now be changed "at such time and upon such notice" as the President may direct. In fact, the sweeping changes in rates, etc., initiated in conformity with General Order No. 28 were made effective upon one day's notice. Clearly it would seem to follow that rates, etc., initiated by the President are regarded as in a special class and as withdrawn from the jurisdiction of state commissions, since the usual foundation of such jurisdiction, as established in state statutes, is generally, though not necessarily, the filing of tariffs establishing such rates, etc., with the state commissions.

Moreover, it is to be noted that by the initiation of rates, etc., the President supersedes the previously existing rates and the tariffs containing such rates cease to be effective, and the only effective tariffs are those currently on file with the Interstate Commerce Commission. The practical importance of this feature of the situation will be adverted to hereafter.<sup>11</sup>

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<sup>11</sup> *Infra*, page 314.



But the act does not confide to the President — as doubtless it might have done — the final determination of the reasonableness of rates, etc. It proceeds to define with some elaboration in the third and fourth paragraphs of section 10 the method of review which the shipper or traveler who deems himself aggrieved may invoke, in order that it may be determined whether the rates, etc., conform to the standard prescribed, *i. e.*, whether they are “reasonable and just.” And the method of review prescribed is limited to proceedings before the Interstate Commerce Commission. There is no implication — even the most remote — that rates, etc., initiated by the President may be reviewed by state commissions because they happen to cover transportation wholly within a state. This silence is eloquent, and an examination of the various provisions of the law, as well as of general legal principles applicable, leads to a single conclusion, *viz.*, that such state commissions are not entitled to assert any authority with respect to such rates.

And first with respect to the provisions of the act. It is to be noted that the second paragraph of section 10 provides that rates, etc., initiated by the President “shall not be suspended by the [Interstate Commerce] Commission pending final determination” as to their reasonableness and justness. Now, as is well known, many state commissions have the power to suspend intrastate rates, etc., pending an inquiry as to their reasonableness, etc., and no express prohibition is found in section 10, or any other part of the act, against such suspension. But is it conceivable that Congress meant to permit a state commission to exercise with respect to rates, etc., initiated by the President an authority denied the Interstate Commerce Commission?

The power of suspension is well understood and its importance is difficult to exaggerate. Apart from the inherent improbability that Congress would have subjected rates, etc., initiated by the President to a greater degree of control on the part of the state commissions than on the part of the Interstate Commerce Commission, it must be remembered that there are also the practical considerations against implying the power resulting from the fact that the exercise of such power by a state would not only impede the federal government in its effort to establish a proper scale of rates, etc., in order to derive adequate revenue from the operation

of the railroads, but would seriously derange the general rate structure by establishing local preferences and discriminations.

It seems clear, therefore, that the limitation of the prohibition against suspension to suspension by the Interstate Commerce Commission confirms the conclusion that Congress regarded the remedial procedure which it was establishing as limited to that commission — in other words, it was unnecessary to deny the right of suspension to the state commissions, since under the system provided in the act it was not intended that they should exercise any authority whatsoever with respect to rates, etc., initiated by the President. It is difficult to find any other explanation of the language, and it is believed that no other reasonable interpretation can be suggested.

And this conclusion is strengthened by further provisions of section 10. In the first place, rates, etc., initiated by the President are required to be "reasonable and just." This is the only standard to which they are required to conform, and there is no warrant for the application of any other or additional standard. But nothing is provided with respect to the enforcement of this standard by the state commissions, or with respect to the evidence they should consider in determining whether rates, etc., conform to this standard, or with respect to the powers they might exercise to remedy any variance therefrom. On the contrary, all these matters are carefully dealt with in the provisions of the act relative to procedure before the Interstate Commerce Commission. That commission is specifically authorized to receive complaints with reference to rates, etc., initiated by the President; it is required to "enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate," etc.; it "may consider all the facts and circumstances existing at the time of the making of the same;" it is to "give due consideration to the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition;" it is to "take into consideration" a "finding and certificate by the President" as to the necessity for additional revenue to defray the expenses of federal control and operation, etc., "together with such recommendations as he may make;" and finally it "may make such findings and orders as are authorized by the act to regulate commerce as

amended, and said findings and orders shall be enforced as provided in said act."

With all these careful and specific directions as to how rates, etc., initiated by the President may be reviewed by the Interstate Commerce Commission, it is almost inconceivable that Congress could have intended that such rates should be subject to review by state commissions unrestricted by any directions as to procedure or remedial measures. This conclusion seems inescapable when it is remembered that the powers of the state commissions differ in many, and frequently in material, respects from those of the Interstate Commerce Commission. Without seeking further illustrations it is sufficient to point out that many state commissions may issue orders effective for a period substantially greater than the two-year period to which the Interstate Commerce Commission is restricted. Thus in one case a state commission required the maintenance of certain passenger fares for ten years.<sup>12</sup>

And it is not believed that any sound argument can be based upon the contention that the Interstate Commerce Commission is empowered to make findings and orders authorized by the Act to Regulate Commerce, and that these must necessarily be restricted to interstate rates, etc. This provision defines the remedies which the commission may apply, but enlarges the scope of these remedies. Since the Federal Control Act brings within the jurisdiction of the commission new rates, etc., it is only natural that there should be a definition of the remedies which it may apply — an extension of power similar in essential character to other enlargements of the commission's authority brought about by amendments to the Act to Regulate Commerce.

But, in addition to these considerations which relate primarily to procedure, it is significant that the act establishes, as has been pointed out, its own standard to which rates, etc., initiated by the President must conform, and necessarily this standard supersedes all state standards unless the act itself saves them.<sup>13</sup> Apart, how-

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<sup>12</sup> *P. R. R. v. Public Service Commission*, 126 Md. 59, 82 (1915). In fact, in *Detroit & Mackinac Ry. Co. v. Michigan Veneer Co.*, 300 U. S. 600 (decided November 18, 1918), the court holds that "There is nothing to hinder a State from providing that after a judicial inquiry into the validity of such an order, it shall be binding upon the parties until changed."

<sup>13</sup> *Northern Pacific Ry. v. Washington*, 222 U. S. 370 (1912); *Michigan Central R. R. v. Vreeland*, 227 U. S. 59 (1913); *So. Ry. v. R. R. Commission*, 236 U. S. 439 (1915).

ever, from the consideration that there is nothing in the act which indicates an intention to preserve the varying standards established by state laws, it is manifestly desirable, from the practical point of view, that rates, etc., initiated by the government should be subject to but one test enforceable in one tribunal.

The contention that state authority still continues seems to be rested entirely on the first sentence of section 10 and the provisions of section 15 of the Federal Control Act. The first sentence of section 10 provides:

"That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President."

Before referring to the provisions of section 15 it should be pointed out that this sentence seems clearly to except the situation now under consideration; *i. e.*, a situation in which an order has been issued by the President. Manifestly it would be inconsistent with such order for a state to order that the rates, etc., should not be charged which the President has directed shall be charged. In addition, the reasons heretofore and hereafter suggested for holding the remedial procedure specifically provided in section 10 the exclusive remedy in case of rates, etc., initiated by the President show clearly, it is believed, that it would be "inconsistent with the general provisions of this act [the Federal Control Act]" to hold the general provisions of the first sentence of section 10 sufficient to permit state control of rates, etc., initiated by the President.

Section 15 of the Federal Control Act, which also is invoked in support of state authority, is as follows:

"That nothing in this act shall be construed to amend, repeal, impair or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

Premitting for the moment the questions whether this section properly construed can be regarded as intended to keep alive the power of the state with respect to rates, etc., and whether the exercise of such power might affect the transportation of troops, etc.,

there seem to be two well-settled rules precluding any construction of the section which would sustain the power of the state to control rates, etc., initiated by the President.

In the first place, when a statute creates a right and provides a particular remedy for its enforcement, such remedy is generally held to be exclusive.<sup>14</sup> This rule is apparently bottomed on legislative intention, as the Supreme Court points out in *United States v. Stevenson*,<sup>15</sup> where Mr. Justice Day said:

"The contention of the defendants in error is that the action for a penalty is exclusive of all other means of enforcing the act, and that an indictment will not lie as for an alleged offense within the terms of the act. The general principle is invoked that where a statute creates a right and prescribes a particular remedy that remedy, and none other, can be resorted to. An illustration of this doctrine is found in *Globe Newspaper Company v. Walker*, 210 U. S. 356, in which it was held that in the copyright statutes then in force Congress had provided a system of rights and remedies complete and exclusive in their character. This was held because, after a review of the history of the legislation, such, it was concluded, was the intention of Congress.

"The rule which excludes other remedies where a statute creates a right and provides a special remedy for its enforcement rests upon the presumed prohibition of all other remedies. If such prohibition is intended to reach the Government in the use of known rights and remedies, the language must be clear and specific to that effect. *Dollar Savings Bank v. United States*, 19 Wall. 227, 238, 239. In the present case, if it could be gathered from the terms of the statute, read in the light of the history of its enactment, that Congress has here provided an exclusive remedy intended to take from the Government the right to proceed by indictment, and leaving to it only an action for the penalty, civil in its nature, then no indictment will lie, and the court below was correct in its conclusion."

That this general rule may properly be invoked in determining the correct construction of the Federal Control Act would seem apparent from the following considerations:

(a) Had Congress intended to continue the remedial procedure heretofore applicable in connection with rates, etc., it would have been extremely easy for Congress to have used simple language

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<sup>14</sup> *Globe Newspaper Co. v. Walker*, 210 U. S. 356 (1908).

<sup>15</sup> 215 U. S. 190, 197 (1909).

evidencing this intention. In lieu of such language, a special and definite procedure is established.

(b) The action of the President, or of his duly constituted representative, in initiating rates, etc., involves the exercise of discretion and consequently would not be subject to judicial control,<sup>16</sup> and it would seem necessarily to follow that the exercise of such discretion would not be subject to administrative control except to the extent that the act of Congress specifically makes it so.

(c) In like manner, a proceeding against the Director-General is in substance a proceeding against the United States and accordingly cannot be maintained except by the express permission of the government,<sup>17</sup> and whatever be the construction to be given to section 15, it certainly contains nothing evidencing the consent of the United States to be made respondent in proceedings before state commissions. The remedy specifically allowed before the Interstate Commerce Commission is therefore created by the statute, and it is impossible to find a justification for any other remedy elsewhere. Necessarily, this remedy is exclusion.

And this conclusion is reënforced by the provisions of the first paragraph of section 10, which authorize "actions at law or suits in equity" to be brought by and against "carriers." Now if it should be held that this paragraph is intended to authorize a proceeding against the United States, a conclusion of doubtful soundness, it is highly significant that it does not authorize proceedings before state commissions. "Actions at law" and "suits in equity" are technical phrases indicating well-known forms of procedure and do not include proceedings before commissions. This consideration, therefore, lends weight to the view that the statutory remedy before the Interstate Commerce Commission is the only *remedy* intended to be available in connection with rates, etc., initiated by the President.

The second well-settled rule which reënforces the conclusion reached from a scrutiny of the language of the act, that the remedy before the Interstate Commerce Commission is exclusive, is found in the principle that when one part of a statute deals specifically

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<sup>16</sup> *Marbury v. Madison*, 1 Cranch (U. S.), 137 (1803).

<sup>17</sup> *Louisiana v. Garfield*, 211 U. S. 70 (1908); *Louisiana v. McAdoo*, 234 U. S. 627 (1914); *New Mexico v. Lane*, 243 U. S. 52 (1917).

with a certain matter, which it may be contended is dealt with more generally in another part of the same statute, the specific provisions apply rather than the general provisions.<sup>18</sup>

From what has been said it is clear that the only portions of the statute which can be opposed to the specific provisions of section 10, confiding to the Interstate Commerce Commission a degree of jurisdiction with respect to rates, etc., initiated by the President, are cast in very general language, and it would seem necessarily to follow that these specific provisions must be regarded as controlling, and the general provisions must be construed as not intended to operate where the specific provisions apply.

Turning now to the precise words of section 15, a significant difference is disclosed in its reference to the states' power of taxation and the states' police power. The "existing *laws or powers* of the States in relation to taxation" are not to be amended, etc., but it is only the "*lawful police regulations*" of the states that are to be accorded a like immunity from change. There must have been some reason for refraining from preserving the "*police power*" of the states to the same extent as the taxing power. It seems not unreasonable to regard the words "police regulations" as intended to refer to police regulations already in effect which were to remain in effect unless superseded by acts of the President under the Federal Control Law.

Or, possibly, the words are intended to refer to the "police power" in its more limited and proper use as describing the authority of the state to legislate to protect the health, safety, and morals of its people,<sup>19</sup> and not in its more extended and general use, within which the power to regulate rates, etc., has sometimes been classified. For there is grave doubt whether the regulation of rates, etc., by the states is in truth a branch of the police power within the meaning of section 15. It is true that various cases have so characterized it when referring to the general classification of legislation.<sup>20</sup> But this use of the term is clearly open to just criticism.

<sup>18</sup> *Rodgers v. United States*, 185 U. S. 83 (1902); *In re Anderson*, 214 Fed. 662 (1914); *Colonial Navigation Co. v. N. Y., etc. Co.*, 50 L. C. C. 625 (1918), and cases cited.

<sup>19</sup> See the difference between "police power" and "police regulations" suggested in 31 *CYCLOPEDIA OF LAW AND PROCEDURE*, 902-03.

<sup>20</sup> *Munn v. Illinois*, 94 U. S. 113 (1876); *Budd v. New York*, 143 U. S. 517, 534, 537,

In the first place, the "police power," as referred to in the decisions, seems to be used in two ways: usually as referring to laws for the promotion of the public health, safety, and morals, but sometimes and less frequently, as referring to laws intended more generally for the public welfare. But, as Chief Justice Taney long ago pointed out,<sup>21</sup> practically all laws are police laws in this sense. That the "police power" in its more proper and limited sense is an inexact description of the rate-making power would seem to result from the following considerations:

(a) In the first place it is well settled that the state police power cannot be bargained away, and yet it is equally well settled that the state may make a binding contract with a public utility which will preclude it, for a substantial period of time, from regulating the rates of that utility.<sup>22</sup>

(b) In the second place, the rate-regulating power is subject to the limitation that it may not be so exercised as to deny the public utility a reasonable return on the fair value of the property which it devotes to the public service; but the police power, in its true sense, is not subject to any such restriction, since it is well settled that it is permissible to require uncompensated obedience to a law which is essentially one of police. Both of these elementary principles are violated if we treat the rate-regulating power as a part of the state's police power.

A true classification of the power to regulate rates, etc., would assimilate it to the power of eminent domain. The state requires a given service and fixes the price at which it shall be rendered.<sup>23</sup> Just as the taking of the railroads by the government is a striking illustration of the exercise of this power, although it constitutes the taking of a limited interest or use only, so the taking of an even more limited use of the property, as for example, the requiring of the furnishing of a freight car to be used for the transportation of

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544 (1892); *German Alliance Insurance Co. v. Kansas*, 233 U. S. 389 (1914); *Puget Sound Traction Co. v. Reynolds*, 244 U. S. 574, 578, 579 (1917).

<sup>21</sup> *License Cases*, 5 How. (U. S.) 504, 582-83 (1847).

<sup>22</sup> *Detroit v. Detroit Citizens' Street Ry.*, 184 U. S. 368 (1902); *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517 (1904); *Minneapolis v. Street Ry. Co.*, 215 U. S. 417 (1910).

<sup>23</sup> It is true that prices may sometimes be regulated, although there is no *legal* obligation to sell or render service; but it is not believed that this changes the essential situation since in the majority of instances there is a *practical* compulsion.



a commodity from point X to point Y subjects the property of the carrier to the use of another person, the government determining the compensation for this use. The resemblance to eminent domain is further emphasized by the fact that the enterprise must be affected with a public interest to justify rate- or price-regulation.<sup>24</sup> Treating the power as thus related to the power of eminent domain furnishes an adequate basis for the rule that the compensation must be fair, and that the business must be affected with a public interest, neither of which rules is a natural corollary of a classification which would place the rate-regulating power under the police power.

It is not believed, therefore, that the provisions of section 15 are sufficient to confer upon the states the power to control rates, etc., initiated by the President; but even if a different construction were adopted the states would be entirely devoid of power to require the United States to appear as a party respondent in proceedings before their various commissions. As has been pointed out above, such a proceeding would constitute a suit against the United States, and could not be maintained without express permission, and no such permission has been granted. Permission to hale the Director-General before a commission in order that he may justify his rates, etc., is limited to proceedings before the Interstate Commerce Commission.

Practical considerations, therefore, reinforce the construction which is sustained by a scrutiny of the terms of the act and by such well-settled rules of construction as are applicable. For, if a complaint is filed with a state commission against the corporation owner of the property, it truthfully answers that it is not in control of the rates, etc., complained of and is powerless to accord any relief. The Director-General cannot be called in, for to require his presence would be to subject the United States to the jurisdiction of the state without its permission.

From every point of view, therefore, it seems clear that the state is without authority during federal control to regulate rates, etc., initiated by the President.

Since under General Order No. 28 practically all rates and fares have been specifically determined by the President and have been initiated in the manner provided in the act, the question as to

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<sup>24</sup> *German Alliance Insurance Co. v. Kansas*, 233 U. S. 389 (1914).

rates, etc., left untouched by his orders, is largely academic. What has been said is applicable in some measure to this question, though in a case involving such a situation it would be impossible to rely on the proposition which is the central thought of this discussion, *viz.*, that the Federal Control Act provides specifically the exclusive remedy for rates, etc., initiated by the President. But, if a complaint should be filed with some state commission, relative to a rate not initiated by the President, it would be a simple matter for the President to initiate a rate between the points in question; so that any difficulties which might be anticipated in this quarter do not seem to be of a practical nature.

Finally, this construction is in furtherance of the provisions of the President's Proclamation of April 11, 1918, which reads as follows:

"Until, and except so far as, said Director-General shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes of the United States and orders of the Interstate Commerce Commission, and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. But any orders, general or special, hereafter made by said Director-General shall have paramount authority and be obeyed as such" —

a provision which is almost verbatim the same as a corresponding provision in the President's Proclamation of December 26, 1917.

It should be noted in conclusion that the rates, etc., initiated by the President have superseded the previously existing rates, etc., both interstate and intrastate. Rates so superseded are non-existent and cannot be revived, but new tariffs must be published if the current rates, etc., are to be changed. It would seem to follow that if federal control were to come to an end without any new legislation the existing rates would continue as the lawful rates on intrastate traffic as well as on interstate traffic, and new tariffs would have to be filed with the state commissions. It seems inconceivable, however, that federal control could terminate without some additional legislation and such legislation will doubtless deal with the rate question.

*Henry Wolf Bickl.*

## PROBLEMS IN PROBATE AND ADMINISTRATION

## EXECUTOR DE SON TORT

WHENEVER one not appointed executor or administrator wrongfully intermeddled with the goods of the deceased he was known as an executor *de son tort*.<sup>1</sup> It was commonly said that he had all of the duties but none of the rights of a real executor.<sup>2</sup> Such an intermeddling would seem to be a tort for which the rightful executor or administrator could, if already appointed, sue,<sup>3</sup> or, if later appointed, take proceedings by relation back.<sup>4</sup> This simple procedure would seem to-day amply to protect the estate. But under the older law confusion, it was thought, might result if such were the sole remedies of the estate. The executor was conceived as taking title from the will, not from the probate court.<sup>5</sup> He had a *prima facie* right to the surplus, if no residuary legatee were named.<sup>6</sup> Consequently the court had no discretion but to appoint him,<sup>7</sup> unless indeed he were insane.<sup>8</sup> And the probate judge could not require of him a bond, if he were insolvent or otherwise unsuitable.<sup>9</sup> He could, therefore, bring a writ and his general acts bound the estate before probate, provided the will were at some later time proved, even though the executor himself never obtained letters.<sup>10</sup> Such being the case a wrongful intermeddler by taking possession of the estate might well mislead strangers into thinking there was a will in which he was named executor. And this fact could not be verified, for, as a rightful executor could act without proving the will, those interested might well feel that there was no use in searching probate records to

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<sup>1</sup> 1 WILLIAMS, EXECUTORS, 10 ed., 183.

<sup>2</sup> Carmichael v. Carmichael, 2 Phill. C. C. 101, 103 (1846).

<sup>3</sup> 1 WOERNER, AMER. LAW ADM., 2 ed., § 193.

<sup>4</sup> See *infra*, page 319.

<sup>5</sup> Smith v. Milles, 1 T. R. 475, 480 (1786).

<sup>6</sup> 1 WILLIAMS, EXECUTORS, 10 ed., 1217.

<sup>7</sup> Rex v. Raines, 1 Ld. Raym. 361 (1698).

<sup>8</sup> Evans v. Tyler, 2 Rob. (Eccl.) 128, 133, 134 (1849).

<sup>9</sup> Rex v. Raines, *supra*.

<sup>10</sup> Brazier v. Hudson, 8 Sim. 67 (1836).

find his appointment. Thus grew up, as much as a protection to those interested as a penalty on the wrongdoer, the essential features of the anomalous doctrine of executor *de son tort*: that a creditor, legatee or next of kin after debts paid could proceed directly against the intermeddler as executor.<sup>11</sup>

In such action he was named as executor generally.<sup>12</sup> Accordingly he could so plead that he was only liable to the extent of the assets that came to his hands.<sup>13</sup> And he could show under the plea of *plene administravit* that he paid debts of equal or of superior degree to that of the plaintiff.<sup>14</sup> Whether the wrongdoer was chargeable by the executor merely as a tortfeasor or had incurred the liability of an executor *de son tort* when there was a duly appointed representative in existence at the time of his acts seems to have depended upon whether the wrongdoer interfered with the estate as executor.<sup>15</sup> In any event it seems clear that he could plead in mitigation of damages, though not in bar, of the suit of the true executor or administrator, payment of debts of the estate.<sup>16</sup>

In Coulter's case<sup>17</sup> it was said: "it is clear, that all lawful acts, which an executor *de son tort* doth, are good." The difficulty with this statement is that it is not clear what acts are "lawful acts." It must be remembered also that an executor *de son tort* did not have all the rights of a true executor. He could not, for instance, retain for his own debt,<sup>18</sup> nor if the estate was insolvent, prefer one creditor to another of equal degree.<sup>19</sup> Apparently the act of the wrongdoer was good only if it was such an act as the true executor was bound to perform, subject to the qualification that the intermeddler was acting as executor, and to a greater extent than the solitary act

<sup>11</sup> 1 WOERNER, AMER. LAW ADM., 2 ed., § 193.

<sup>12</sup> COULTER'S CASE, 5 Co. 31 a.

<sup>13</sup> Dyer, 166 marg.

<sup>14</sup> Oxenham v. Clapp, 2 B. & Ad. 309 (1831).

<sup>15</sup> 1 WILLIAMS, EXECUTORS, 10 ed., 186, 187.

<sup>16</sup> Roggenkamp v. Roggenkamp, 68 Fed. 605 (1895); Brown v. Walter, 58 Ala. 310 (1877); Leach v. Prebster, 35 Ind. 415 (1871); Tobey v. Miller, 54 Me. 480 (1865); Glenn v. Smith, 2 Gill & J. (Md.) 493 (1830); Gay v. Lemee, 32 Miss. 309 (1856); Lenderink v. Sawyer, 92 Neb. 587 (1912); Howell v. Smith, 2 McCord (S. C.) 516 (1823); Kinard v. Young, 2 Rich. Eq. (S. C.) 247 (1846); McElveen v. Adams, 94 S. E. 733 (S. C.) (1917); Oxenham v. Clapp, 2 B. & Ad. 309 (1831); Am. & Eng. Ann. Cas. 1914A, 263, note.

<sup>17</sup> 5 Co. 30 b.

<sup>18</sup> Alexander v. Lane, Yelv. 137.

<sup>19</sup> 1 WILLIAMS, EXECUTORS, 10 ed., 195.

complained of.<sup>20</sup> If, then, the original intermeddler, acting as executor, used the assets in paying valid debts of the estate, the anomalous principles of the general doctrine of executor *de son tort* seem to have protected the creditors thus paid.<sup>21</sup> And, if assets were sold to pay debts and debts were thus paid, the purchaser should have been protected.<sup>22</sup> Probably, however, these anomalies did not extend so far as to protect a debtor of the estate in payments to the executor *de son tort*,<sup>23</sup> though the debtor logically should have been able to invoke them if the money was used in the proper administration of the estate. Though something might perhaps be said for this curious doctrine under the old English law, there should be nothing left of it under a system which assimilates executors to administrators by giving the court a discretion in their appointment, by requiring them to file bonds, and by abolishing the old presumption in regard to the residue of the estate; in short, where the executor takes title not from the will but from the court.<sup>24</sup> Such is the theory of the executor's right in a number of the United States, and in some of our jurisdictions the law of executor *de son tort* is abolished;<sup>25</sup> and in others it is falling into disuse.<sup>26</sup>

<sup>20</sup> 1 WILLIAMS, EXECUTORS, 10 ed., 195; *Mountford v. Gibson*, 4 East, 441 (1804). But see *Dorsett v. Frith*, 25 Ga. 537 (1858).

<sup>21</sup> *Thomson v. Harding*, 2 E. & B. 630 (1853).

<sup>22</sup> *Roumfort v. McAlarney*, 82 Pa. 193 (1876); *Pickering v. Thompson*, 24 Ont. L. Rep. 378 (1911). But see *Carpenter v. Going*, 20 Ala. 587 (1852); *Woolfork v. Sullivan*, 23 Ala. 548 (1853).

<sup>23</sup> See *Lee v. Chase*, 58 Me. 432, 435 (1870).

<sup>24</sup> 1 WOERNER, AMER. LAW ADM., 2 ed., § 172.

<sup>25</sup> ALABAMA, CODE (1907) § 2801; *Bowden v. Pierce*, 73 Cal. 459, 463, 14 Pac. 302 (1887); FLORIDA, COMP. LAWS (1914) § 2411; KANSAS, GEN. STATS. (1915) § 4495; MINNESOTA, GEN. STATS. (1913) § 8177; *Rozelle v. Harmon*, 29 Mo. App. 569, 103 Mo. 339, 15 S. W. 432 (1888); *Dixon v. Cassell*, 5 Ohio, 533 (1832); OREGON, LAWS (1910) § 384; *Ansley v. Baker*, 14 Tex. 607 (1855); WASHINGTON, CODES STATS. (1915) § 971; WISCONSIN, STATS. (1915) § 3259.

On the other hand, the doctrine has been perpetuated by statute in some states. GEORGIA, ANNOT. CODE (1914), § 3886; MASSACHUSETTS, REV. LAWS (1902), c. 139, §§ 14, 15; MAINE, REV. STATS. (1916), c. 68, § 40; MISSISSIPPI, ANNOT. CODE (1917), § 1768; NEVADA, REV. LAWS (1912), §§ 5052-55; NEW HAMPSHIRE, PUB. STATS. (1901), c. 188, § 16; NEW JERSEY, COMP. STATS. (1910), § 2258; NORTH CAROLINA, REVISAL (1908), § 2; RHODE ISLAND, GEN. LAWS (1909), c. 312, § 30; SOUTH CAROLINA, CODE (1912), § 3621; VERMONT, PUB. STATS. (1906), § 2860.

In Georgia, Nevada, New Hampshire, and Vermont the executor *de son tort* is liable for double the value of the goods appropriated by him. See references in preceding paragraph of this note.

<sup>26</sup> See *Rozelle v. Harmon*, 29 Mo. App. 569, 578 (1888).

## EFFECT OF PROBATE AND ADMINISTRATION

It is common knowledge that by statute an executor or administrator may sue for a tort to the property of the estate committed during the life of the deceased. This *chose in action* is as much an asset as a watch or a horse. But suppose after the death of the decedent and before the appointment of the personal representative a similar wrong is done to the estate.

If the deceased died intestate, the assets passed on death to the ordinary, who was usually the bishop. The statute of Westminster the Second, c. 19 (1285), recognized that personal property of an intestate passed immediately to the ordinary.<sup>27</sup> The Statute of 31 Edw. III (1357), c. 11, required

"that in case where a man dieth intestate, the ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods; (2) which deputies shall have an action to demand and recover as executors the debts due to the said person intestate in the King's court. . . . (4) And they shall be accountable to the ordinaries, as executors be in the case of testament, as well of the time past as of the time to come."

By Stat. 22 & 23 Car. II, c. 10 (1670), the administrator became bound to distribute the surplus. The Probate Amendment Act, 21 & 22 Vict., c. 95, § 19 (1858), expressly vested the personal estate of an intestate until letters granted in the judge of the Court of Probate "in the same Manner and to the same Extent as heretofore they vested in the Ordinary." Though the property was in the ordinary, it was hardly possible for him to sue for a tort to the estate while he held title, for the object of Stat. 31 Edw. III, c. 11, was to take the administration from him.<sup>28</sup> Indeed, subdivision 4 of c. 11 made the administrator accountable as executor "as well

<sup>27</sup> See Dyer, C. J., in *Graysbrook v. Fox*, 1 Plowd. 275, 279.

<sup>28</sup> In *Graysbrook v. Fox*, 1 Plowd. 278, Weston, J., said referring to the statute, 31 Edw. 3, c. 11: "And the reason thereof seems to be because the Ordinary is a spiritual Governor, wholly conversant in spiritual Causes, to whom it is inconvenient to toll in the temporal Concerns of others, and therefore the Statute has given him Liberty to appoint others to take the Trouble of the Administration of the Intestate's Goods, and they shall have Power as Executors, and may recover the Debts of the Intestate; and so it has remedied the said Mischief." Dyer, C. J., and Walsh, J., said on page 279: "And Administrators are appointed by the Ordinary for his Ease, and to discharge himself of the Burden of the Office."

of the time past as the time to come." Therefore it was decided three centuries ago that title of an administrator related back to give him a right to sue in trover.<sup>29</sup> And this was extended to other forms of action.<sup>30</sup> At law the administrator must show an appointment antedating the writ;<sup>31</sup> though in equity it is sufficient to produce letters at the hearing, provided the bill alleges grant of letters.<sup>32</sup>

As to an executor: from the earliest times it was conceived that he took title from the will and not from the ordinary.<sup>33</sup> Accordingly he could sue at law before appointment, though, "for the enforcing of probates," he must prove his appointment before he declared.<sup>34</sup> In equity the rule as to executors was the same as in the case of administrators.<sup>35</sup>

While the principle of relation back was a familiar doctrine of the law of administration, difficulties arose when it was attempted to extend it to all situations. Suppose the personal representative before letters granted dealt with the estate in a certain way, did his later appointment make valid his acts? First, it may be supposed that the administrator before letters granted gives away part of the estate to one not entitled to distribution who may be either (a) a fellow wrongdoer, or (b) an innocent donee. In both these cases the person receiving the property should disgorge even though the donor later obtains letters;<sup>36</sup> for, indeed, even had authority existed before the act, the donee would not have been able as against a credi-

<sup>29</sup> Locksmith v. Creswel, 2 Roll. Ab. 399.

<sup>30</sup> *Trespass*, Thorpe v. Stallwood, 5 M. & G. 760 (1843); Brackett v. Hoitt, 20 N. H. 257 (1850). *Indebitatus Assumpsit*, Welchman v. Sturges, 13 Q. B. 552 (1849); Dempsey v. McNabb, 73 Md. 433, 21 Atl. 378 (1891); Brown v. Lewis, 9 R. I. 497 (1870). Probably actions for injuries to leasehold property, Barnett v. Guildford, 11 Exch. 19, 31 (1855). But *detinue*, see Crossfield v. Such, 8 Exch. 825 (1853). In Patten v. Patten, Alc. & N. 493 (1833) it was held that on ejectment by an administrator the fictitious demise might be laid before grant of letters. Compare Foster v. Bates, 12 M. & W. 226 (1843).

<sup>31</sup> Wankford v. Wankford, 1 Salk. 299, 303.

<sup>32</sup> Humphreys v. Humphreys, 3 P. Wms. 349 (1734); Fell v. Lutwidge, Barnard. Ch. 319, 320 (1741); Horner v. Horner, 23 L. J. Ch. 10 (1854); 1 DANIEL, CHANCERY PRACTICE, 6 Am. ed., 318, 319. See Y. B. 18 Hen. VI. 22 b.

<sup>33</sup> Graysbrook v. Fox, 1 Plowd. 275, 280; 2 Roll. Abr. 554; Prattle v. King, T. Jones, 169.

<sup>34</sup> Anon. 1 Roll. Abr. 917; Wankford v. Wankford, 1 Salk. 299, 303. Mitchell v. Smart, 3 Atk. 606 (1747).

<sup>35</sup> 1 DANIEL, CHANCERY PRACTICE, 6 Am. ed., 318, 319.

<sup>36</sup> See Morgan v. Thomas, 8 Exch. 302 (1853); Haselden v. Whitesides, 2 Strob. (S. C.) 353 (1847).

tor or next of kin to retain what he had received, unless he had changed his position before full knowledge of the breach of trust.<sup>37</sup>

Second, imagine that the administrator before appointment sells assets to (a) a fellow wrongdoer, or (b) acting as administrator to an innocent purchaser. The authorities are divided on the efficacy of relation back of a later acquired authority as a protection to the buyer. Some cases state the rule to be that, if the act of the administrator would have been rightful when done by a representative *de jure*, such protection will be granted.<sup>38</sup> Other authorities require for the validity of the transfer that the act be not prejudicial to the estate.<sup>39</sup> The latter rulings, while the cases do not carefully distinguish between different situations, tend in the right direction. On principle it would seem that all transactions with one whose only association with the decedent is a possibility of appointment as representative should be discouraged, for ordinarily such transactions are unnecessary. Therefore, one who buys knowing all the facts should derive no protection from a later appointment except to the extent that what he has paid the administrator is actually applied for the benefit of the estate.<sup>40</sup> So far as he pays less than full value, and so far as what he pays never reaches the creditors or next of kin, he should take the risk. This principle, however, must be qualified in the extreme case of perishable property sold for full value by one who in all likelihood will be appointed administrator.<sup>41</sup> The same risks should fall on one buying in ignorance of the absence of letters from a prospective administrator

<sup>37</sup> On change of position, see *infra*, page 344. If the donee was under the statute of distributions entitled to the payment relation back of the later appointment should validate the transfer, for the estate is not prejudiced. Compare note 39.

<sup>38</sup> *McDearmon v. Maxfield*, 38 Ark. 631 (1882); *Moore v. Wright*, 4 Ill. App. 443 (1879); *McClure v. People*, 19 Ill. App. 105 (1886); *Alvord v. Marsh*, 12 Allen (Mass.) 603 (1866); *Magner v. Ryan*, 19 Mo. 196 (1853); *Rattoon v. Overacker*, 8 Johns. (N. Y.) 126 (1811); *Outlaw v. Farmer*, 71 N. C. 31 (1874) (*semble*); *Casho v. Murray*, 47 Ore. 57, 81 Pac. 388, 883 (1905) (*semble*); *Vroom v. Van Horne*, 10 Paige (N. Y.) 549 (1844); *Cook v. Cook*, 24 S. C. 204 (1885); *Whitehall v. Squire*, 1 Salk. 295. See *The Globe Ins. Co. v. Gerisch*, 163 Ill. 625 (1896).

Some of these opinions state broadly that the later acquired appointment validates all prior acts. The facts of the cases, however, do not justify this generalization.

<sup>39</sup> See *Wilson v. Hudson*, 4 Harr. (Del.) 168 (1844); *Gilkey v. Hamilton*, 22 Mich. 283 (1871) (*semble*); *Bradbury v. Reynel*, Croke Eliz. 565; *Middleton's Case*, 5 Co. 28 b (*semble*); *Morgan v. Thomas*, 8 Exch. 302 (1853) (*semble*); *Doe d. Hornby v. Glenn*, 1 A. & E. 49 (1834).

<sup>40</sup> The same principles should apply to one who pays prematurely a debt due the estate.

<sup>41</sup> See *Tucker v. Whaley*, 11 R. I. 543 (1877); *Perkins v. Ladd*, 114 Mass. 420 (1874).



who purports to act in a representative capacity. It is a simple matter to-day for such a fiduciary to provide himself with a certified copy of his appointment by the probate court. In fact every businesslike administrator keeps on hand such a copy to facilitate transfers. The absence of authority should put on his guard every reasonable buyer. He who omits to take the simple precaution of demanding evidence of power should bear the burdens resulting from such neglect.<sup>42</sup>

Third, it may be supposed that the administrator sells as his own assets of the estate to an innocent buyer, and receives inadequate compensation. To the extent that the purchaser has profited it does not seem unjust that the administrator, when later appointed, should compel for the benefit of the estate a further payment. But if full value has been paid must the purchaser give back what he has received when the administrator has wasted the proceeds of the sale? It may be urged that the whole sale is a nullity as made by one who has no title. But this theory would abrogate entirely any doctrine of relation back. And such a doctrine does exist, and is entirely in accord with the spirit of the early administration statutes. Again, it may be said that the nearest analogy to the doctrine of relation back in administration is ratification of a quasi agent's act by a quasi principal, and that the first step in ratification is that the quasi agent act in the name of the quasi principal. And here *ex hypothesi* the administrator acted in his own name. But this limitation of ratification confines the logical but extreme doctrine of undisclosed principal within due bounds by preventing contracting parties from becoming liable to unexpected persons except in restricted cases. In administration the so-called ratification is through the appointment by a court of the very person who did the act, — the quasi agent and the quasi principal are the same, and very different considerations govern. It is merely a question whether a due regard for the rights of the estate require us to ignore the unfortunate situation of the purchaser. It seems fairer on the whole to protect the latter. The estate has many benefits from the doctrine of relation back, and should accept this burden, which, it may be noted, is not a real burden if the administrator's bond is adequate.<sup>43</sup>

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<sup>42</sup> See cases cited in notes 38 and 39.

<sup>43</sup> See cases cited in notes 38 and 39. The distinctions between the second and

An executor named in a will could act freely without appointment from the probate court. This followed naturally from the old notion that an executor took title from the will and not from the court.<sup>44</sup> So long as the will was at some time proved, even though the executor had previously died, his acts were valid.<sup>45</sup> In the United States, however, where the executor has to rely on his appointment from the court,<sup>46</sup> the rules in regard to administrators explained above should obtain. The old law is followed, however, in some states.<sup>47</sup> Other courts with more reason treat executors and administrators alike.<sup>48</sup>

#### REVOCATION OF PROBATE AND ADMINISTRATION

Where an executor under a forged will, or an administrator inadvertently appointed in derogation of a nearer relative of the deceased, has his appointment revoked by one entitled to administer, the law with good reason is well settled. If debtors to the estate have paid their debts to the first appointee who has then wasted the money, they are fully protected against another demand by the second appointee.<sup>49</sup> Likewise those who have purchased property of the estate as such for full value with no intent to spirit away the particular chattel or to allow the first representative to divert the proceeds to his own use should be entitled to keep what they have

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third groups of cases dealt with in the text is not clearly brought out either in the facts or the opinions of the authorities.

The administration bond required by Stat. 22 & 23 Car. II, c. 10, §§ 1-3, and by many of our statutes makes the administrator and sureties responsible for all "goods, chattels, and credits of the said deceased which *have* or shall come to the hands, possession, or knowledge of him."

<sup>44</sup> Dyer, C. J., in *Graysbrook v. Fox*, 1 Plowd. 275, 280; *Middleton's Case*, 5 Co. 28 b; *Wankford v. Wankford*, 1 Salk. 299, 301; *Roe v. Summerset*, 2 W. Bl. 692.

<sup>45</sup> *Brazier v. Hudson*, 8 Sim. 67 (1836); *Johnson v. Warwick*, 17 C. B. 516 (1856).

<sup>46</sup> 1 WOERNER, *AMER. LAW ADM.*, 2 ed., § 172.

<sup>47</sup> *Thiefes v. Mason*, 55 N. J. Eq. 456, 37 Atl. 1084 (1897); *Magwood v. Legge, Harp. (S. C.)* 116 (1824). See *Hogan v. Wyman*, 2 Oreg. 302 (1868); *Shoenberger v. Lancaster Savings Institution*, 28 Pa. 459 (1857).

<sup>48</sup> *Carter v. Carter*, 10 B. Mon. (Ky.) 327 (1850); *Pinkham v. Grant*, 78 Me. 158, 3 Atl. 179 (1886); *Gay v. Minot*, 3 Cush. (Mass.) 352 (1849); *Stagg v. Green*, 47 Mo. 500 (1871) (but see *Wilson v. Wilson*, 54 Mo. 213 (1873)); *People v. Barker*, 150 N. Y. 52, 44 N. E. 785 (1896); *Monroe v. James*, 4 Munf. (Va.) 194 (1814). See *Wall v. Bissell*, 125 U. S. 382 (1888); *Gardner v. Gantt*, 19 Ala. 666 (1851).

<sup>49</sup> *Allen v. Dundas*, 3 T. R. (1789) 125. And see *Mo. Pac. Ry. Co. v. Bradley*, 51 Neb. 596, 71 N. W. 283 (1897); *Zeigler v. Storey*, 220 Pa. 471, 69 Atl. 894 (1908); *Schluter v. Bowery Savings Bank*, 117 N. Y. 125, 22 N. E. 572 (1889).

bought.<sup>50</sup> And this is entirely independent of the disposition made by the administrator of the consideration received by him. There are plenty of analogies in the law to support the power of one who has no title, or a defeasible title, to transfer it. The registry acts allow a grantor of an unrecorded deed to A to transfer title which is in A to B, who without notice of A registers his document;<sup>51</sup> an agent without title may of course transfer it, even contrary to instructions;<sup>52</sup> a disseisor of land may convey title to crops which he has severed from the soil to a *bonâ fide* purchaser for value;<sup>53</sup> a pledgee by observing proper formalities may transfer the pledgor's title;<sup>54</sup> and, finally, the case of sale in market overt furnishes a common law analogy.<sup>55</sup> Indeed the position of the administrator is better than that of the seller in many of these cases; for he is acting under appointment of the court. He is not only a representative *de facto*, but *de jure*. And, though no case has been found clearly pointing this out, nothing should turn on whether the first appointee acted as a fiduciary or on his own behalf; he has title and can transfer it. The case of a distributee, however, is very different from that of a debtor paying his debt, or of a purchaser from the estate. They are volunteers; and, if they take under a forged will, or administration later revoked, they should disgorge in favor of the second administrator,<sup>56</sup> unless under principles of quasi contracts they have changed their position.

Hitherto it has been imagined that the grant of probate or administration has been in derogation of the right of one rightfully entitled to administration. Where the revocation is effected at the instance of one selected by the testator to wind up his estate, *i. e.*, an executor, the law was not so clear. The earliest case is *Y. B.*

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<sup>50</sup> BROOKE'S ABR. (1576) Tit. Administrators, 33; Packman's Case, 6 Co. 18 b; *Semine v. Semine*, 2 Lev. 90; *Boxall v. Boxall*, 27 Ch. D. 220 (1884). See *infra* American cases where grant is in derogation of will. Compare *Woolley v. Clark*, 5 B. & Ald. 744 (1822). In *Foulke v. Zimmerman*, 14 Wall. (U. S.) 113 (1871) and *Thompson v. Samson*, 64 Cal. 330 (1883), purchasers from distributees under the earlier appointment were protected.

<sup>51</sup> TIFFANY, REAL PROPERTY, § 476.

<sup>52</sup> WILLISTON, SALES, § 317.

<sup>53</sup> *Stockwell v. Phelps*, 34 N. Y. 363 (1866).

<sup>54</sup> JONES, COLLATERAL SECURITIES, 3 ed., § 603.

<sup>55</sup> WILLISTON, SALES, § 347.

<sup>56</sup> *Thompson v. Samson*, 64 Cal. 330, 30 Pac. 980 (1883); *Fallon v. Chidester*, 46 Iowa, 588 (1877); *In re West*, [1909] 2 Ch. 180.

7 Edw. IV, Trin. ff. 12, 13, where Littleton, J., with the concurrence of Newton and Danby, JJ., said:

"A man may make me his executor unknown to me etc. And then when I have become aware of it I may well take on myself the power of administration and disposition etc. And Sir the Ordinary may well grant administration in the meantime as he did here, but by the proving of the will the power of the administrator is determined unless the executor has refused some time before the Ordinary then perhaps the law will be otherwise."

In Fitzherbert's Abridgment (1565)<sup>57</sup> and Brooke's Abridgment (1576)<sup>58</sup> the passage is similarly cited. In Rolle's Abridgment (1668)<sup>59</sup> and in Viner's Abridgment (1753)<sup>60</sup> the same proposition is stated as follows:

"If a man makes an executor, but it is not known, or concealed, the Ordinary may grant administration, and this shall be good till the other prove the will. 7 Edw. 4, 12 f. 13."

But the leading case until recent years was *Graysbrook v. Fox*.<sup>61</sup> The plaintiff executor under the will of Kene brought detinue for chattels. The defendant pleaded that Kene died possessed of the chattels, that administration of his goods was granted, and that before probate of the will the administrator sold the goods to the defendant. The plaintiff's demurrer was sustained by Dyer, C. J., and Walsh, J.; Weston, J., dissenting.

Walsh, J., said:<sup>62</sup>

"And administrators are appointed if the Ordinary for his Ease, and to discharge himself of the burden of the office, and they take their Commencement by a spiritual Act viz. by the Letters of Administration, and have Authority over a Thing temporal. But the Executor takes his Commencement by a temporal Act, viz. by the making of the Will of the Testator, which is a temporal Act, but takes its perfection by a spiritual Act, viz. by Probate in the Spiritual Court, and the Executor's Authority is over a Thing temporal. But the Ordinary or Administrator have no Authority or interest, unless the deceased die intestate."

Lord Dyer said (p. 280 a):

"Then if the Law, immediately after the Death of the Testator, vests the Property and the Possession of his Goods in the Executor, from thence

<sup>57</sup> Administratours, par. 8.

<sup>58</sup> Page 907.

<sup>59</sup> Plowd. 275 (1565).

<sup>60</sup> Executors, par. III.

<sup>61</sup> Page 66.

<sup>62</sup> Page 279 a.

it follows that the Law never vests the Property in the Ordinary, and from thence it follows that the law never vests the property in the Administrator."

For this proposition the Chief Justice cites, however, Y. B. 7 Edw. IV, Trin. 12, which is, if anything, an authority in favor of the administrator. Walsh, J. (p. 282), with the concurrence of all his associates, later said:

"If the defendant here had averred that the Administrator had aliened the Goods to him for a certain Sum, and had employed the Money in Discharge of the Funeral, or of the Debts of the deceased, or about other Things which an executor should be forced to do, there the Sale for such Purposes should not be avoided, but should remain indefeasible; and the Reason is, because by the Commission of the Administration to him by the Ordinary, who was ignorant of the Testament, he has a Colour of Authority, though it is not a rightful one and he that has the Right suffers no Disadvantage although he be found by the Act of the Administrator, for it is no more than he himself was compellible to do."

It is difficult to see how this concession can be reconciled with the statement that the property was always in the executor and never in the administrator.

*Abram v. Cunningham*<sup>63</sup> went even further than *Graysbrook v. Fox*, when it held that title given by an administrator *de bonis non* was worthless as against the claim of an administrator to the executor. *Wolley v. Clark*<sup>64</sup> was an action by an executrix against the administrator and one to whom he sold goods after both had notice of the will which was later proved. The plaintiff was successful. But the element of notice differentiated the case from the earlier authorities. In *Boxall v. Boxall*,<sup>65</sup> through the suppression of a will containing no appointment of an executor, a grant of administration was secured and a sale made thereunder to one ignorant of the concealment. This sale was held to be good though the letters were later revoked. The omission of an executor from the will makes this case, too, distinguishable. The same may be said of *Craster v. Thomas*,<sup>66</sup> owing to the Indian Succession Act, 1865. But *Ellis v. Ellis*<sup>67</sup> was a clean case in support of *Graysbrook v. Fox*

<sup>63</sup> 2 Lew. 182.

<sup>64</sup> 5 B. & Ald. 744.

<sup>65</sup> 27 Ch. D. 220.

<sup>66</sup> [1909] 2 Ch. 348.

<sup>67</sup> [1905] 1 Ch. 613.

and *Abram v. Cunningham*, both of which had been cited as law in leading books.<sup>68</sup>

In spite of this line of cases there is a trend of authority leading in the other direction. The year book case is the earliest authority. Moreover the courts have held, as we have seen, that an administrator, or an executor under a forged will, can give a good discharge to the deceased's debtor.<sup>69</sup> And then there are the cases of administrations *durante minore aetate*, *pendente lite*, *durante absentia*, and *durante animi aut corporis vitio*.<sup>70</sup>

The administration *durante minore aetate* was recognized at common law in Piggot's case,<sup>71</sup> though later it rested in part on Stat. 38 Geo. 3, c. 87, § 6. It has not clearly been decided whether in the event of such an administrator selling not in due course of administration to one who purchases in good faith that an indefeasible title passes. But Williams states that it does;<sup>72</sup> and in the recent case of *In re Cope*<sup>73</sup> Jessel, M. R., said of such a representative

"The limit to his administration is no doubt the minority of the person, but there is no other limit. He is an ordinary administrator: he is appointed for the very purpose of getting in the estate, paying the debts, and selling the estate in the usual way; and the property vests in him."

An administration *pendente lite* when the controversy before the ordinary had to do with a will was once considered utterly void.<sup>74</sup> But it was held later that such an administrator could receive debts of the estate, though, indeed, it was said by way of *dictum* that the property in the goods was in the executor.<sup>75</sup> If the executor named in the will or the next of kin were out of the country the probate court had power to grant before probate obtained or letters issued an administrator *durante absentia*.<sup>76</sup> It has been held that an administrator *de bonis non cum testamento annexo durante absentia*

<sup>68</sup> 1 WILLIAMS, EXECUTORS, 10 ed., 461, 462. But see 1 WOERNER, AMER. LAW ADM., 2 ed., § 274.

<sup>69</sup> *Allen v. Dundas*, 3 T. R. 125 (1789); *Prosser v. Wagner*, 1 C. B. (N. S.) 289 (1856).

<sup>70</sup> Compare *Patton's Appeal*, 31 Pa. St. 465 (1858).

<sup>71</sup> 5 Rep. 29.

<sup>72</sup> 1 WILLIAMS, EXECUTORS, 10 ed., 393.

<sup>73</sup> 16 Ch. D. 49, 52.

<sup>74</sup> *Frederick v. Hook*, Carth. 153.

<sup>75</sup> *Walker v. Woollaston*, 2 P. Wms. 576, 588 (1731).

<sup>76</sup> *Clare v. Hedges*, 1 Lutw. 342.

could make a good title to leaseholds belonging to the estate.<sup>77</sup> In *Slater v. May*,<sup>78</sup> Chief Justice Holt said:

"that it was reasonable there should be such an administrator, and that this administration stood upon the same reason as an administration *durante minori aetate* of an executor, *viz.* that there should be a person to manage the estate of the testator, till the person appointed by him is able."

Administration may also be granted temporarily during the illness or lunacy of the executor;<sup>79</sup> or pending a search for a lost will;<sup>80</sup> or until the will should arrive from a foreign country.<sup>81</sup>

These administrations admit the principle of a power and, at least in the case of an administration *durante minore aetate*, a complete power, to deal with the estate even though there be an executor. The logical result of the holding in *Graysbrook v. Fox* would be to hold all these administrations void, "traps for the unwary."<sup>82</sup>

At length the law of England received a definite turn in the right direction in the recent case of *Hewson v. Shelley*<sup>83</sup> in the Court of Appeal. Letters were granted to the widow of a man who was erroneously supposed to have died intestate. The administratrix sold to a purchaser a portion of the deceased's real estate. A will was found and executors appointed. In an action by the executors to recover possession of the realty sold the Court of Appeal, reversing Astbury, J., who conceived himself bound by the earlier cases, held that the grant of administration was not void and that the purchaser had acquired a good title. Phillimore, J., after reviewing the earlier authorities said (p. 44):

"It seems to me that the true view is that till the Ordinary was concluded by probate he had for the benefit of all those interested, including, at any rate in ancient times, the soul of the deceased for the repose of which masses were to be provided, the power to commit administration and to pass the property thereby, subject to that administration being recalled and the power and title of the administrator determined upon production possibly, upon probate certainly, of a will. . . . It is not as if we were asked to decide that the mere discovery of a will avoided all the acts

<sup>77</sup> *Webb v. Kirby*, 3 Sm. & G. 333 (1856).

<sup>78</sup> 2 Ld. Raym. 1071.

<sup>79</sup> *Hills v. Mills*, 1 Salk. 36.

<sup>80</sup> *Goods of Wright*, [1893] P. 21; *Goods of Campbell*, 2 Hagg. 555 (1829).

<sup>81</sup> *Goods of Metcalfe*, 1 Add. 343 (1822).

<sup>82</sup> Phillimore, L. J., in *Hewson v. Shelley*, [1914] 2 Ch. 13, 44.

<sup>83</sup> [1914] 2 Ch. 13.

of the administrator. If the will names no executor, if the executor be dead leaving no executor, if he or his executor if he takes his place refuses to take out probate and accept the executorship, the title of the administrator would, I gather, confessedly prevail. Those who have purchased goods from an administrator may find their title depend on the caprice of an executor or of an executor's executor."

These observations are clearly sound and in accord with the prevailing view in this country,<sup>84</sup> where the notion that an executor took title from the court and not from the will has had with good reason considerable following.

Administration granted in a state where the deceased did not reside and left no effects is void.<sup>85</sup> Distributees and purchasers from the representative get no title, and are liable, though innocent, as converters. The decree of the probate court which has no jurisdiction may be attacked collaterally.<sup>86</sup> Likewise administration on the estate of a living person is void.<sup>87</sup> In the United States in

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<sup>84</sup> *Fidelity Co. v. Freeman*, 109 Fed. Rep. 847 (1901); *Floyd v. Clayton*, 67 Ala. 265 (1880); *Meek v. Allison*, 67 Ill. 46 (1873); *Martin v. Dix*, 134 Ga. 481 (1910); *Schluter v. Bowery Savings Bank*, 117 N. Y. 125, 22 N. E. 572 (1889); *Kittredge v. Folsom*, 8 N. H. 98 (1835); *Barkaloo v. Emerick*, 18 Ohio 268 (1849); *Patton's Appeal*, 31 Pa. 465 (1858); *Zeigler v. Storey*, 220 Pa. 471, 69 Atl. 894 (1908); *Foster v. Brown*, 1 Bailey L. (S. C.) 221 (1829); *Benson v. Rice*, 2 Nott. & McC. (S. C.) 577 (1820); *Price v. Nesbit*, 1 Hill Ch. (S. C.) 445 (1834); *Pinkerton v. Walker*, 3 Hayw. (Tenn.) 221 (1816); *Franklin v. Franklin*, 91 Tenn. 119, 18 S. W. 61 (1892). *Fallon v. Chidester*, 46 Iowa 588 (1877), *contra*. Compare *Waters v. Stickney*, 12 Allen (Mass.) (1866); *Besanson v. Brownson*, 39 Mich. 388 (1878); *Kelly v. Davis*, 37 Miss. 76 (1859); *Ragland v. Green*, 14 Sm. & M. (Miss.) 194 (1850).

In some states by statute all acts of a personal representative before revocation of his authority are as valid as if he had continued to execute his trust. CALIFORNIA, CODE CIV. PROC. (1916), § 1428; NORTH DAKOTA, COMP. LAWS (1913), § 8705; OHIO ANNOT. GEN. CODE (1912), § 10635; SOUTH DAKOTA, COMP. LAWS (1913) PROB. CODE, § 131; WISCONSIN, STATS. (1898), §§ 3815-17.

<sup>85</sup> *Insurance Co. v. Lewis*, 97 U. S. 682 (1878); *Thormann v. Frame*, 176 U. S. 350 (1900); *Perry v. St. Joseph, R. Co.*, 29 Kan. 420 (1883); *Thumb v. Gresham*, 2 Met. (Ky.) 306 (1859); *Hall v. L. & N. R. Co.*, 102 Ky. 480, 43 S. W. 698 (1897); *Moise v. Mutual Life Association*, 45 La. Ann. 736, 13 So. 170 (1893). Compare *Appeal of Willetts*, 50 Conn. 330 (1882); *Record v. Howard*, 58 Me. 225 (1870); *Hoes v. N. Y. N. H. & H. R. Co.*, 173 N. Y. 435, 66 N. E. 119 (1903); *Andrews v. Avory*, 14 Gratt. (Va.) 229 (1858).

On jurisdiction to establish a *devastavit* against an executor, see *Michigan Trust Co. v. Ferry*, 228 U. S. 346 (1913).

<sup>86</sup> See cases in preceding note.

<sup>87</sup> *Scott v. McNeal*, 154 U. S. 34 (1894); 1 WOERNER, AMER. LAW ADM., 2 ed., §§ 208-13.

Some states by statute provide for the appointment of a receiver of the effects



general the probate court of the county where the deceased last dwelt has jurisdiction. If the deceased dwelt in another state, the court of the county in which he left effects. And, if there are more than one of these, the county where jurisdiction is first taken.<sup>88</sup> In England since Stat. 20 & 21 Vict., c. 77, § 23 (1857), but one court has jurisdiction.<sup>89</sup> Grant of probate or administration in the wrong locality is voidable, not void.<sup>90</sup>

## REFUNDING

### I

An executor or administrator is never protected in paying legacies or shares when a present existing liability of the estate known to him is outstanding; nor will a court order such a distribution. With respect to debts or liabilities known to the representative which are not yet due or may never become due, the situation of the executor or administrator is a difficult one. The English practice has not been uniform. It was held in *Simmons v. Bolland*<sup>91</sup> that the executors could not be compelled without security to deliver over to a residuary legatee the whole of the estate when there was a possible future liability on covenants made by the deceased. The practice of giving security has disappeared, but the executor or administrator, if he distribute the assets under order of court in

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of an absentee, and a distribution of those effects after absence for a certain time. There is a division of opinion on the constitutionality of legislation of this sort. *Cunnius v. Reading School District*, 198 U. S. 458 (1905); *Nelson v. Blinn*, 197 Mass. 279, 83 N. E. 889 (1908); *Clapp v. Houg*, 12 N. D. 600, 98 N. W. 710 (1904); *Carr v. Brown*, 20 R. I. 215, 38 Atl. 9 (1897); *Selden v. Kennedy*, 104 Va. 826, 52 S. E. 635 (1906).

<sup>88</sup> 1 WOERNER, AMER. LAW ADM., 2 ed., § 204.

<sup>89</sup> For a description of jurisdiction of English probate courts prior to 1857, see 4 GRAY CAS. ON PROPERTY, 2 ed., 411-13.

<sup>90</sup> *Holmes v. Oregon & California Ry. Co.*, 5 Fed. 523 (1881); *Kling v. Connell*, 105 Ala. 590, 17 So. 38 (1894); *Irwin v. Scriber*, 18 Cal. 499 (1861); *Estate of Griffith*, 84 Cal. 107, 23 Pac. 528 (1890); *Tant v. Wigfall*, 65 Ga. 412 (1880); *Donahue v. Daniel*, 58 Md. 595 (1882); *McFeely v. Scott*, 128 Mass. 16 (under statute) (1879); *Johnson v. Beazley*, 65 Mo. 250 (1877); *Bolton v. Schriever*, 135 N. Y. 65 (1892); *Eller v. Richardson*, 89 Tenn. 575, 15 S. W. 650 (1891); *Burdett v. Silsbee*, 15 Tex. 604 (1855); *Fisher v. Bassett*, 9 Leigh (Va.) 119 (1869) (*semble*). *Miller v. Swan*, 91 Ky. 36, 14 S. W. 964 (1890); *Miltnerberger v. Favrot*, 21 La. Ann. 399 (1837); *People's Savings Bank v. Wilcox*, 15 R. I. 258, 3 Atl. 211 (1886), *contra*. And see *Slate's Estate*, 40 Ore. 349, 68 Pac. 399 (1902).

<sup>91</sup> 3 Mer. 547 (1817).

an administration suit, is fully protected.<sup>92</sup> The creditor, thus deprived of his right against the representative, still had a remedy against the legatees or distributees. In *Fletcher v. Stevenson*<sup>93</sup> the retention for possible future liability was put with good reason on the ground of a protection to the covenantee. But in a later case such retention was conceived to be for the benefit of the executor or administrator; and, as soon as it was held the decree of court protected him, the reason for the retention of assets seemed to disappear.<sup>94</sup> Accordingly it is the modern practice not to retain except in cases of leases where there is a privity between the executor and the lessor.<sup>95</sup>

Closely connected with the foregoing inquiry is the situation of an executor or administrator who pays legacies or distributive shares in ignorance of a present existing liability or of an obligation which may later mature. The law of England seems now clear that, unless the representative pays the beneficiaries under order of the court in an administration suit, he is liable to the creditor.<sup>96</sup> But if he secure the sanction of the court the creditor is without other remedy than to follow the assets in the hands of the legatees or distributees. This protection to the representative was a great inducement to him to resort to the Court of Chancery for an administration suit.<sup>97</sup> His position is further mitigated by Lord St. Leonard's Act,<sup>98</sup> allowing him after such notice as the Chancellor shall deem proper and the expiration of the time stated therein, to distribute the assets free from further molestation by indolent or belated creditors.

In the United States the question of presentation of claims is governed by statutes in general requiring the representative to give notice of his appointment and barring creditors who do not present their claims within a short period of limitation. The necessity of presenting contingent claims varies. The Massachusetts

<sup>92</sup> *March v. Russell*, 3 Myl. & Cr. 31 (1837); *Knatchbull v. Fearnhead*, 3 Myl. & Cr. 122 (1837); *Waller v. Barrett*, 24 Beav. 413 (1857).

<sup>93</sup> 3 Hare, 360 (1844).

<sup>94</sup> *King v. Malcott*, 9 Hare, 692 (1852); *Dodson v. Sammel*, 1 Dr. & Sm. 575 (1861).

<sup>95</sup> *In re Nixon*, [1904] 1 Ch. 638; *In re King*, [1907] 1 Ch. 72.

<sup>96</sup> *Norman v. Baldry*, 6 Sim. 621 (1834); *March v. Russell*, 3 Myl. & Cr. 31 (1837); *Knatchbull v. Fearnhead*, 3 Myl. & Cr. 122 (1837); *Waller v. Barrett*, 24 Beav. 413, 418 (1857).

<sup>97</sup> MAITLAND, *EQUITY*, 197.

<sup>98</sup> STAT. 22 & 23 VICT., c. 35, § 29.

Act<sup>99</sup> furnishes a reasonable solution. Three classes of debts are there defined. 1. Claims payable within the period of limitation. 2. Claims which with reasonable certainty will accrue thereafter. 3. Claims which may never become payable. A creditor whose right of action does not accrue within one year after giving the administration bond may present his claim at any time before final settlement, and, if the court find that the claim is or may become justly due, it shall order the representative to retain sufficient assets to satisfy it. The court has an option to take a suitable bond from those interested and pay over to them the assets. If such a claim is not so presented, all right to sue on it is lost both against the executor or administrator and legatees or distributees. Such a liability is a promissory note payable at a future date,<sup>100</sup> or a liability, which, though contingent, presents a fair chance of actual maturity.<sup>101</sup> On the other hand, the chance of holding the estate on the deceased's obligation as surety on a probate bond is so remote that it does not represent a claim which "is or may become justly due." It does not, therefore, require to be filed in court in order to save the rights of the creditor against the beneficiaries of the estate.<sup>102</sup> But of course there can be no claim against the executor personally if his final account has been allowed by the probate judge. This legislation protects the careful executor or administrator, and preserves the rights of the creditor so far as is consistent with not withholding too long the enjoyment of the property from those, who, after creditors, are entitled to it. The practice in Massachusetts has been followed more or less closely in some states.<sup>103</sup> In other jurisdictions every claim no matter how contingent must be presented within proper time or it is barred forever.<sup>104</sup> In Illinois

<sup>99</sup> REV. LAWS (1902), c. 141, §§ 9, 13, 26-32, as amended by ACTS (1914), c. 699.

<sup>100</sup> *Bassett v. Drew*, 176 Mass. 141, 57 N. E. 384 (1900).

<sup>101</sup> *Electric Welding Co. v. Fitz*, 215 Mass. 315, 102 N. E. 354 (1913).

<sup>102</sup> *Forbes v. Harrington*, 171 Mass. 386, 50 N. E. 641 (1898).

<sup>103</sup> MAINE, REV. STATS. (1903), c. 89, §§ 14-18; *Greene v. Dyer*, 32 Me. 460 (1851); *Sampson v. Sampson*, 63 Me. 328 (1874); *Pole v. Simmons*, 49 Md. 14 (1878); MICHIGAN, COMP. LAWS (1915), c. 234, §§ 20, 23, 25, 28; *Berryhill v. Peabody*, 72 Minn. 232, 75 N. W. 220 (1898); *Lake Phalen Co. v. Lindeke*, 66 Minn. 209, 68 N. W. 974 (1896); *Hunt v. Burns*, 90 Minn. 172, 95 N. W. 1110 (1903); NEBRASKA, REV. STATS. (1913), §§ 1409, 1412, 1413; *Libby v. Hutchinson*, 72 N. H. 190, 55 Atl. 547 (1903); OHIO, ANNOT. GEN. CODE (1912), §§ 10748, 10877-883; RHODE ISLAND, GEN. LAWS (1909), c. 318, §§ 19-25; VERMONT, PUB. STATS. (1906), c. 137, §§ 2912-20; WISCONSIN, STATS. (1915), §§ 3858-61, 3866-67; *Schmidt v. Grinzow*, 156 N. W. (Wis.) 143.

<sup>104</sup> ALASKA, CODES (1907), § 821; ARKANSAS, DIG. OF STATS. (1916), c. 1, § 110;

the statute is interpreted to mean that the claim is barred also against the legatees or distributees.<sup>106</sup> In some of these states it is expressly stated that the creditor is not barred if no notice was given by the personal representative, or if the creditor had no notice because he was out of the state.<sup>106</sup> In other of these states it will be seen that the construction of the statutes does not bar proceedings against beneficiaries who have been partially or wholly paid. In Connecticut,<sup>107</sup> Missouri<sup>108</sup> and North Carolina<sup>109</sup> the statute of non-claim runs from the maturity of the obligation.

## II

With these preliminary observations on the necessity of presentment one may examine the nature of the obligation of a legatee, distributee, or creditor to refund for the benefit of other legatees, distributees, or creditors payments received. Refunding by a beneficiary when creditors have been overlooked may be had at the suit of the personal representative. After conflicting *dicta* in the latter part of the seventeenth century<sup>110</sup> it was squarely held in *Davis v. Davis*,<sup>111</sup> "that an executor may bring a bill against a legatee to refund a legacy voluntarily paid, as well as a creditor; for the executor paying a debt of the testator out of his own pocket stands in the place of the creditor and has the same equity against a legatee

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ARIZONA, REV. STATS. (1913), CIV. CODE, §§ 882, 889; CAL. ANNOT. STATS. (1912), § 7996; FLORIDA, COMP. LAWS (1914), § 2405; GEORGIA, ANNOT. CODE (1914), § 3997; HAWAII, REV. LAWS (1915), § 2493; IDAHO, REV. CODES (1908), § 5462; ILLINOIS, ANNOT. STATS. (1913), § 119; MINNESOTA, GEN. STATS. (1913), § 7323; MONTANA, REV. CODES (1907), § 7760; NORTH DAKOTA, COMP. LAWS (1913), § 8736; OKLAHOMA, REV. LAWS (1910), § 6454; SOUTH DAKOTA, COMP. LAWS (1913), PROB. CODE, § 171; UTAH, COMP. LAWS (1907), § 3851; WASHINGTON, CODES & STATS. (1915), §§ 1472-79. Compare NEW JERSEY, COMP. STATS. (1910), § 3837; TENNESSEE, ANNOT. CODE (1917), § 4117.

<sup>106</sup> *Cutright v. Stanford*, 81 Ill. 240 (1876); *People v. Brooks*, 123 Ill. 246, 14 N. E. 39 (1887); *Snydacker v. Swan Land Co.*, 154 Ill. 220, 40 N. E. 466 (1895).

<sup>106</sup> ARIZONA, REV. STATS. (1913), CIV. CODE, § 1023; CALIFORNIA, CODE CIV. PROC. (1916), § 1650; IDAHO, REV. CODE (1908), § 5631; MONTANA, REV. CODES (1907), § 7660; NORTH DAKOTA, COMP. LAWS (1913), § 8736; OKLAHOMA, REV. LAWS (1910), § 6454.

<sup>107</sup> *Gay's Appeal*, 61 Conn. 445, 23 Atl. 829 (1892).

<sup>108</sup> *Burton v. Rutherford*, 49 Mo. 255 (1872).

<sup>109</sup> *Miller v. Shoaf*, 110 N. C. 319, 14 S. E. 800 (1892).

<sup>110</sup> *Hodges v. Waddington*, 2 Vent. 360; *Noell v. Robinson*, 2 Vent. 358; *Nelthrop v. Hill*, 1 Ch. Cas. 135, 136.

<sup>111</sup> 8 Vin. Abr. pl. 35 (1718).

to compel him to refund." This case has been followed in two English decisions where the personal representative has paid the legatee with no notice of the debt, or, where, though aware of a possible liability, reasonably felt it to be so uncertain as not to warrant withholding from the legatee his due.<sup>112</sup> In these three cases the representative had not secured a decree protecting him in distribution, and had been obliged to pay the creditor out of his own pocket. *Alexander v. Fisher*<sup>113</sup> squarely follows the last two English cases, and the principle of the English law is recognized in *Stokes v. Goodykoontz*<sup>114</sup> and *Lewis v. Overby*.<sup>115</sup> In *Buchanan v. Pue*<sup>116</sup> the executor who was not blameworthy secured a refund even before he had paid creditors.<sup>117</sup> If the payment is made under a mistake of law, it would seem that generally recovery would not be allowed.<sup>118</sup> A few jurisdictions, which, with more reason, make no distinction between mistake of fact and mistake of law compel the beneficiary to disgorge.<sup>119</sup> In the United States the personal representative must have acted prudently in distributing the property or he will not be allowed to recover.<sup>120</sup>

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<sup>112</sup> *Jervis v. Wolferstan*, L. R. 18 Eq. 18 (1874); *Whittaker v. Kershaw*, 45 Ch. D. 320 (1890).

<sup>113</sup> 18 Ala. 374 (1850).

<sup>114</sup> 126 Ind. 535, 26 N. E. 391 (1890).

<sup>115</sup> 31 Gratt. (Va.) 601, 622 (1879).

<sup>116</sup> 6 Gill. (Md.) 112 (1847).

<sup>117</sup> In the cases in which the representative has sued successfully it has generally appeared that he had already paid the creditor who had been overlooked. The language of several of the opinions assumes, however, that he could recover by way of exoneration as well as by way of reimbursement. See also *Wolf v. Beaird*, 123 Ill. 585, 15 N. E. 161 (1888); *Morris v. Porter*, 87 Me. 510, 33 Atl. 15 (1895); *Walker v. Hill*, 17 Mass. 380 (1821).

<sup>118</sup> *Phillips v. McConica*, 59 Ohio St. 1, 51 N. E. 445 (1898); *Scott v. Ford*, 52 Oreg. 288, 97 Pac. 99 (1908); *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660 (1887); *Rogers v. Ingham*, 3 Ch. D. 351 (1876).

<sup>119</sup> See *Northrop v. Graves*, 19 Conn. 548 (1849); *Culbreath v. Culbreath*, 7 Ga. 64 (1849). Compare *Prince, de Bearn v. Winans*, 111 Md. 434, 74 Atl. 626 (1909); *Livesey v. Livesey*, 3 Russ. 287 (1827); *Dibbs v. Goren*, 11 Beav. 483 (1849).

<sup>120</sup> See *Clifton v. Clifton*, 54 Fla. 535, 45 So. 458 (1907); *Clark v. Truslow*, 161 App. Div. 675, 146 N. Y. Supp. 750 (1914); *Donnell v. Cooke*, 63 N. C. 227 (1869); *Clark v. Williams*, 70 N. C. 679 (1874); *McEndree v. Morgan*, 31 W. Va. 521, 531, 8 S. E. 285 (1888). See *Harris v. White*, 2 South (N. J.) 422 (1819); *Edgar v. Shields*, 1 Grant (Pa.) 361 (1856). But compare *Atwood v. Lester*, 20 R. I. 660, 40 Atl. 866 (1898); *Wetmore v. Porter*, 92 N. Y. 76 (1883). And in the case of a trust, the trustee guilty of a conscious breach of trust, may without joining the *cestui que trust* bring a bill in equity against the transferee to set aside the transfer and recover the *res*. *Franco*

Of course the representative, who, even *bonâ fide*, pays legacies without protection of a court order, is liable to creditors for a *devastavit*, if the assets later prove insufficient to meet their demands.<sup>121</sup> Do the creditors also have a direct right against the legatees who have received more than their equitable share? This liability of beneficiaries was early settled in the English law.<sup>122</sup> And it is not necessary to-day to join the personal representative.<sup>123</sup> Furthermore the right of the creditor is inferentially recognized in Lord St. Leonard's Act (1859).<sup>124</sup> In the United States the right of the belated creditor to proceed directly against the legatee or distributee is clearly settled, unless as in Illinois the statute of presentment in terms or by construction bars him.<sup>125</sup> There is clearly a right in equity, as many of the foregoing decisions show. The suit was at law in *McClure v. Dee*, *supra*; *Rohrbaugh v. Hamblin*, *supra*; *Johnson v. Libby*, *supra*; *South Milwaukee Co. v. Murphy*, *supra*. An action at law was denied in *Hendricks v. Keeser*.<sup>126</sup>

The right of the creditor to proceed directly against the benefi-

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*v. Franco*, 3 Ves. Jr. 75 (1796); *Greenwood v. Wakeford*, 1 Beav. 576 (1839); *Robinson v. Evans*, 7 Jur. 738 (1843); *Baynard v. Woolley*, 20 Beav. 583 (1855); *Carson v. Sloane*, L. R. 13 Ir. 139 (1884); *Zimmerman v. Kinkle*, 108 N. Y. 282, 15 N. E. 407 (1888); *Abbott v. Reeves*, 49 Pa. 494 (1865); *Mansfield v. Wardlow*, 91 S. W. 859 (Tex. Civ. App.) (1905).

<sup>121</sup> 2 WILLIAMS, EXECUTORS, 10 ed., 1078, 1436; *Knatchbull v. Fearnhead*, 3 Myl. & Cr. 122 (1837); *Clegg v. Rowland*, L. R. 3 Eq. 368 (1866).

<sup>122</sup> *Anon.*, 1 Vern. 162 (1683); *Hodges v. Waddington*, 2 Vent. 360 (1795); *Gillespie v. Alexander*, 3 Russ. Ch. 130, 136, 137 (1826); *March v. Russell*, 3 Myl. & Cr. 31 (1837); *In re Eustace*, [1912] 1 Ch. 561.

<sup>123</sup> *Hunter v. Young*, 4 Exch. D. 256 (1879).

<sup>124</sup> STAT. 22 & 23 VICT., c. 35, § 29.

<sup>125</sup> *Hall v. Brewer*, 40 Ark. 433 (1883); *Gibson v. Mitchell*, 16 Fla. 519 (1878); *Blair v. Allen*, 55 Ind. 409 (1876); *Stevens v. Tucker*, 87 Ind. 109 (1882); *Security Fire Ins. Co. v. Hansen*, 104 Iowa, 264, 73 N. W. 596 (1897); *McClure v. Dee*, 115 Iowa, 546, 88 N. W. 1093 (1902); *Rohrbaugh v. Hamblin*, 57 Kan. 393, 46 Pac. 705 (1896); *Johnson v. Libby*, 111 Me. 204, 88 Atl. 647 (1913); *Forbes v. Harrington*, 171 Mass. 386, 50 N. E. 641 (1898); *Hantzsch v. Massolt*, 61 Minn. 361, 63 N. W. 1069 (1895); *Walker v. Deaver*, 79 Mo. 664 (1883); *Hall v. Martin*, 46 N. H. 337 (1865); *Chitty v. Gillett*, 46 Okla. 724, 148 Pac. 1048 (1915); *South Milwaukee Co. v. Murphy*, 112 Wis. 614, 88 N. W. 583 (1908).

In some states the right of the creditor is recognized by statute, see ALABAMA, CODE (1907), § 2785; INDIANA, ANNOT. STATS. (1914), §§ 2831-32; MASSACHUSETTS, REV. LAWS (1902), c. 135, § 27; ACTS (1914), c. 699; MICHIGAN, COMP. LAWS (1915), c. 234, c. 56, § 20; NEBRASKA, REV. STATS. (1913), § 1409; OHIO, ANNOT. GEN. CODE, §§ 10748, 10877-883; RHODE ISLAND, GEN. LAWS (1909), c. 318, §§ 19-25; VERMONT, PUB. STATS. (1906), c. 137, § 2915; WISCONSIN, STATS. (1915), § 3861.

<sup>126</sup> 32 Ark. 714 (1878).

ciary seems entirely defensible both at law or in equity, despite his alternative right to hold the personal representative for a *devastavit*.<sup>127</sup> The legatee holds without consideration what is equitably due the creditor; he is unjustly enriched at the latter's expense. This right, too, should be the only way of enforcing the interest of the creditor. To allow the personal representative to recover for the person best entitled and a second action by the latter against the representative is circuitous. The executor's or administrator's right should exist only when he has been obliged to make the creditor whole, and is, therefore, the real party in interest. And when he is the real party in interest the representative should secure a refund, unless, indeed, he has paid with conscious disregard of a claim due and payable or reasonably sure to become payable. No equitable or quasi-contractual principle allows recovery where such a flagrant violation of duty occurs. So far as his interest is concerned he has made in effect a pure gift, though of course this cannot prejudice the creditor's direct right against the overpaid beneficiary. Yet if the plaintiff has been merely negligent, he should recover both in equity and at law. The defendant has something for which he has paid nothing, and which after the plaintiff has been mulcted by the creditor for *devastavit* equitably belongs to the representative. If the creditor's right is unknown to the personal representative at the time of payment, the situation is analogous to those cases where money paid under a mistake of a present existing fact may be recovered.<sup>128</sup> If payment is made when the existence of a contingent claim is known, but is thought too doubtful of maturity to be regarded, the creditor should nevertheless recover. It is as inequitable for the beneficiary to keep the money when he has received it under an erroneous impression as to the future, as where a mutual mistake as to the present has induced the payment.<sup>129</sup> The liability at law is in the common

<sup>127</sup> See the analogous case of *cestui que trust's* remedy against donee of trust *res*. PERRY, TRUSTS, 6 ed., §§ 217, 225, 346, 828; AMES, LECTURES ON LEGAL HISTORY, 255; 27 COL. L. REV. 283.

<sup>128</sup> KEENER, QUASI CONTRACTS, c. 2.

<sup>129</sup> Compare cases where one party has been allowed to recover money paid under a contract in return for a promise which the other party has wholly failed to perform. *Towers v. Barrett*, 1 T. R. 133 (1786); *Squire v. Tod*, 1 Camp. 293 (1808); *Nash v. Towne*, 5 Wall. (U. S.) 689 (1866); *Janulewycz v. Quagliano*, 88 Conn. 60, 89 Atl. 897 (1914); *Trenkle v. Reeves*, 25 Ill. 214 (1860); *Lodi v. Goyette*, 219 Mass. 72, 106 N. E. 1012 (1914); *Vallentyne v. Immigration*, 95 Minn. 195, 103 N. W. 1028 (1905);

counts, and is purely quasi contractual. According to principles of quasi contracts negligence of the plaintiff is no defense.<sup>130</sup> The same rule should apply in equity, though here the authorities are not so clear that negligence of the plaintiff does not bar him.<sup>131</sup>

### III

The law of both countries is more favorable to the defendant when refund is demanded of a beneficiary to reimburse a legatee or distributee who has not received his due. If the executor or administrator sues, he cannot recover if he paid voluntarily—not under compulsion of suit. The distinction is not taken between cases where he pays under a misapprehension as to the existence of other beneficiaries or as to the size of the fund at his disposal on the one hand, and where on the other hand he disburses with full knowledge of law and facts. As some judges put it, whenever an executor pays a legacy the presumption is that he has sufficient assets to pay all.<sup>132</sup> In *Montgomery's Appeal*,<sup>133</sup> the court, in a case where the executor sought a refund for creditors, said:

"When an administrator pays out money, he is presumed to know the condition of the estate. The assets are in his hands, and he is familiar

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*Brokaw v. Duffy*, 165 N. Y. 391, 59 N. E. 196 (1901); *Ohio Trust Co. v. Allison*, 243 Pa. 201, 89 Atl. 1137 (1914).

And cases where the defendant has been compelled to restore what he has received upon his repudiation of the contract though he has not actually failed to perform it. *Drake v. Goree*, 22 Ala. 409 (1853); *Smith v. Jaccard*, 20 Cal. App. 280, 128 Pac. 1023 (1912); *Ryan v. Dayton*, 25 Conn. 188 (1856); *Elder v. Chapman*, 176 Ill. 142, 52 N. E. 10 (1898).

And cases where after partial or complete performance on the part of the plaintiff he has been allowed to recover what he has parted with upon the defendant's performance becoming excusably impossible. *The Allanwilde*, 247 Fed. 236 (1917); *Bibb v. Hunter*, 2 Duv. (Ky.) 494 (1866); *Butterfield v. Byron*, 153 Mass. 517, 27 N. E. 667 (1891); *Joyce v. Adams*, 8 N. Y. 291 (1853); *Williams v. Allen*, 10 Hump. (Tenn.) 337 (1849); *Logan v. Le Mesurier*, 6 Moo. P. C. 116 (1847); *Krell v. Henry*, 18 T. L. Rep. 823 (1902); *Lumsden v. Barton*, 19 T. L. Rep. 53 (1902) (*semble*). Compare *Alfred Marks Realty Co. v. Hotel Hermitage*, 156 N. Y. Supp. 179 (1915).

<sup>130</sup> *Kelly v. Solari*, 9 M. & W. 54 (1841); *Appleton Bank v. McGilvray*, 4 Gray (Mass.) 518 (1855). See *infra*, page 340.

<sup>131</sup> 2 POMEROY, *EQUITABLE JURISDICTION*, § 856.

<sup>132</sup> *Newman v. Barton*, 2 Vern. 205 (1690); *Orr v. Kaines*, 2 Ves. Sr. 194 (1750-51); *Coppin v. Coppin*, 2 P. Wms. 291, 296 (1725). See *Davis v. Newman*, 2 Rob. (Va.) 664 (1844). But compare *Gallego v. Atty. Gen.*, 3 Leigh (Va.) 450, 488 (1832); *Northrop v. Graves*, 19 Conn. 548 (1849); *Culbreath v. Culbreath*, 7 Ga. 64 (1849).

<sup>133</sup> 92 Pa. 202, 206 (1879).



with their amount and value. He ought to know, and is chargeable with knowledge, of the amount of claims against the estate when he makes a payment on account of a distributive share. It would be a great hardship upon distributees, to whom an administrator has voluntarily made payments on account of their shares, if they may be called upon for repayment after lapse of years. They may have spent it, or increased their style of living in entire good faith, and in ignorance of any overpayment."

Here it is not clear whether the court rests its decision on the "voluntary" character of the payment or on change of position of the defendant. If, however, the executor paid under compulsion of suit, the English law allowed him to recover for the benefit of other legatees.<sup>134</sup>

The legatee or distributee who sued the overpaid beneficiary neither in England nor this country had as easy a path as the claimant who was a creditor. The beneficiary must first exhaust the personal representative. If the latter had protected himself by paying under order of court or was insolvent, the beneficiary, provided the assets were originally insufficient to pay his legacy, had indeed a right to demand relief.<sup>135</sup> But if the assets, originally sufficient, had after payment to the defendant been accidentally destroyed, or wasted by the personal representative, the belated beneficiary had no remedy against the more diligent.<sup>136</sup>

The use of the term "voluntary" is unfortunate and misleading. The personal representative is in just as unfortunate a position whether he pays without compulsion of suit or at the end of a judgment. If "voluntary" means a payment, when all the facts are before the payer and the right of the other beneficiaries than the one paid is clear, the result is well enough. There is in effect a pure gift. While the payer cannot then cut off without their consent the defrauded legatees or distributees, he loses his right to

<sup>134</sup> *Newman v. Barton*, 2 Vern. 205 (1690); *Orr v. Kaines*, 2 Ves. Sr. 194 (1750); *Noell v. Robinson*, 2 Vent. 358 (*semble*); *Davis v. Newman*, 2 Rob. (Va.) 664 (1844) (*semble*).

<sup>135</sup> *Anon.*, 1 P. Wms. 495 (1718); *Walcott v. Hall*, 1 P. Wms. 495 n (*semble*); *Lupton v. Lupton*, 2 Johns. Ch. (N. Y.) 614 (1817); *Miller v. Stark*, 29 S. C. 325, 7 S. E. 501 (1888); *Uffner v. Lewis*, 27 Ont. App. 242 (1900).

<sup>136</sup> *Walcott v. Hall*, 1 P. Wms. 495 n; *Fenwick v. Clarke*, 31 L. J. Ch. 728 (1862); *Peterson v. Peterson*, L. R. 3 Eq. 111 (1866); *Lupton v. Lupton*, 2 Johns. Ch. (N. Y.) 614 (1817); *Story*, Equity Jurisprudence, § 92. But see *Wallace v. Latham*, 52 Miss. 291 (1876); *Buffalo Trust Co. v. Leonard*, 154 N. Y. 141, 47 N. E. 966 (1897).

reimbursement if they choose to charge him. But grammatically a payment made under a mistake of fact is a voluntary payment, and yet of course money so paid can be recovered. The words "involuntary" and "voluntary" have been often used by judges as a test of recovery quasi contractually, and have caused endless confusion.<sup>137</sup> The word "voluntary" furnishes no accurate guide for nonrecovery. As Baron Martin said of an overpayment of fees to a parish clerk for extracts made from the register of burials and baptisms, "this is more like the case of money paid without consideration — to call it a voluntary payment is an abuse of language."<sup>138</sup> In Pollock on Contracts,<sup>139</sup> the learned author remarks of money paid under circumstances of compulsion:

"But in all these cases the foundation of the right to recover back the money is not the involuntary character of the payment in itself, but the fact that the party receiving it did no more than he was bound to do already, or something for which it was unlawful to take money if he chose to do it, though he had his choice in the first instance. Such payments are then regarded as made without consideration. The legal effect of their being practically involuntary, though important, comes in the second place: the circumstances explain and excuse the conduct of the party making the payment. Similarly in the kindred case of a payment under mistake the actual foundation of the right is the failure of consideration, and ignorance of material facts accounts for the payment being made."

There seems no reason why the right of the personal representative here should not be the same as where a creditor, not a legatee or distributee, has been overlooked.

If a legatee or distributee is suing the beneficiary directly his right is more restricted than the creditor in two respects. First, it is stated that he must first exhaust the personal representative, unless perhaps the latter is insolvent.<sup>140</sup> For this there seems no adequate reason. The unsatisfied legatee or beneficiary, is just as much entitled to sue directly as the unsatisfied creditor. The

<sup>137</sup> See *Brown v. McKinally*, 1 Esp. 64 (1795); *Heiserman v. Burlington Ry. Co.*, 63 Iowa, 732, 18 N. W. 903 (1884); *Ill. Glass Co. v. Chicago Tel. Co.*, 234 Ill. 525, 85 N. E. 200 (1908); 3 ILL. L. REV. 235.

<sup>138</sup> *Steele v. Williams*, 8 Exch. 625, 632 (1853).

<sup>139</sup> 3 Am. ed. 732.

<sup>140</sup> *Orr v. Kaines*, 2 Ves. Sr. 194 (1750); 1 ROPER, LEGACIES, 3 ed., 399. See *Miller v. Stark*, 29 S. C. 325, 7 S. E. 501 (1888).

unjust enrichment of the beneficiary is as clear in one case as in the other. The distinction is simply indefensible. Second, if the assets were originally sufficient to satisfy all legacies, but were subsequently wasted by act of the personal representative or otherwise, the legatee already paid may keep. The reason commonly given is that a dilatory beneficiary should not prejudice a more diligent who may have spent the bounty. If this means anything, it represents a combination of the defenses of laches and change of position. It is a sufficient answer to say that if there has been change of position by the defendant before notice in any of the cases where a refund is demanded it should be a complete defense both at law or in equity.<sup>141</sup> But what of the many cases where there has been no change of position? The laches of the plaintiff should then not bar him. The defendant, if he disgorge what he has received or its equivalent, suffers no loss, for he has merely given up that which he has been holding without consideration and which would have gone to another had it not been for his windfall. Other decisions are put on the ground that the satisfied beneficiary has received no more than what was due him.<sup>142</sup> But until every beneficiary is paid his share, it is only fair that each should bear proportionately the loss caused by depreciation of assets in the hands of the representative due to causes to which they are not parties.

#### IV

If an executor or administrator sues an overpaid creditor where the assets have unexpectedly proved deficient for the payment of creditors, he may recover.<sup>143</sup> No case has been found where an unsatisfied creditor proceeded against an overpaid creditor. But upon principles considered above the right should exist.

<sup>141</sup> See *infra*, page 344.

<sup>142</sup> *Lupton v. Lupton*, 2 Johns. Ch. (N. Y.) 614, 626 (1817); *Walcott v. Hall*, 1 P. Wms. 495, note.

<sup>143</sup> *Mansfield v. Lynch*, 59 Conn. 320, 22 Atl. 313 (1890) (*semble*); *Wolf v. Beaird*, 123 Ill. 585, 15 N. E. 161 (1888); *East v. Ferguson*, 59 Ind. 169 (1877); *Tarplee v. Capp*, 25 Ind. App. 56, 56 N. E. 270 (1900) (but see *Beardsley v. Marsteller*, 120 Ind. 319, 22 N. E. 315 (1889)); *Morris v. Porter*, 87 Me. 510, 33 Atl. 15 (1895); *Walker v. Hill*, 17 Mass. 380 (1821); *Heard v. Drake*, 4 Gray (Mass.) 514 (1855); *Woodruff v. Claffin Co.*, 198 N. Y. 470, 91 N. E. 1103 (1910); *Rogers v. Weaver*, 5 Ohio, 536 (1832); *Thorsen v. Hooper*, 57 Oreg. 75, 109 Pac. 388 (1910). *Carson v. M'Farland*, 2 Rawle (Pa.) 118 (1828); *Findlay v. Trigg*, 83 Va. 539, 3 S. E. 401 (1887); *Staples v. Staples*, 85 Va. 76, 7 S. E. 197 (1888), *contra*.

## V

It remains to consider certain principles affecting all situations hitherto dealt with in refunding.

Negligence, or laches of the plaintiff in itself, unaccompanied by other circumstances such as change of position of defendant, in England properly constitutes no defense.<sup>144</sup> The American law is not so clear.<sup>145</sup> In other branches of the law of mistake it is often remarked that negligence or at least gross negligence will bar the plaintiff.<sup>146</sup> But Pomeroy says that each instance of negligence must depend on its own circumstances; and that even a clearly established negligence may not be ground for refusing relief if the other party is not prejudiced thereby.<sup>147</sup> And this statement has been quoted with approval or similar statements made in the cases.<sup>148</sup> At law in cases of mistake it is clear that negligence without more does not prejudice the plaintiff.<sup>149</sup> Generally delay in ap-

<sup>144</sup> *Ridgway v. Newstead*, 3 De G. F. & J. 474 (1861); *Blake v. Gale*, 32 Ch. D. 571 (1886). *In re Eustace*, [1912] 1 Ch. 561.

<sup>145</sup> In *Wallace v. Swepston*, 74 Ark. 520, 528, 86 S. W. 398 (1905), the unpaid creditor failed because "After this long lapse of time and the changes in the status of the parties, it seems to us to be inequitable to permit appellee to disturb the heirs." Here change of position seems to have influenced the decision as much as delay. But see *Wilson v. Smith*, 117 Fed. 707 (Pa.) (1902).

<sup>146</sup> *Duke of Beaufort v. Neeld*, 12 Cl. & F. 248, 286 (1845); *Leuty v. Hillas*, 2 De G. & J. 110 (1858); *Besley v. Besley*, L. R. 9 Ch. D. 103 (1878); *Earl v. Van Natta*, 29 Ind. App. 532, 64 N. E. 475 (1902); *Citizen's Bank v. Judy*, 146 Ind. 322, 43 N. E. 259 (1896); *Diman v. Providence R. R.*, 5 R. I. 130 (1858); *Voorhis v. Murphy*, 26 N. J. Eq. 434 (1875); *Dillett v. Kemble*, 25 N. J. Eq. 66 (1874); *Wood v. Patterson*, 4 Md. Ch. 335 (1850); *Capehart v. Mhoon*, 5 Jones Eq. 178 (1859); *Lewis v. Lewis*, 5 Ore. 169 (1874).

<sup>147</sup> 2 POMEROY, EQ. JURIS., 3 ed., § 856.

<sup>148</sup> *Bush v. Bush*, 33 Kan. 556, 563; *Kinney v. Ensminger*, 87 Ala. 340, 6 So. 72 (1888); *Seeley v. Bacon*, 34 Atl. (N. J.) 139 (1896); *Collignon v. Collignon*, 52 N. J. Eq. 516, 28 Atl. 794 (1894); *Southern F. & W. Co. v. Ozment*, 132 N. C. 839, 44 S. E. 683 (1903); *Powell v. Heisler*, 16 Ore. 412, 19 Pac. 109 (1888); *San Antonio Nat. Bank v. McLane*, 96 Tex. 48, 70 S. W. 201 (1902).

<sup>149</sup> *Kelly v. Solari*, 9 M. & W. 54 (1841); *Townsend v. Crowdy*, 8 C. B. (N. S.) 477 (1860); *Brown v. Tillinghast*, 84 Fed. 71 (1897); *Merrill v. Brantly*, 133 Ala. 537, 31 So. 847 (1901); *Devine v. Edwards*, 101 Ill. 138 (1881); *Brown v. College Road Co.*, 56 Ind. 110 (1877); *Fraker v. Little*, 24 Kan. 598 (1880); *First Nat. Bank v. Behan*, 91 Ky. 560, 16 S. W. 368 (1891); *Baltimore R. R. Co. v. Faunce*, 6 Gill (Md.) 68 (1847); *Pingree v. Mutual Gas Co.*, 107 Mich. 156, 65 N. W. 6 (1895); *Koontz v. Central Nat. Bank*, 51 Mo. 275 (1873); *Bone v. Friday*, 180 Mo. App. 577, 167 S. W. 599 (1914); *Douglas County v. Keller*, 43 Neb. 635, 62 N. W. 60 (1895); *Waite v. Leggett*, 8 Cow. (N. Y.) 195 (1828); *Hathaway v. County of Delaware*, 185 N. Y. 368, 370, 78 N. E. 153 (1906); *Simms v. Vick*, 151 N. C. 78, 65 S. E. 621 (1909); *James River Bank v.*

plication for relief from error is a defense only if it is accompanied by circumstances prejudicing the defendant.<sup>150</sup> It is often said that the right to set aside a fraudulent bargain must be exercised with reasonable promptness after discovery of the fraud.<sup>151</sup> But "the question of how much time a party to a contract has permitted to elapse is not necessarily determinative of the right to rescind, the immediate consideration being whether the period has been long enough to result in prejudice to the defendant."<sup>152</sup> The

Weber, 19 N. D. 702, 124 N. W. 952 (1910); McKibben v. Doyle, 173 Pa. 579, 34 Atl. 455 (1896); City Nat. Bank v. Peed, 32 S. E. 34 (Va.) (1899). But see Grymes v. Sanders, 93 U. S. 55 (1876); Stanley Rule Co. v. Bailey, 45 Conn. 464 (1878); Norton v. Marden, 15 Me. 45 (1838); Ash v. McLellan, 101 Me. 17, 62 Atl. 598 (1905); Wheeler v. Hathaway, 58 Mich. 77, 24 N. W. 780 (1885); Brummitt v. McGuire, 107 N. C. 351, 12 S. E. 191 (1890); First Nat. Bank v. Taylor, 122 N. C. 569, 29 S. E. 831 (1898); Simmons v. Looney, 41 W. Va. 738, 24 S. E. 677 (1896).

<sup>150</sup> Newman v. Milner, 2 Ves. Jr. 483 (1794); Grymes v. Sanders, 93 U. S. 55 (1876); Kinney v. Consolidated Virginia Min. Co., 4 Sawyer (U. S. C. C.) 382 (1877); Paulison v. Van Iderstine, 28 N. J. Eq. 306 (1877); Holt v. Ruleau, 102 Atl. 934 (Vt.) (1918); Sable v. Maloney, 48 Wis. 331, 4 N. W. 479 (1880); Van Brunt v. Ferguson, 163 Wis. 540, 158 N. W. 295 (1916).

<sup>151</sup> Clough v. London, etc. Ry. Co., L. R. 7 Exch. 26 (1871); Upton v. Tribilcock, 91 U. S. 45 (1875); Pence v. Langdon, 99 U. S. 578 (1878); Mudsill Mining Co. v. Watrous, 61 Fed. 163 (1894); Blank v. Aronson, 187 Fed. 241 (1911); Bowden v. Spellman, 59, Ark. 251, 27 S. W. 602 (1894); Board of Water Comm'rs v. Robbins, 82 Conn. 623, 74 Atl. 938 (1909); Cedar Rapids Ins. Co. v. Butler, 83 Iowa, 124, 129, 48 N. W. 1026 (1891); Nichols & Shepard Co. v. Wheeler, 150 Ky. 169, 150 S. W. 33 (1912); Byrd v. Rautman, 85 Md. 414, 36 Atl. 1099 (1897); Boles v. Merrill, 173 Mass. 491, 53 N. E. 894 (1899); Barnard v. Campbell, 58 N. Y. 73 (1874); Ditton v. Purcell, 21 N. Dak. 648, 132 N. W. 347 (1911); Robinson v. Roberts, 20 Okla. 787, 95 Pac. 246 (1908); Koehler v. Dennison, 72 Ore. 362, 143 Pac. 649 (1914).

<sup>152</sup> Brown v. Young, 62 Ind. App. 364, 374 (1916). And see Basye v. Paola Refining Co., 79 Kan. 755, 101 Pac. 658 (1909); Armstrong v. Jackson, [1917] 2 K. B. 822, 830. In Roberts v. James, 83 N. J. L. 492, 495, 496, 85 Atl. 244 (1912), Judge Swayze said: "It is also settled that one who desires to rescind a contract, must act within a reasonable time. Dennis v. Jones, 17 Stew. Eq. 513; Clappitt v. Doyle, 3 Buch. 678. What is a reasonable time necessarily depends on the circumstances of each particular case. It is settled in the English courts that unless the situation of the other party has changed to his detriment, the contract continues until the party defrauded elects to avoid it, and he may keep the question open as long as he does nothing to affirm the contract. Clough v. London and Northwestern Railway (1871), L. R. 7 Ex. 26, 41 L. J. Exch. 17; Morrison v. Universal Marine Insurance Co. (1873), L. R. 8 Ex. 197, 42 L. J. Exch. 115; United Shoe Machinery Co. of Canada v. Brunet (1909), A. C. 330. He may even wait until action is brought against him (Clough v. London and Northwestern Railway, *ubi supra*), and a plea setting up the fraud amounts to a rescission of the contract. Lawton v. Elmore, 27 L. J. Ex. 141; Dawes v. Harness, L. R. 10 C. P. 166, 44 L. J. C. P. 194; Aaron's Reefs v. Twiss (1896), A. C. 273, 65 L. J. P. C. 54. The case last cited was an action by a company against

right to rescind a contract for repudiation or substantial breach by the other contracting party is frequently stated to depend upon its exercise without undue delay.<sup>153</sup> It has been pointed out, however, that in many of these cases the facts show that the inaction of the plaintiff may be interpreted as election.<sup>154</sup> There is no more reason why delay, pure and simple, should furnish a defense here than where the basis of rescission is mutual mistake. Indeed less consideration should be shown the defendant who repudiates or breaks his promise than him who has innocently and inadvertently received what equitably belongs to another. Many jurisdictions, doubtless to promote the marketability of realty, require an infant who has executed a deed of land to disaffirm promptly on arriving at majority.<sup>155</sup> An equal number, with more

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a shareholder for calls upon his stock. In such cases the right of creditors and other stockholders to have the stock paid for requires a prompt disaffirmance of the subscription to stock; but inasmuch as in the case before the court, the rights of creditors and other stockholders were not involved, it was held enough to set up the fraud by way of defence when action was brought. . . ." "In the case of an executory contract, a refusal to perform any obligation thereunder and the defence of an action brought thereon are all that the defrauded party can do by way of asserting his right to disaffirm the contract, and unless his silence or delay has operated to the prejudice of the other party, he may first assert his right when his adversary first asserts his claim by action."

<sup>153</sup> *Collins v. Tigner*, 5 Pen. (Del.) 345 (1905); *Mizell v. Watson*, 57 Fla. 111, 49 So. 149 (1909); *Harden v. Lang*, 110 Ga. 392, 395, 36 S. E. 100 (1900); *Carney v. Newberry*, 24 Ill. 203 (1860); *Artel v. Chase*, 77 Ind. 74 (1881), 83 Ind. 546 (1882); *Mills v. Osawatومية*, 59 Kan. 463, 53 Pac. 470 (1898); *World Pub. Co. v. Hull*, 81 Mo. App. 277 (1899); *Alfree Mfg. Co. v. Grape*, 59 Neb. 777, 82 N. W. 11 (1900); *Lawrence v. Dale*, 3 Johns. Ch. (N. Y.) 23 (1817); *Caswell v. Black River Mfg. Co.*, 14 Johns (N. Y.) 453 (1817); *NORTH DAKOTA, CIV. CODE* (1913), § 5936; *OKLAHOMA, STATS.* (1910), § 986; *Thomas v. McCue*, 19 Wash. 287, 53 Pac. 161 (1898).

<sup>154</sup> "In most of them, either the plaintiff had received something from the defendant under the contract, or the contract was of such a nature that unless promptly informed the defendant would naturally proceed with his performance. Under such circumstances . . . an action may well be interpreted as an election not to seek restitution. Hence the statement that unless notice is promptly given restitution will not be enforced." *WOODWARD, QUASI CONTRACTS*, § 267.

<sup>155</sup> *Hastings v. Dollarhide*, 24 Cal. 195 (1864); *Kline v. Beebe*, 6 Conn. 494 (1827); *Wallace v. Lewis*, 4 Harr. (Del.) 75 (1843); *Nathans v. Arkwright*, 66 Ga. 179 (1886); *Bentley v. Greer*, 100 Ga. 35, 27 S. E. 974 (1896); *Hogan v. Utter*, 95 S. E. 565 (N. C.) (1918); *Cole v. Pennoyer*, 14 Ill. 158 (1852); *Blankenship v. Stout*, 25 Ill. 132 (1860); *Keil v. Healey*, 84 Ill. 104 (1876); *Tunison v. Chamblin*, 88 Ill. 378 (1878); *Hartman v. Kendall*, 4 Ind. 403 (1853); *Scranton v. Stewart*, 52 Ind. 68 (1875); *Shroyer v. Pittenger*, 31 Ind. App. 158, 67 N. E. 475 (1903) (but see *Sims v. Bardoner*, 87 Ind. 94 (1882)); *IOWA, CODE* (1897), § 3189; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 18 N. W. 283 (1884); *Ward v. Laverty*, 19 Neb. 429, 27 N. W. 393 (1886); *O'Brien*

logic, allow him to avoid the transfer at any time before the statute of limitations has run after he has attained full age,<sup>156</sup> unless there are circumstances showing estoppel, promissory estoppel, or change

v. Gaslin, 20 Neb. 347, 30 N. W. 274 (1886); Englebert v. Troxell, 40 Neb. 195, 58 N. W. 852 (1894); Criswell v. Criswell, 163 N. W. 302 (Neb.) (1917); Weeks v. Wilkins, 134 N. C. 516, 47 S. E. 24 (1904); Gaskins v. Allen, 137 N. C. 426, 49 S. E. 919 (1905); Dolph v. Hand, 156 Pa. 91, 27 Atl. 114 (1893); Scott v. Buchanan, 11 Humph. (Tenn.) 468 (1850); Bingham v. Barley, 55 Tex. 281 (1881); Ferguson v. Houston Ry. Co., 73 Tex. 344, 11 S. W. 347 (1889); Bigelow v. Kinney, 3 Vt. 353 (1830); Richardson v. Boright, 9 Vt. 368 (1837); WASHINGTON, CODES & STATS. (1915), § 5293; Featherston v. McDonnell, 15 U. C. C. P. 162 (1865); Foley v. Canada Loan Co., 4 Ont. 38 (1883). The same rule was applied to a transfer of personalty by an infant. Hastings v. Dollarhide, 24 Cal. 195 (1864); IOWA, CODE (1897), § 3189; Gannon v. Manning, 42 App. D. C. 206 (1914); Baker v. Kennett, 54 Mo. 82 (1873); Summers v. Wilson, 2 Cold. (Tenn.) 469 (1865); WASHINGTON, CODE & STATS. (1915), § 5293. See Parsons v. Teller, 188 N. Y. 318, 326, 80 N. E. 930 (1907); Woolridge v. Lavoie, 104 Atl. 346 (N. H.) (1918). And to the executory contract of a minor. Johnson v. Storie, 32 Neb. 610, 49 N. W. 371 (1891) (surety on note); Chandler v. Jones, 173 N. C. 427, 92 S. E. 145 (1917). See Darlington v. Hamilton Bank, 116 N. Y. Supp. 678 (1909) note; Holmes v. Blogg, 8 Taunt. 35 (1817); Edwards v. Carter, [1893] A. C. 360; Carnell v. Harrison, [1916] 1 Ch. 328.

<sup>156</sup> Wells v. Seixas, 24 Fed. 82 (1885); Gilkinson v. Miller, 74 Fed. 131 (1896); Tucker v. Moreland, 10 Pet. (U. S.) 58, 75 (1836) (*semble*); Irvine v. Irvine, 9 Wall. (U. S.) 617 (1869); Sims v. Everhardt, 102 U. S. 300 (1880); McCarthy v. Nicrossi, 72 Ala. 332 (1882) (but see Schaffer v. Lauretta, 57 Ala. 14 (1876)); Putnal v. Walker, 61 Fla. 720, 55 So. 844 (1911); Syck v. Hellier, 140 Ky. 388, 131 S. W. 30 (1910). Compare Hoffert v. Miller, 86 Ky. 572, 6 S. W. 447 (1888). But see Justice v. Justice, 170 Ky. 423, 426, 186 S. W. 148 (1916); Boody v. McKenney, 23 Me. 517, 523, 524 (1844) (*semble*); Davis v. Dudley, 70 Me. 236 (1879); Prout v. Wiley, 28 Mich. 164 (1873); Donovan v. Ward, 100 Mich. 601, 59 N. W. 254 (1894); Wallace v. Latham, 52 Miss. 291 (1876); Allen v. Poole, 54 Miss. 323 (1877); Shipp v. McKee, 80 Miss. 741, 31 So. 197 (1902) (but see Thompson v. Strickland, 52 Miss. 574 (1876)); Brantley v. Wolf, 60 Miss. 420 (1882); Peterson v. Laik, 24 Mo. 541 (1857); Thomas v. Pullis, 56 Mo. 211 (1874); Lacy v. Pixler, 120 Mo. 383, 25 S. W. 206 (1894); Linville v. Greer, 165 Mo. 380, 65 S. W. 579 (1901); Parrish v. Treadway, 267 Mo. 91, 183 S. W. 580 (1916); Jackson v. Carpenter, 11 Johns. (N. Y.) 539, 542 (1814); Voorhies v. Voorhies, 24 Barb. (N. Y.) 150 (1857); Eagan v. Scully, 51 N. Y. Supp. 680 (1898), *aff'd* 173 N. Y. 581, 65 N. E. 1116 (1902); Green v. Green, 69 N. Y. 553 (1877) (but see Jones v. Butler, 30 Barb. 641 (1859)); Drake v. Ramsay, 5 Ohio, 252 (1831). Cresinger v. Welch, 15 Ohio, 156 (1846); Lanning v. Brown, 84 Ohio St. 385 (1911); Wilson v. Branch, 77 Va. 65 (1883); Birch v. Linton, 78 Va. 584 (1884); Gillespie v. Bailey, 12 W. Va. 70 (1877).

The same rule was applied in the case of a transfer of personalty by a minor. Vaughan v. Parr, 20 Ark. 600 (1859); Hill v. Nelms, 86 Ala. 442, 5 So. 796 (1888). See Boody v. McKenney, 23 Me. 517, 525 (1884). And the same is true of an infant's executory contract. Buzzell v. Bennett, 2 Cal. 101 (1852); Magee v. Welsh, 18 Cal. 155 (1861); Tyler v. Gallop, 68 Mich. 185, 35 N. W. 902 (1888); Nichols Co. v. Snyder, 78 Minn. 502, 81 N. W. 516 (1900); Tupps v. Pederson, 78 Minn. 524, 81 N. W. 1103 (1900); New Hampshire Ins. Co. v. Noyes, 32 N. H. 345 (1855); International Text Book Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722 (1912).

of position.<sup>157</sup> In equity generally the better view is expressed by Stinness, C. J., in *Chase v. Chase*:<sup>158</sup>

"Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as an estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities and other causes, but when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief."<sup>159</sup>

There is no reason, however, why delay longer than the period covered by the statute of limitations should not, without more, bar the plaintiff.<sup>160</sup>

If after the receipt of the money the situation of the defendant has so altered that he cannot restore it without suffering a detriment which he would not have incurred had it not been for the

<sup>157</sup> *Henson v. Culp*, 157 Ky. 442, 163 S. W. 455 (1914); *Davis v. Dudley*, 70 Me. 236 (1879); *Prout v. Wiley*, 28 Mich. 164 (1873) (*semble*); *Allen v. Poole*, 54 Miss. 323 (1877) (*semble*); *Thomas v. Pullis*, 56 Mo. 211 (1874); *Emmons v. Murray*, 16 N. H. 385 (1844); *Wheaton v. East*, 5 Verg. (Tenn.) 41, 62 (1833); *Gillespie v. Bailey*, 12 W. Va. 70 (1877) (*semble*).

<sup>158</sup> 20 R. I. 202, 203, 37 Atl. 804 (1897).

<sup>159</sup> *Jonathan Mills Mfg. Co. v. Whitehurst*, 60 Fed. 81 (1894); *O'Brien v. Wheelock*, 78 Fed. 673 (1897); *Wheeling Bridge Co. v. Reymann Co.*, 90 Fed. 189 (1898); *Hanchett v. Blair*, 100 Fed. 817 (1900); *London Bank v. Horton & Co.*, 126 Fed. 593, 601 (1903); *Shea v. Nilima*, 133 Fed. 209 (1904); *Haney v. Legg*, 129 Ala. 619, 30 So. 34 (1900); *Pratt Land Co. v. McClain*, 135 Ala. 452, 33 So. 185 (1902) (*semble*); *Hovey v. Bradbury*, 112 Cal. 620, 44 Pac. 1077 (1896); *Ex-Mission Co. v. Flash*, 97 Cal. 610, 32 Pac. 600 (1893); *Brake v. Payne*, 137 Ind. 479, 37 N. E. 140 (1893); *Lindell Real Estate Co. v. Lindell*, 142 Mo. 61, 43 S. W. 368 (1897); *Fitzgerald v. Constr. Co.*, 44 Neb. 463, 62 N. W. 899 (1895); *Daggers v. Van Dyck*, 37 N. J. Eq. 130 (1883); *Tynan v. Warren*, 53 N. J. Eq. 313, 31 Atl. 596 (1895); *Lundy v. Seymour*, 55 N. J. Eq. 1, 35 Atl. 893 (1896); *Law v. Smith*, 59 Atl. 327, 68 N. J. Eq. 81 (1904); *Farr v. Hauenstein*, 69 N. J. Eq. 740 (1905); *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 34 S. W. 209 (1896); *Hamilton v. Dooley*, 15 Utah, 280, 49 Pac. 769 (1897); *Tidball's Executors v. Shenandoah Bank*, 42 S. E. 867 (W. Va.) (1902); *Ludington v. Patton*, 111 Wis. 208, 86 N. W. 571 (1901); *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221 (1874); *Erlanger v. Sombrero Co.*, 3 App. Cas. 1218, 1279 (1878).

<sup>160</sup> *Gray v. Goddard*, 90 Conn. 561, 98 Atl. 126 (1916); *Shelburne v. Robinson*, 8 Ill. 597 (1846); *Ely v. Norton*, 1 Hals. (N. J. L.) 187 (1822). See *Fitzsimmons v. Johnson*, 90 Tenn. 416 (1891).



payment, he will not be compelled to disgorge. "Change of position" here,<sup>161</sup> as elsewhere in the law of quasi contracts,<sup>162</sup> is a defense. The change of position may consist in loss of rights on the claim or instrument on which payment is made,<sup>163</sup> in delay in enforcing rights against others,<sup>164</sup> the payment over by an agent of money to his principal,<sup>165</sup> or by a fiduciary to his beneficiary.<sup>166</sup>

<sup>161</sup> *Brooking v. Farmers' Bank*, 83 Ky. 431 (1885); *Ridgway v. Newstead*, 3 De G., F. & J. 474, 487 (1861). See *Phetteplace v. Bucklin*, 18 R. I. 297, 27 Atl. 211 (1893).

<sup>162</sup> *German Security Bank v. Columbia Trust Co.*, 27 Ky. L. R. 581, 85 S. W. 761 (1905); *Pelletier v. State Nat. Bank*, 117 La. 335, 41 So. 640 (1906); *Wilson v. Barker*, 50 Me. 447 (1862); *Walker v. Conant*, 65 Mich. 194, 31 N. W. 786 (1887); 69 Mich. 321, 17 N. W. 292 (1888); *Picksley v. Starr*, 149 N. Y. 432, 44 N. E. 163 (1896); *Continental Nat. Bank v. Tradesman's Bank*, 173 N. Y. 272, 65 N. E. 1108 (1903); *Ball v. Shepard*, 202 N. Y. 247, 95 N. E. 719 (1911); *Fegan v. Gt. Northern Ry. Co.*, 9 N. D. 30, 81 N. W. 39 (1899); *Boas v. Updegrove*, 5 Pa. 516 (1847); *Atlantic Coast Line v. Schirmer*, 87 S. C. 309, 69 S. E. 439 (1910); *Richey v. Clark*, 11 Utah 467, 40 Pac. 717 (1895). And see *Deutsche Bank v. Beriro & Co.*, 73 L. T. R. 669 (1895); *Maher v. Miller*, 61 Ga. 556 (1878); *Guild v. Baldrige*, 2 Swan (Tenn.) 295 (1852); KEENER, QUASI CONTRACTS, 59; WOODWARD, QUASI CONTRACTS, §§ 26-30; Costigan, "Change of Position as a Defense," 20 HARV. L. REV. 212. If the mistake is due to defendant's fault, change of position is no defense, for he only has himself to blame. *Union Bank v. United States Bank*, 3 Mass. 74 (1807); *Koontz v. Central Nat. Bank*, 51 Mo. 275 (1873); *Phetteplace v. Bucklin*, 18 R. I. 297, 27 Atl. 211 (1893); *Metcalf v. Denson*, 4 Bart. (Tenn.) 565 (1874).

<sup>163</sup> *German Security Bank v. Columbia Trust Co.*, 27 Ky. L. R. 581, 85 S. W. 761 (1905); *Pelletier v. State Nat. Bank*, 117 La. 335, 41 So. 640 (1906).

<sup>164</sup> *Behring v. Somerville*, 63 N. J. L. 568, 44 Atl. 641 (1899); *Fegan v. Great Northern Ry.*, 9 N. D. 30, 81 N. W. 39 (1899); *Boas v. Updegrove*, 5 Pa. 516 (1847); *Atlantic Coast Line R. Co. v. Schirmer*, 87 S. C. 309, 69 S. E. 439 (1909); *Richey v. Clark*, 11 Utah, 467, 40 Pac. 717 (1895). *Durrant v. Ecclesiastical Comm'rs*, 62 Q. B. D. 234 (1880); *Kingston v. Eltinge*, 40 N. Y. 391 (1869); *Houston R. Co. v. Hughes*, 63 Tex. Civ. App. 514 (1911), *Contra*. It is doubtful, however, whether *Kingston v. Eltinge*, which is clearly erroneous, would now be followed in New York in view of *Continental Nat. Bank v. Tradesman's Bank*, 173 N. Y. 272, 65 N. E. 1108 (1903); *Hathaway v. County of Delaware*, 185 N. Y. 368, 78 N. E. 153 (1906); *Ball v. Shepard*, 202 N. Y. 247, 95 N. E. 719 (1911). See KEENER, QUASI CONTRACTS, 66, 67; WOODWARD, QUASI CONTRACTS, § 25, note; Costigan, "Change of Position as a Defense," 20 HARV. L. REV. 215, note.

<sup>165</sup> *Holland v. Russell*, 1 B. & S. 424 (1861); 4 B. & S. 14 (1863); *Shand v. Grant*, 15 C. B. (N. S.) 324 (1863); *Hooper v. Robinson*, 98 U. S. 528 (1878); *Hibbs v. Beall*, 41 App. D. C. 592; *Maher v. Miller*, 61 Ga. 556 (1878); *Granger v. Hathaway*, 17 Mich. 500 (1869). See *Martin v. Allen*, 125 Mo. App. 636, 103 S. W. 138 (1907); *Mason v. Commerce Trust Co.*, 192 Mo. App. 528, 183 S. W. 707 (1915); 23 L. R. A. (N. S.), note. Through an extraordinary misconception of the true principles underlying the subject

<sup>166</sup> *Yarborough v. Wise*, 5 Ala. 292 (1843); *Beam v. Copeland*, 54 Ark. 70, 14 S. W. 1004 (1890); *Grier v. Huston*, 8 Serg. & R. (Pa.) 402 (1822). But see *Baylis v. Bishop of London*, [1913] 1 Ch. 127.

Sale, consumption, or gift of the windfall before notice of the plaintiff's right cannot necessarily and always give a defense.<sup>167</sup> If the defendant has spent it beneficially to himself, he should clearly refund the equivalent. If he carelessly loses it, or spends it in riotous living, he should still be liable. In these cases he should not be in a better position than the frugal man who has invested and kept the *res*. "It must be assumed that the defendant has had his money's worth of enjoyment."<sup>168</sup> If he gives the legacy to the Red Cross as his normal periodical contribution we should still reach, though without authority, the same result. Suppose, however, in consequence of the windfall he has altered his manner of living. He has journeyed to Palm Beach, an outing beyond his normal income, or he has shared his good fortune with Belgian refugees whom he otherwise could not aid. It is intimated in *Brisbane v. Dacres*,<sup>169</sup> and in *Skyring v. Greenwood*,<sup>170</sup> that the plaintiff could not reach him.<sup>171</sup> A real hardship would result if he were compelled to make whole the payer. The wiser view is to leave matters in *statu quo*, rather than shift the plaintiff's loss to the defendant's shoulders. The same result should be reached, though only on the authority of text-writers,<sup>172</sup> if the property received has before notice been without defendant's fault accidentally lost, as by fire or theft. The claim that the defendant is a purchaser for value without notice from the overpaid creditor or legatee is clearly a defense both at law and in equity.<sup>173</sup>

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the Court of Appeal in *Baylis v. Bishop of London*, [1913] 1 Ch. 127, held that change of position as a defense was confined to payment by an agent to his principal.

If the agent purported to act for himself in receiving the payment, it is no defense that he settled with his principal before notice. *Newall v. Tomlinson*, L. R. 6 C. P. 405 (1871); *United States v. Pinover*, 3 Fed. 305 (1880); *Smith v. Kelly*, 43 Mich. 390, 5 N. E. 437 (1880); *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287 (1841). See Costigan, 20 HARV. L. REV. 211. This distinction, however, is without merit.

<sup>167</sup> *Standish v. Ross*, 3 Exch. 527 (1849); *Continental Co. v. Kleinwort Co.*, 20 T. L. R. 403 (1904); *Moors v. Bird*, 190 Mass. 400, 410, 77 N. E. 643 (1906); *Picotte v. Mills*, 203 S. W. 825 (Mo. App.) (1918).

<sup>168</sup> Costigan, "Change of Position as a Defense." 20 HARV. L. REV. 212, note.

<sup>169</sup> 5 Taunt. 143, 152.

<sup>170</sup> 4 B. & C. 281, 289 (1825).

<sup>171</sup> But see *Standish v. Ross*, 3 Exch. 527, 534 (1849).

<sup>172</sup> Costigan, "Change of Position as a Defense." 20 HARV. L. REV. 212, note. Compare WOODWARD, QUASI CONTRACTS, § 30.

<sup>173</sup> *Berton v. Anderson*, 56 Ark. 470, 20 S. W. 250 (1892); *Hoffman v. Armstrong*, 90 Md. 123 (1899). See *Thompson v. Samson*, 64 Cal. 330, 30 Pac. 980 (1883).

A defendant obliged to refund is liable for interest from the date of demand and

The liability of several legatees and distributees, who have been overpaid, is not joint.<sup>174</sup> Failure to join others is no defense. But, in Massachusetts, Michigan, Nebraska, Ohio, Rhode Island, and Vermont, the court may at any time order joined other parties liable.<sup>175</sup> And in Illinois the liability is joint.<sup>176</sup> At common law in England, if the estate had been administered under order of the court, the belated creditor could proceed against any particular legatee or distributee only for such portion of his debt as the value of the legatee's or distributee's share bore to all legacies and shares.<sup>177</sup> This rule, however, did not apply when the administration did not take place under order of court.<sup>178</sup> In this country the authorities are divided, — none of them seem to take the English distinction. In some jurisdictions the beneficiary is liable up to the full amount of his legacy or share for the plaintiff's claim, and must seek contribution in a separate suit from the other beneficiaries.<sup>179</sup> In other states the defendant is only liable for his rateable proportion of the debt.<sup>180</sup> A third view makes the defendant liable for a proportional amount unless the others liable are insolvent or beyond the jurisdiction. In that case he must make good the debt up to the amount he has received and seek contribution in another suit.<sup>181</sup> Perhaps

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from that date only. *Northrop v. Graves*, 19 Conn. 548 (1849). And see *Gittens v. Steele*, 1 Swanst. 199 (1818); *Jervis v. Wolferstan*, L. R. 18 Eq. 18 (1874); *Uffner v. Lewis*, 5 Ont. L. R. 684 (1903).

<sup>174</sup> INDIANA, ANNOT. STATS. (1914), § 2972; *Rubell v. Bushnell*, 91 Ky. 251, 15 S. W. 520 (1891); *Rohrbaugh v. Hamblin*, 57 Kan. 393, 46 Pac. 705 (1896); MASSACHUSETTS, REV. LAWS (1902), c. 141, § 30; MICHIGAN, COMP. LAWS (1915), c. 234, c. 56, § 25; *Miller v. Shoaf*, 110 N. C. 319, 14 S. E. 400 (1892); *Walker v. Deaver*, 79 Mo. 664, 679 (1883); NEBRASKA, REV. STATS. (1913), § 1414; OHIO, ANNOT. GEN. CODE (1912), § 10882; RHODE ISLAND, GEN. LAWS (1909), c. 318, § 22; *Gillespie v. Alexander*, 3 Russ. 130 (1826).

<sup>175</sup> See references in preceding note.

<sup>176</sup> *Cutright v. Stanford*, 81 Ill. 240 (1876). See *Lewis v. Overby*, 31 Gratt. (Va.) 601, 619 (1879); *McClung v. Sieg*, 54 W. Va. 467, 46 S. E. 210 (1903).

<sup>177</sup> *Gillespie v. Alexander*, 3 Russ. 130 (1826).

<sup>178</sup> *Davies v. Nicolson*, 2 De G. & J. 693 (1858).

<sup>179</sup> *Rubell v. Bushnell*, 91 Ky. 251, 15 S. W. 520 (1891); *Miller v. Shoaf*, 110 N. C. 319, 14 S. E. 800 (1892).

<sup>180</sup> ALABAMA, CODE (1907), § 2785; ARKANSAS, DIG. STATS. (1916), c. 1, § 164; COLORADO, ANNOT. STATS. (1912), § 8027; *Cutright v. Stanford*, 81 Ill. 240 (1876); *Lewis v. Overby*, 31 Gratt. (Va.) 601, 618-20 (1879); KANSAS, GEN. STATS. (1915), § 4658; MISSOURI, REV. STATS. (1909), § 255. And see MICHIGAN, COMP. LAWS (1915), c. 234, c. 56, §§ 23, 25, 28; NEBRASKA, REV. STATS. (1913), §§ 1412, 1417; VERMONT, PUB. STATS. (1906), c. 137, §§ 2912-20.

<sup>181</sup> INDIANA, ANNOT. STATS. (1914), § 2970; MASSACHUSETTS, REV. LAWS (1902),

the best solution is that suggested in a leading Virginia case. There by a creditor's bill all parties interested, including the personal representative, were brought into court and each held liable for his rateable proportion so far as that was possible without injury to the creditor's right. All conflicting rights may then be settled in one suit.<sup>182</sup>

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c. 141, § 31; OHIO, ANNOT. GEN. CODE (1912), § 10881; RHODE ISLAND, GEN. LAWS (1909), c. 318, § 24; WISCONSIN, STATS. (1915), § 3867; *McClung v. Sieg*, 54 W. Va. 467 (1903).

<sup>182</sup> *Lewis v. Overby*, 31 Gratt. (Va.) 601, 619-20 (1879). See *McClung v. Sieg*, 54 W. Va. 467, 46 S. E. 210 (1903), where some parties were out of the jurisdiction.

## MILITARY LAW — A STUDY IN COMPARATIVE LAW

## I

A GRANITE boulder lies in a fertile plain underlaid by limestone. To the passer-by it is merely a rock. To the tiller of the soil it is merely an obstacle. Its existence is taken for granted and its presence needs no explanation. The embryonic scientist who has advanced far enough in his studies to know granite from limestone and to know that they are not ordinarily associated *in situ*, recognizes in the boulder an alien, an intruder. He does not know whence it came or how it reached its present location, but he realizes that its position upon fertile soil in a limestone formation needs some explanation. This is the beginning of wisdom with reference to the granite intruder. The explanation which the scientist will give for the phenomenon depends upon the extent of his knowledge and upon his previous beliefs and opinions. In the early days of geology, Noah's Flood was a sort of first aid to the perplexed, and served as a solution of all sorts of puzzles. Our scientist may invoke this theory and assume that the boulder was washed from a remote outcrop by the great flood. At a later period and with wider knowledge, he may find that something more substantial than water is necessary to explain other phenomena which he has discovered; and he may believe that it was carried down from some Laurentian formation by some great ice movement. What further explanations scientists may offer us in the future are matters of conjecture. The starting point, however, is the recognition of the fact that the granite boulder came from some remote point and that its presence here needs an explanation of some sort.

In the last year and a half many of us who have been studying Anglo-American law have been attempting to teach military law. We have recognized at once that in many respects it is an alien. Its foreign character does not consist in its content.<sup>1</sup> As far as

<sup>1</sup> For a brief comparison of English Military Law with that of France, Germany, Russia and Italy, see J. E. R. Stephens, "English and Continental Military Codes," 5 JOURN. OF COMP. LEGIS. (N. S.), 244.

may be, considering the great difference between the organization of the Army and the organization of a peaceful industrial society, the content of military law is Anglo-American criminal law based primarily upon its Maryland form, as far as this is recognized and adopted in the District of Columbia.<sup>2</sup> Nor is the pro-

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<sup>2</sup> A MANUAL FOR COURTS-MARTIAL [U. S. Army] (corrected to April 15, 1917), paragraph 338 (3, d).

The common law in force in the District of Columbia is the common law of Maryland.

"We think, therefore, that if it be a common-law offence, committed in this county, it is within the jurisdiction of this Court, whose common-law jurisdiction is derived from the common law of Maryland, which was, by the cession of Maryland and the acceptance of Congress, under the provision in the Constitution of the United States, transferred from Maryland to the United States, with that remnant of State sovereignty, which, after the adoption of the Federal Constitution, was left to Maryland. All the State prerogative which Maryland enjoyed under the common law, which she adopted, so far as concerned the ceded territory, passed to the United States. All the power which Maryland had, by virtue of that common-law prerogative, to punish, by indictment, offenders against her sovereignty, and to protect that sovereignty, became vested in the United States; and authorized them to punish offenders against their sovereignty, and to protect that sovereignty by the same means, so far as regarded the territory ceded.

"We therefore think that, in regard to offences committed within this part of the district, the United States have a criminal common law, and that this Court has a criminal common-law jurisdiction." *United States v. Watkins*, 28 Fed. Cas. No. 16649, 3 Cranch C. C. (U. S.) 441, 452 (1829).

"As against the United States regarded as co-extensive with the Federal union of States and operating within the territorial limits of the States, it is undoubtedly true that there are no common law offences; for the jurisdiction there given to the United States by the Federal Constitution is distinctly and expressly restricted to the powers enumerated in the Constitution. But the statement was not intended to have application to the District of Columbia. The question as to the authority of the United States in this District is not what power has been conferred upon it, but rather what power has been inhibited to it. Subject to the limitations imposed by the Constitution itself and by the spirit of our free institutions, the United States have supreme and exclusive power over the District of Columbia, and they are not limited to the governmental powers in the Constitution specifically enumerated as defining their jurisdiction for the country at large. For the District of Columbia it is competent for the Congress of the United States to declare that the common law is to be regarded as in force, and even in the absence of express statutory enactment we should have to hold, in view of the circumstances, that the common law in its entirety, both in its civil and criminal branches, except in so far as it has been modified by statute or has been found repugnant to our conditions, is in force in the District of Columbia. But we are not left to implication in that regard.

"At the time of the cession of the Territory of Columbia by the State of Maryland to the Federal Union, its law, as well as that of the rest of the States, was the common law of England, both civil and criminal, so far as that common law was suited to our condition and was unaffected by statute. And with the common law the State of

cedure the point at which it differs from Anglo-American law.<sup>3</sup> It is true that neither grand jury nor indictment is necessary.<sup>4</sup> Charges are prepared under authority of an officer of competent rank without the approval of any independent body.<sup>5</sup> There is no trial by jury. The court-martial passes upon the facts.<sup>6</sup> The reviewing authority exercises a freedom in dealing with the findings<sup>7</sup> which is impossible in ordinary criminal law where the action of the grand jury and the verdict of the petit jury are both guaranteed by constitutional provisions. At the same time the procedure is not unlike that of ordinary criminal courts which try minor offenses in which neither indictment nor petit jury are required. If dignity and military form could be added to a police court, the procedure would not be unlike that of a court-martial.

The great difference between military law and our Anglo-American law is far deeper than this. While the content is borrowed in part from the common law and in part shaped by the needs of military service, while the procedure is a summary Anglo-American criminal procedure, without grand jury or petit jury,

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Maryland had adopted a considerable part of the statute law of England. When by the act of February 27, 1801 (2 Stat. 103), the Congress of the United States finally accepted the cession and assumed jurisdiction over the ceded District, it was specifically provided 'that the laws of the State of Maryland, as they now (then) exist, shall be and continue in force in that part of the said District which was ceded by that State to the United States and by them accepted.' This express enactment, if any such enactment was needed at all, was amply sufficient to continue in force and to perpetuate to the present day in the District of Columbia the common law of England as it existed in Maryland at that time, with all the existing statute legislation of the State and all the statute legislation of England that had been adopted by Maryland. And upon that theory of the law we have been conducting our affairs for nearly a hundred years. It is very true that much of the criminal branch of our common law has either become obsolete or has been obliterated by statutory enactment upon the same subject. Nevertheless, it is true that where it has not been repealed by express statutory provision, or modified by inconsistent legislation, or where it has not become obsolete or unsuited to our republican form of government, the common law of England in all its branches, both civil and criminal, remains to-day the law of the District of Columbia, and it has been repeatedly so held. See *United States v. Watkins*, 3 Cranch C. C. 441; *United States v. Marshall*, 6 Mackey, 34; *United States v. Hale*, 4 Cranch C. C. 83." *De Forest v. United States*, 11 App. D. C. 458, 465, 466 (1898).

<sup>3</sup> For a discussion of the history of the Court-Martial, see WINTHROP, *MILITARY LAW AND PRECEDENTS*, 2 ed., Chap. V.

<sup>4</sup> Fifth Amendment to Constitution of United States.

<sup>5</sup> *MANUAL FOR COURTS-MARTIAL* [U. S. Army] (corrected to April 15, 1917), paragraphs 62-64.

<sup>6</sup> *Ibid.*, paragraphs 294-304.

<sup>7</sup> *Ibid.*, paragraphs 369-400.

the great difference between military law and Anglo-American law is found in the form of each and in the method of growth.

To those who are familiar with Anglo-American law and Roman law and who have given any consideration to the form and to the method of growth of military law, what is to be said here upon this subject will be trite and commonplace. To those who are familiar with the form and the method of growth of Roman law it will be necessary only to point out the corresponding characteristics of military law. Those who have never considered the peculiarities of Roman law as to form and method of growth and who have considered military law as merely a special variant of Anglo-American criminal law, may have wondered at the great difference between the two latter systems of law upon these points. It is with the hope of arousing interest and securing coöperation in an investigation of this subject that the following suggestions are offered.

## II

Beginning with the reign of Henry II the common law<sup>8</sup> has been what we call with our inaccurate nomenclature, unwritten law. It has been a judicial development of legal custom by technically trained tribunals aided by a technically trained bar. It is possible that popular custom was worked over by the courts from an early date and to a far greater extent than many writers upon Anglo-American law will admit. In any event, whatever the relative proportion of popular custom and judicial custom, it was not based on legislation. The royal constitutions and the statutes of Parliament have modified its development, sometimes aiding it, sometimes hindering it; but at no time did English law take the form of a legislative code as a basis for juristic development.

Roman law on the other hand, at the earliest known period of its development, took the form of a written code.<sup>9</sup> What other

<sup>8</sup> "Common law" is used here as the law of the King's courts. For convenience no account is taken of the relics of the older law that lingered in the local courts; or of the law of the courts which administered the Law Merchant.

<sup>9</sup> MUIRHEAD, *HISTORICAL INTRODUCTION TO THE PRIVATE LAW OF ROME*, 2 ed., Pt. II, Chap. II, §§ 21 *et seq.*, p. 94 *et seq.* MELVILLE, *MANUAL OF THE PRINCIPLES OF ROMAN LAW*, Pt. I, Chap. I, § 11, pp. 6-9. WALTON, *HISTORICAL INTRODUCTION TO ROMAN LAW*, 2 ed., Chap. XI. SALKOWSKI, *INSTITUTES AND HISTORY OF ROMAN PRIVATE LAW* (Whitfield's translation); Introduction, Pt. II, § 7, pp. 27, 28. SOHM,



codes preceded the Twelve Tables, and to what extent the priestly caste regarded their law as legislation rather than as a mass of principles, we have no means of knowing with any certainty. The Twelve Tables themselves were undoubtedly far from a complete statement of Roman law when they were enacted. They rather constituted a great reform statute. Cruel and harsh as many of its provisions seem to us, it undoubtedly was, in its day and generation, legislation intended to protect the weaker classes against the exactions of a military and a priestly aristocracy. At any rate, from an early period, the Roman law showed a strong tendency to reduce its principles to form and order; to embody them in what was practically legislation; and to base its subsequent development in part upon this legislation. Its future juristic growth was in part in the form of commentaries upon this early legislation; commentaries which gradually covered the original foundation with a mass of law under which the Twelve Tables were practically buried; but which nevertheless, in theory at least, rested upon them as their sole foundation. Along with this development was the constant tendency to resort to legislation for the purpose of affording systematic aid to the development of the law and for introducing new principles into the law. The Roman law did not regard a statute as an arbitrary rule made by an external power which had authority to give orders to the court; which the courts must obey as far as the specific order went; but formed no part of the living, growing law. On the contrary at Roman law a statute was a source of law from which new principles could be deduced and from which analogies could be drawn.<sup>10</sup> Subsequent legislation, in other words, was treated, like the original Twelve Tables, as a source of law for further comment, interpretation, and juristic growth.

The military law of England existed apparently from the out-

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INSTITUTES OF ROMAN LAW (Ledlie's translation), 3 ed., Pt. I, Chap. I, § 11, p. 48 *et seq.* GIRARD, SHORT HISTORY OF ROMAN LAW (translated by Lefroy and Cameron), Chap. II, § 1, 1, p. 47 *et seq.* 1 CUQ, LES INSTITUTIONS JURIDIQUES DES ROMAINS, § 1, Bk. I, Chap. III (1), § 2, p. 28 *et seq.* CZYHLARZ, LEHRBUCH DER INSTITUTIONEN DES RÖMISCHEN RECHTES, § 7, p. 12. KUHLENBECK, ENTWICKLUNGSGESCHICHTE DES RÖMISCHEN RECHTS, Bk. II, Chap. 11, § 4, p. 152 *et seq.* ESMARCH, RÖMISCHE RECHTSGESCHICHTE, 3 ed., Bk. I, Chap. III, §§ 20-25. VOIGT, RÖMISCHE RECHTSGESCHICHTE, § 4.

<sup>10</sup> Roscoe Pound, "Common Law and Legislation," 21 HARV. L. REV. 383.

set, in the form of legislation, whether it was in writing or not, in the popular sense of the term.<sup>11</sup> By virtue of his prerogative, the King ordained the Articles of War for the Royal Army during the continuation of the war for which they were ordained. By a delegation of royal authority the commanders of armies from time to time proclaimed similar articles. Cromwell assumed this power as a part of the inherent power of the head of the English state. Legislation by Parliament proved necessary to supplement the royal prerogative in cases in which it was found necessary to impose restrictions and to inflict punishments which were in excess of the royal prerogative alone. The early English Army was a temporary force raised in each war for the continuation of that war and dissolving when the war had come to an end. When the Army had become a permanent national force, the Articles of War by which it was governed in England in time of peace were enacted by Parliament, while outside of England the royal prerogative was still sufficient to ordain Articles of War and to enforce them. The growth of the power of Parliament and the gradual disappearance of the personal authority of the King gradually led to legislation by Parliament which superseded, while it adopted, the Articles of War ordained by royal prerogative; although the prerogative was nominally exercised by the ministry long after the subordination of the King to Parliament had become thoroughly established. The usages and customs of the Army undoubtedly furnished much material for the content of the Articles of War but the constant tendency was to reduce them to definite form and to promulgate them as royal or parliamentary Articles of War.

With the outbreak of the American Revolution the English Articles of War, with slight modifications, were enacted by the Congresses and Assemblies of the different colonies and by the Continental Congress. The Congress of the United States under the Constitution of 1787 has reenacted these Articles from time to time with various additions and amendments and at present

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<sup>11</sup> For the scope and extent of Military Law in England and the relation between Military Law and Martial Law see W. S. Holdsworth, "Martial Law Historically Considered," 18 L. QUART. REV. 117; H. Erle Richards, "Martial Law," 18 L. QUART. REV. 133; Cyril Dodd, "The Case of Marais," 18 L. QUART. REV. 143, and Frederick Pollock, "What is Martial Law?" 18 L. QUART. REV. 152, in which however, special emphasis is laid on the nature of Martial Law.

they form a part of the Federal Statutes, being section 1342 of the Revised Statutes of the United States. From the time of the earliest royal Articles of War down to the Articles of War which were enacted by Congress in their present form on August 29, 1916, and which, with the exception of certain specified Articles, took effect on March 1, 1917, the constant tendency has been to express military law in the form of legislation. Customs have been incorporated in legislation. New problems which arose from time to time under changed conditions have been solved, omissions and gaps in the existing law have been filled, and the elimination of provisions which had become obsolete have all been made, for the most part, by legislation. Military law in its present form consists, to a large extent, of the Articles of War and of the commentaries written upon these Articles by the different authorities upon this subject. In this respect the development of military law has been far more like the development of Roman law than like the development of English law.

It must be admitted that the development of criminal law in the United States and in some of the states of the Union has been, to a large extent, statutory. This is a peculiarity due to constitutional and statutory provision, however, and is a rather accidental phenomenon. While some states have no substantive common law of crimes, it is because their legislatures have shown an intention to make legislation exclusive on the subject of crimes; although even in such states the legislatures may forbid common-law crimes by name and thus make them statutory crimes without any enumeration of their elements.<sup>12</sup> While the United States courts have no substantive criminal jurisdiction over common-law crimes, this grows out of the fact that the inferior federal courts are limited to such jurisdiction as is conferred upon them by Federal Statute.<sup>13</sup> Congress may forbid common-law crimes by name and thus make them statutory crimes without any enumeration of their elements.<sup>14</sup> This may in part account for the

<sup>12</sup> Such as assault, *Baker v. State*, 12 Ohio St. 214 (1861); disturbance of the public peace, *Stewart v. State*, 4 Okla. Crim. 564, 109 Pac. 243 (1910); and nuisances, *State v. De Wolfe*, 67 Neb. 321, 93 N. W. 222 (1903).

<sup>13</sup> *United States v. Hudson*, 7 Cranch (U. S.) 32 (1812); *Manchester v. Massachusetts*, 139 U. S. 240 (1890); *United States v. Eaton*, 144 U. S. 677 (1892).

<sup>14</sup> Such as murder and robbery, *United States v. Palmer*, 3 Wheat. (U. S.) 610 (1818).

form that military law has assumed in the United States. On the other hand military law assumed the form of a code in England at a time when criminal law was being developed by the King's courts as a law of judicial precedent. From the outset, the two systems, even when unchecked by constitutional restrictions or by statutory provisions, tended to assume different forms.

### III

The common law was, from the outset, a law of judicial precedent, that is, a system of law in which a decision of the court was regarded as declaring the law and as fixing it, within more or less vague limits, for the purpose of applying it to similar facts as they might arise in the future.<sup>15</sup> Attention has been called to the fact that in the earlier year books no specific citation is made to prior decisions of the court.<sup>16</sup> The court speaks as one having authority. This is undoubtedly correct but it does not necessarily mean that prior decisions were not regarded as precedents. To this day, a busy trial judge who has decided groups of similar questions on many different occasions and who has not been reversed, may speak as one having authority and may follow his earlier decisions as precedents without citing them specifically. The courts whose opinions are reported in the year books were trial courts. The memoranda of cases which make up the year books whether noted down by students, by practicing attorneys or by court officials, were hasty memoranda taken down at the time, while the trial was proceeding. In all probability the reporter had scant opportunity to note a citation if one were made. At that time cases could be studied only from the official rolls and in the memoranda of the year books. In both cases, they were in manuscript. Copies of the year books were few and it

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<sup>15</sup> On this question see, A. H. F. Lefroy, "Judge-Made Law," 20 L. QUART. REV. 399. A. H. F. Lefroy, "The Basis of Case-Law," 22 L. QUART. REV. 293, 416. Alexander Lincoln, "The Relation of Judicial Decisions to the Law," 21 HARV. L. REV. 120. William B. Hornblower, "A Century of 'Judge-Made' Law," 7 COL. L. REV. 453. M. C. Klingensmith, "The Continuity of Case Law," 58 PA. L. REV. 399.

<sup>16</sup> See John Chipman Gray, "Judicial Precedents. A Short Study in Comparative Jurisprudence," 9 HARV. L. REV. 27. For a discussion of the nature of the year books, see W. S. Holdsworth, "The Year Books," 22 L. QUART. REV. 266, 360.

was very natural that specific citations should not be made. We find correspondingly few references to the textbooks which appear to have been the standard books and to have shaped the entire development of the law. Furthermore, at the outset, precedents were few. Nearly every case which was thought worthy of a memorandum in the year books was one of first impression. Cases in which well-known principles were applied to combinations of facts with which the court and bar had become familiar would probably not be noted by the reporter. The year books are rather books of selected cases. In all probability there was no attempt to report all the opinions which were pronounced by the judges during the period covered by each of the year books. That precedents were looked upon as binding in the middle of the thirteenth century is evident, when we consider the way in which Bracton wrote that part of his book which is based upon English law and which is not more or less a copy or adaptation of Azo's Version of the Roman Law. Having no book of selected cases, Bracton proceeded to make one; and out of this book of selected cases prepared for his own use, he took the material upon which he based the text of his great work, "*Tractatus de Legibus et Consuetudinibus Angliae*." It is likely that specific precedents were actually relied upon from a very early period in the King's courts, whether cited in the opinion or not. Eventually the custom arose of citing in the court's opinion the specific decisions upon which it relied. Anglo-American law grows to a great extent by the accumulation of precedents, guided by the criticism and discussion of text-writers; and unvexed and unaided by legislation. The courts are constantly comparing and analyzing the earlier cases. The early explanations, theories, and reasons of the law as set forth in judicial decisions may be followed, amplified or rejected in succeeding cases, but they are always the basis of discussion in testing the validity of recognized principles or in applying them to new facts. It is these opinions of the judges which are gathered by the subsequent text-writers as Bracton gathered them, except that the later text writers had the opinions of the courts in the year books and were not forced to rely upon the Plea Rolls. These decisions are compared and analyzed by the text-writers and from them are deduced the principles set forth in the textbooks, which in turn

exercise more or less influence upon the subsequent current of judicial decision.<sup>17</sup>

Roman law was not a law of judicial precedent. In the classic period of the Roman law the commentators make no reference to the decisions of the court; that is, to the decisions of the prætor and the *judex*. They are not noticed, even for hostile criticism. They have no effect of any sort upon the development of the Roman law.

The reason for this great difference in the organs of legal development between these two systems of law lies in the fact that Anglo-American judges are trained lawyers and that they are considered as the oracles of the law, at least for each case which is submitted for adjudication. The decision of a judge is therefore the law of that case and as far as the case is a precedent, subject to the chance of reversal by a higher court or of overruling by a coördinate court, it helps to declare and to fix the law for future cases. Arguments of counsel and citations of authority are advisory only. In Roman law on the other hand, the prætor was not a trained lawyer except by a mere accident. He was not supposed to have any official knowledge of the law other than to grant or to deny the *formula* to the plaintiff or the *exceptio* to the defendant. The prætor presided over the case and referred it to the *judex* to ascertain the facts. The *judex*, like the prætor, was not supposed to have any official knowledge of the law. Any legal question of any difficulty was decided by the opinion of the *jurisconsultus*. This method of administering justice which seems so peculiar to the Anglo-American lawyer is due to the fact that the *jus civile* originally was one of the mysteries of the college of pontiffs, the priestly caste. The growing power of the plebeians and the downfall of the power of the early aristocracy of Rome reacted upon the position of the pontiffs and the exclusive knowledge of the law which was one of the great sources of their authority was wrested from them. By that time, however, it had become well settled that neither prætor nor *judex* was supposed to know the law and that legal questions were to be de-

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<sup>17</sup> For a discussion of the break-down of the law of precedent under present conditions, see Roscoe Pound, "Law in Books and Law in Action," 44 AM. L. REV. 12, and John S. Sheppard, Jr., "The Decadence of the System of Precedent," 24 HARV. L. REV. 298.

terminated by the advice of men learned in the law. Accordingly, as the class of *jurisconsulti* succeeded to the college of pontiffs as the trained lawyers of Rome, the opinion or *responsum* of a *jurisconsultus* was the means of determining the legal questions involved in a case which was submitted for adjudication. The opinions or *responsa* of a learned *jurisconsultus* were collected as we collect decisions of courts in Anglo-American law and they were the basis of subsequent analysis, discussion, and comment.<sup>18</sup>

<sup>18</sup> "The beginnings of professional knowledge and administration of the law are found with the *pontifices*. As knowing and guarding the calendar and the law of the *sacra*, which had great influence over the secular law in mercantile transactions and in procedure, they had brought this as well within the sphere of their activities. The knowledge of the law which grew up within the *collegium* flourished there and became a sort of secret science of the *pontifices*, by means of which the position of power of the patricians was greatly strengthened. Any one who wished to conclude juristic acts or to institute legal proceedings did well to have the *pontifices* point out to him the right way. This condition of affairs was changed only in the fifth century by the publication of the calendar, which was made in the year 450 A. U. C. (304 B. C.) by Cn. Flavius, a secretary of the *pontifex* Appius Claudius; and by the publication of the forms of actions which had been drawn up by the *pontifices* (*jus Flavianum*), as well as by the fact that a half century later the plebeians, too, were admitted to the college of the *pontifices*. The boast is made concerning the first plebeian *pontifex maximus*, Tiberius Coruncanius that he *primus publice jus vicile professus est*. By this means the juristic tradition of the *pontifices*, which had been collected up to this time, became generally accessible; and thus began an independent jurisprudence, which soon developed in great profusion.

"The activity of the jurists in Rome was from the beginning a predominately practical one. Apart from their coöperation in juristic acts (*cavere*), it was manifested chiefly in the rendering of legal opinions (*responsa*) on concrete practical cases. The weight of these opinions was determined according to their external basic principles, and the standing of the jurists by which they were rendered. They had no inherent compulsory authority over the *judex*. Frequently in legal proceedings opinion was opposed to opinion. This led in court to a conflict of opinions (*disputatio fori*), which was eventually ended by the fact that one view would compel a continued recognition in practice, and would thereby become law by usage. Therefore these *responsa* possessed no statutory force as yet.

"They did not attain statutory force until the period of the Empire, and, indeed, under Augustus through the decree that the *responsa* should hereafter be bestowed by virtue of Imperial authority. This arrangement was kept up by the later Emperors; and the *jus respondendi*, which they exercised themselves by granting their rescripts, was bestowed by them as a special favor upon prominent jurists. With reference to the form of these *responsa*, it was provided that they must be given in writing and must be sealed. Since such a *responsum* was now given under Imperial authority, it was binding upon the judge, unless a contradictory opinion of another jurist, who was likewise authorized, was produced. In the beginning this authoritative validity belonged only to the *responsum* as such; and for this reason it was applied to the individual proceedings only for which the *responsum* was granted. Soon this authoritative validity was granted to opinions which were no longer at hand in their official

A cursory examination of the views of the different historians of Roman law will show a number of minor differences of opinion as to the position of the *jurisconsultus* at Roman law. Passing allusions in Roman literature show us that *responsa* were rendered, that they were collected and that they formed the basis of comment and discussion. Of definite statements in legal writings concerning the position of the *jurisconsultus* we have only two texts, those of Gaius<sup>19</sup> and of Pomponius;<sup>20</sup> for the text from

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form, but were found in collections of *responsa*; and finally it was extended to the views of these authorized jurists, which were expressed in other writings of theirs. This usage was confirmed through a rescript of Hadrian, which provided that if there was no divergence of opinion among the authorized jurists concerning a question, this so-called *jus receptum* should be as binding as a *lex*; and that on the other hand in cases of the so-called *jus controversum*, that is to say, in questions concerning which the jurists held diverging views the *judex* was to decide as he held to be right." CZYHLARZ, LEHRBUCH DER INSTITUTIONEN DES RÖMISCHEN RECHTS, § 11.

On this question see also, MUIRHEAD, HISTORICAL INTRODUCTION TO THE PRIVATE LAW OF ROME, 2 ed., Pt. IV, Chap. I, § 59, pp. 291-93. BUCKLAND'S ELEMENTARY PRINCIPLES OF ROMAN PRIVATE LAW, § 6, p. 11. MELVILLE, MANUAL OF THE PRINCIPLES OF ROMAN LAW, Pt. I, Chap. I, § VIII, p. 35 *et seq.* WALTON, HISTORICAL INTRODUCTION TO ROMAN LAW, 2 ed., Chap. XXIII. LEAGE, ROMAN PRIVATE LAW, 22 *et seq.* SALKOWSKI, INSTITUTES AND HISTORY OF ROMAN PRIVATE LAW (Whitfield's translation), Introduction, Pt. II, § 7, pp. 36-39. SOHM, INSTITUTES OF ROMAN LAW (Ledlie's translation, 3 ed.), Pt. I, Chap. II, § 18, p. 92 *et seq.* GIRARD, SHORT HISTORY OF ROMAN LAW (translated by Lefroy and Cameron), Chap. III, § 1, 2, VI, p. 142 *et seq.* 1 CUQ, LES INSTITUTIONS JURIDIQUES DES ROMAINS, § 2, Bk. I, Chap. II, p. 16 *et seq.* 2 CUQ, LES INSTITUTIONS JURIDIQUES DES ROMAINS, Bk. I, Chap. II (VI), p. 35 *et seq.* KUHLENBECK, ENTWICKLUNGSGESCHICHTE DES RÖMISCHEN RECHTS, Bk. III, Chap. I, § 3, p. 305 *et seq.* ESMARCH, RÖMISCHE RECHTSGESCHICHTE, 3 ed., Bk. II, Chap. III, §§ 88-92.

For pontifical interpretation see also ESMARCH, RÖMISCHE RECHTSGESCHICHTE, 3 ed., Bk. I, Chap. V, §§ 41-45; 1 CUQ, LES INSTITUTIONS JURIDIQUES DES ROMAINS, § 1, Bk. I, Chap. II (III), p. 24 *et seq.*

For the effect of *responsa* in the time of Augustus, see also WALTON, HISTORICAL INTRODUCTION TO ROMAN LAW, 2 ed., Chap. XXIV, pp. 280, 281. SALKOWSKI, INSTITUTES AND HISTORY OF ROMAN PRIVATE LAW (Whitfield's translation), Introduction, Pt. II, § 8, V, pp. 45, 46.

For the effect of *responsa* in the time of Hadrian, see also 1 CUQ, LES INSTITUTIONS JURIDIQUES DES ROMAINS, § 2, Bk. I, Chap. II (III), § 3.

<sup>19</sup> "The responses of the learned in the law are the expressed views and opinions of those to whom license has been given to expound the laws; and if the opinions of all these are in accord, that which they so hold has the force of a *lex*; but if they are not in accord the *judex* is at liberty to follow which opinion he pleases, as is stated in a rescript of the late emperor Hadrian." GAIUS, I, § 7 (translated by Abdy and Walker.)

<sup>20</sup> "Massurius Sabinus was a member of the equestrian order, and was the first to give opinions in the public interest (*publice*); the fact being that after this privilege had come to be given, it was allowed to him by Tiberius Caesar. It may be observed



Justinian's Institutes<sup>21</sup> is a reproduction of the text of Gaius with slight modifications. Upon these two texts there has been a considerable amount of comment and discussion; and by giving emphasis to one phrase or to another, different historians have reached different views. It must be admitted in advance that we cannot be sure that we have either text in its original form and that it is doubtful how far each text-writer was incorporating positive legislation into his statement of the law. The point upon which this divergence of view has arisen is as to the official position of the *jurisconsultus* and as to the binding effect of his *responsa*. The college of pontiffs undoubtedly possessed an official position as the custodians and oracles of the law. Apparently their statements of the law were binding upon the officials to whom such statements were made, including the *judex*. When this monopoly was wrested from them and when men who were not members of the college of pontiffs acquired knowledge of the law and gave *responsa*, this knowledge and authority for a long time remained in the wealthier classes. A *jurisconsultus* was not paid by his clients. His services were gratuitous. They were rendered in part as a performance of a public duty, and in part for the purpose of obtaining political influence. It is thought worthy of note that Sabinus was not a man of ample means and that he was maintained to a great extent by his pupils. The

in passing that before the days of Augustus the right of delivering opinions in the public interest was not granted by the head of the state, but any persons who felt confidence in their own learning gave answers to such as consulted them; moreover they did not always give their answers under seal; they very often wrote to the judge themselves, or called upon those who consulted them to testify to the opinions they gave. The Divine Augustus was the first to lay down, in order to ensure greater authority to the law, that the jurisconsult might deliver his answer in pursuance of an authorization given by himself; and from that time such an authorization was asked for as a favour. It was in consequence of that that our excellent Emperor Hadrian, on receiving a request from some lawyers of prætorian rank for leave to give legal opinions, answered the applicants that this privilege was not usually asked for but granted [or that there was no leave asked for this practice, it was simply carried out], consequently, if any one were confident of his powers, he (the Emperor) would be much pleased to find that he took steps to qualify himself for delivering opinions to the citizens." POMPONIUS, D. I, 2, 48, 49 (translated by Monro.)

<sup>21</sup> "The answers of those learned in the law are the opinions and views of persons authorized to determine and expound the law; for it was of old provided that certain persons should publicly interpret the laws, who were called jurisconsults, and whom the Emperor privileged to give formal answers. If they were unanimous the judge was forbidden by imperial constitution to depart from their opinion, so great was its authority." INSTITUTES, I, 2, 8 (translated by Moyle.)

*jurisconsulti*, up to the reign of Augustus, had apparently the right to give *responsa*, but a *responsum* would not be binding upon a *judex* by positive law. Were these *responsa* regarded as practically binding even though they had no formal legal sanction? What was the object and effect of the legislation of Augustus which is referred to by Pomponius? Was Augustus attempting to give a monopoly to the *jurisconsulti* who had obtained authority from himself, to render opinions which should be binding upon the *judex*; or was he trying to strengthen the position of the *jurisconsulti* by compelling the *judex* to follow the opinions of those to whom such authority was given? The text of Pomponius reads as if such authority were permissive only; as if no attempt was made to prevent *jurisconsulti* who had not obtained such authority from giving *responsa*. Was the *jus respondendi* given to a very few of the *jurisconsulti* or was it given to any one who had demonstrated an adequate knowledge of the law? Between the legislation of Augustus and the legislation of Hadrian was the *judex* bound to follow the *responsum* of a *jurisconsultus* to whom the Emperor had given authority to give *responsa*? What was the object of the legislation of Hadrian? Was it to make the *responsum* of the authorized *jurisconsultus* binding upon the *judex* in that particular case; or was it intended to make all *responsa* of all authorized *jurisconsulti* precedents which must be followed by the *judex* except when there was a conflict of authority? If we select the proper expressions of opinion from the different historians, we can see the *jurisconsultus* on the one hand as devoid of official position and of power to give *responsa* which should be binding upon the *judex* down to the reign of Hadrian, and we can then see that his *responsa* are binding only in the particular case in which they are given. By a similar selection of other expressions of opinion we can see a *jurisconsultus* who from the time of Augustus had power, if authorized by the Emperor, to give *responsa* which were binding upon the *judex*; and who had power from the time of Hadrian to give *responsa* which should amount to precedents and which should be binding in all future cases.<sup>22</sup> If the *jurisconsultus* could render *responsa* to the

<sup>22</sup> For the final breakdown of *responsa* see Erwin Grueber "The Decline of Roman Jurisprudence," 7 L. QUART. REV. 70.

For legislation which attempted to fix absolutely the rank and authority of juristic

*judex*, only if the *jurisconsultus* had been authorized by the Emperor to render such *responsa*, and if their *responsa* thus rendered were absolutely binding, the position of the *jurisconsultus* at Roman law would be almost identical with that of the Judge-Advocate-General in military law.

Whatever these differences of detail, the actual difference between Roman law and Anglo-American law on this point is rather apparent than real. While they differed sharply upon their theories as to the possessor of technical legal knowledge, they agreed

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writings generally, see MUIRHEAD, HISTORICAL INTRODUCTION TO THE PRIVATE LAW OF ROME, 2 ed., Pt. V, Chap. I, § 78, p. 363-65. MELVILLE, MANUEL OF THE PRINCIPLES OF ROMAN LAW, 2 ed., Pt. I, Chap. I, § VIII, pp. 42, 43. WALTON, HISTORICAL INTRODUCTION TO ROMAN LAW, 8, Chap. XXVI, pp. 293-95. SALKOWSKI, INSTITUTES AND HISTORY OF ROMAN PRIVATE LAW (Whitfield's translation), Introduction, Pt. II, § 9, p. 58. SOHM, INSTITUTES OF ROMAN LAW (Ledlie's translation), 3 ed., Pt. I, Chap. II, § 21, pp. 118, 119. GIRARD, SHORT HISTORY OF ROMAN LAW (translated by Lefroy and Cameron), Chap. III, §§ II (II), pp. 152, 153. KUHNENBECK, ENTWICKLUNGSGESCHICHTE DES RÖMISCHEN RECHTS, Bk. III, Chap. II, § 4, p. 350.

"By the third century there begins a decline of Roman jurisprudence, which suffers a rapid decay after Diocletian. Scientific productive activity died; the responses of the jurists ceased; the development of the law took place along the path of Imperial legislation only. Still the writings of the great past, which had been handed down, preserved their binding force. The lack of scientific capacity and the great bulk of the juristic literature caused an uncertainty in practice as to its application. What writings were in force? Those of the authorized jurists. But how was one to know by this time whether this or that jurist of his own time (centuries ago) had acquired the *jus respondendi*? This and other similar difficulties were the cause of a statute of Theodosius II. and Valentinian III., of the year 426, by which the sphere of the valid juristic writings was delimited, and at the same time their validity was regulated according to external facts, in accordance with the notions of the time. Through this so-called law of citations, the validity of the most current writings, that is to say, those of Papinianus, Paulus, Gaius, Ulpianus and Modestinus were confirmed as pre-eminent; but with the exception of the *note* of Paul and Ulpian to Papinian, which Constantine had already prohibited. These *note* were to remain prohibited in the future as well. Since Gaius had had no *jus respondendi* in his time, this was given to him by a sort of *ex post facto* confirmation, since his writings were nevertheless used in the courts. In addition to these five jurists, statutory validity was to be given to all the works of every other jurist, to which a reference was made in the works of one of the five thus named. To go into details, the process was regulated as follows. If all these jurists were of the same opinion with reference to a question, this was to be binding like a statute. In case of a divergence of opinion, on the other hand, that view should prevail for which a majority of the jurists had declared themselves. In case of an equal division of authority, that view was to prevail which Papinian (*excellentis ingenii vir*) had expressed. In case he had not expressed himself concerning this question, the judge was finally to decide according to his own views." CZYHLARZ, LEHRBUCH DER INSTITUTIONEN DES RÖMISCHEN RECHTES, § 11. See, also, Roscoe Pound, "Mechanical Jurisprudence," 8 COL. L. REV. 605.

that it was the opinions of those who possess technical legal knowledge and whose opinions actually determined adjudicated cases that were to be the basis of further growth of the law.

Military law like Roman law, is not a law of judicial precedent. The members of a court-martial are not supposed to know the law as technical experts. If they possess such knowledge it is personal and not official. Technical and expert knowledge of the law is supposed to be possessed by the judge-advocate. In England the judge-advocate who appears at a court-martial represents the Judge-Advocate-General and is required to maintain an entirely impartial position as the legal adviser of all the parties connected with the trial, as well as the legal adviser of the court. While the court has power to disregard his advice, such action is highly inadvisable. The court should be guided by the opinions of the judge-advocate on any questions of law or procedure that may arise during the trial and it must consider the grave consequences which may result from a disregard of legal advice given to them by the judge-advocate.<sup>23</sup> The judge-advocate is not the prosecutor and his position as an impartial adviser is not complicated by the fact that he is officially charged with the duty of conducting the prosecution.

In the United States the position of the trial judge-advocate is somewhat ambiguous. He has charge of the prosecution. He is bound to inform the prisoner of his legal rights if he is not represented by counsel. He may call the attention of the court-martial to apparent irregularities in proceedings and he is to act as the legal adviser of the court so far as to give his opinion upon a point of law arising during the trial when asked for by the court, but not otherwise.<sup>24</sup> Under both English and American theories as to the position of the judge-advocate, the Judge-Advocate-General, at least, is the oracle of the law. He occupies the position which originally the college of pontiffs and subsequently the *jurisconsulti* occupied in Roman law, rather than the position which the prosecuting attorney occupies in the ordinary administration of criminal justice. While provision might be made for preserving the opinions of every judge-advocate, at every impor-

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<sup>23</sup> PRATT, *MILITARY LAW*, 19 ed., § 73, p. 62.

<sup>24</sup> *MANUAL FOR COURTS-MARTIAL* [U. S. Army] (corrected to April 15, 1917), paragraphs 95-103.

tant court-martial, this is not done as a matter of fact. The opinions of the Judge-Advocate-General are preserved but they are not published. They are available in the form of a digest in which a summary of abstract rules of law is generally given with such lack of detailed statement of fact, in many cases, as to prevent the application of the abstract principle from being discernible readily. This digest is the collection of *responsa* of military law and as such it has been commented upon by the different text-writers on military law. These opinions as a rule are treated as finalities except where modified subsequently by statute.

#### IV

At Anglo-American law it has become settled doctrine that the court has power only to decide each case as it is submitted for adjudication. Judicial power is distinguished from legislative power and the declaration of law for the particular case is regarded as judicial power which can be exercised by the court. While the declaration of law in advance for similar cases which may arise in the future, is now regarded as legislative power which is outside of the jurisdiction of the court, at an earlier period it once seemed as if a different view of this matter might be taken. The year books occasionally show us judges who feel free to make official declarations of law from the bench as well as to draft statutes. In the case of doubtful or disputed points, conferences of judges were occasionally held and resolutions were adopted which were intended not merely to decide the specific case but to lay down broad and comprehensive principles by which analogous cases could be decided. Coke seems to have felt that as a common-law judge he had authority to take part in making such resolutions. When Coke's rival and enemy, Bacon was made Lord Keeper of the Great Seal of England and took his place in Chancery, he made an address to the bar in which he avowedly compared himself to a Roman prætor as the officer who had the greatest affinity to the jurisdiction of the Chancellor; and in which he announced, like the prætor, how he would use his jurisdiction.<sup>25</sup>

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<sup>25</sup> 2 WORKS OF FRANCIS BACON, 1844 ed., 471, *et seq.* 1827 ed., Vol. 7, 244 *et seq.* See also KERLY, HISTORICAL SKETCH OF THE EQUITABLE JURISDICTION OF CHANCERY, 102 *et seq.* U. M. Rose, "Coke and Bacon: The Conservative Lawyer, and the Law

His declaration to a large extent dealt with procedure and practice rather than substantive law; but equity has persisted even more than common law in regarding substantive law as a sort of a by-product of procedure and practice. In a more definite and formal way Bacon made and published ordinances for the better and more regular administration of justice in the Chancery, which were to be duly observed, saving the prerogative of the court.<sup>26</sup> How far Bacon could have gone in developing equity by his seventeenth-century views of the praetor's edict if he had continued to occupy his office for a sufficient length of time, must always be a matter of conjecture. His fall, to which his virtues contributed perhaps more than his vices, prevented him from developing his plans. Subsequent chancellors have felt free to make rules of procedure but no one has revived his attempt to publish an edict upon entering into office in which should be set forth the manner in which he proposed to use his jurisdiction. Two remnants of the practice of framing resolutions and deciding cases in advance remain. Occasionally as a matter of convenience, coördinate judges who have differed on matters of procedure of substantive law meet in consultation, and attempt to adopt a common basis of decision, so as to prevent the misfortune of having two similar cases decided in different ways because of the divergent personal views of the judges before whom the questions may happen to arise. Under some constitutions, provisions have been made for requiring advisory opinions of the supreme court upon specific points of law before litigation actually arises.<sup>27</sup> This latter method of declaring the law is so at variance with our common-law ideas that the attitude of the courts toward this addition to their powers is decidedly hostile.

In Rome the downfall of the kings left the power of the government and administration essentially royal in its nature, but divided among the consuls and the other officers who were from time to time created as successive lines of intrenchment whenever the old aristocracy was forced to open any one of the exist-

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Reformer." 31 AMERICAN L. REV. 1, and E. M. in LAW TIMES (London), "Francis Bacon: Philosopher, Law Reformer, Lord Chancellor," 40 AMERICAN L. REV. 28.

<sup>26</sup> 2 WORKS OF FRANCIS BACON, 1844 ed., 479 *et seq.*

<sup>27</sup> F. Granville Munson, "The Decision of Moot Cases by Courts of Law," 9 COL. L. REV. 667.

ing offices to the plebeians. The prætor to whom the administration of justice was committed possessed therefore a portion of the *imperium*; limited, it is true, but pure and unalloyed as far as it went. By virtue of this *imperium*, on taking office he published an edict in which he set forth the actions which he would allow.<sup>28</sup> While each prætor probably had power to issue an edict

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<sup>28</sup> "The administration of justice was vested in Rome, during the earliest period, in the King, and later in the consuls. In the year 387 A. U. C. (367 B. C.) a prætor (*prætor urbanus*) was created by the side of consuls; and jurisdiction in proceedings between Roman citizens (*qui inter cives jus dicit*) was assigned to him as a special jurisdiction. About the year 512 A. U. C. (242 B. C.) a second prætor, the so-called *prætor peregrinus*, was created to whom proceedings between non-citizens (*peregrini*) as well as proceedings between citizens and non-citizens were assigned (*qui inter peregrinos jus dicit, inter cives et peregrinos jus dicit*). In addition to the two prætors the *œdiles curules* had a special jurisdiction in Rome in disputes of the market place (§ 87). In the provinces jurisdiction was in the hands of the prefects.

"These judicial authorities, like the other magistrates of Rome, possessed the *jus edicendi*, that is to say, the right to make binding enactments and to promulgate them. They did this by announcing, upon their entrance into their office, for the guidance of the public who sought justice, the principles which they proposed to observe in administering justice during their year in office. The most important of these edicts are those of the prætors. Our legal sources contained nothing but fragments of the *edictum prætoris urbani*, for which reason we restrict ourselves to these in our subsequent discussion.

"The beginnings of the edict go back to an early period of time, and it is as old as the office of the *prætor urbanus*. By virtue of the *imperium* belonging to the prætor, he could from remotest times appoint a court in every case, which was not regulated by the statutes enacted by the people (outside the law), as it might be needed; and he could instruct the *judex* appointed by him by way of commands, under what pre-suppositions and for what he should condemn the defendants. The *judex* was bound by this instruction (*formula*), which was the emanation from the power of command, which was contained in the prætorian *imperium*; and he did not have to inquire whether it was based upon a statute enacted by the people or not. He had merely to carry out these instructions; and he had only to investigate to see whether the pre-suppositions, which were set forth in the instructions, had happened or not; and to render his decision in accordance with the result of this investigation. In this way it was made possible for the prætor to fill in the gaps in the law by the administration of his *imperium* and to come half-way to give judicial validity to the claims, which arose out of the necessities of commerce and life, claims which according to the statutes enacted by the people, enjoyed no legal protection; and especially to grant new actions; to promise these in advance in his edict upon his entrance into office; and to establish in his edict *formulae*; which were appropriate thereto. Numerous rights of action owe their existence to this. Furthermore, by virtue of his *imperium*, the prætor also had power to deny judicial enforcement to such provisions of the statutes enacted by the people as had become obsolete, or to join them to further pre-suppositions established by him. Finally since the reform of procedure introduced by the *lex Aebutia*, he also had to draft *formulae* of action suitable for the claims which were based upon the statutes enacted by the people; and to set them forth in the edict. For this reason

absolutely different from that of his predecessors, the edict was as a matter of fact repeated by prætor after prætor, with only

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the edict necessarily underwent a considerable expansion. The jurist Papinian called these different purposes, which indeed are merely hinted at, the *supplere, corrigeræ, adjuvare jus civile*, since he defines the law which is based on the prætor's edict as the *jus quod prætores introduxerunt adjuvandi vel supplendi vel corrigendi juris civilis gratia propter utilitatem publicam*.

"The edict was a result of the official power of the prætor. It was promulgated by the prætor upon his entrance into office as the program of his activity; it was in force for his official jurisdiction and for his period of office. For the latter reason it was called the *edictum perpetuum (annuum)*, in contradistinction to the *edicta repentina*, which were issued for purely temporary occasions. His edict was obligatory upon the prætor himself only since the *lex Cornelia* 687 A. U. C. (67 B. C.). At the expiration of his term of office it expired automatically, for which Cicero calls it a *lex annua*. His successor promulgated a new edict. It was a matter of course that in his edict he reiterated those provisions of his predecessors which had been found adequate. Thus a solid nucleus of successive edicts was built up, which constitute the chief part of these edicts, the so-called *edictum tralatitium*. The actually new part of the formally new edict was limited to additions of greater or less significance (*novæ clausulæ, novæ edicta*).

"In such manner the prætorian edict formed a sort of codification of the law, which had practical validity, since only that could be regarded as having practical validity which had back of the power of the prætor as the upholder of his jurisdiction. This codification had the inestimable advantage of preserving on the one hand, the traditional law as far as it had proven itself adequate; and, on the other hand, of being able to meet the new demands of a progressive society very easily, because of its annual renewal. It is plain that on account of the difficulty of legislation by the *comitia*, the center of gravity of legislation for private law shifted over to the edict. The law which is based upon the edict is called *jus honorarium*, or *jus prætorium*, as the case might be. From the Roman point of view it is neither *lex* or *legis vice*. Its validity, in contradistinction to the *lex* is limited as to place to the jurisdiction of the official; and as to time, to his period of office. But it is really statutory law in the general sense, as discussed above, since it is in force only by virtue of the enactment of the official and not in the least as customary law.

"The time of greatest development of the edict lay in the period of the Republic. It is true that the old magistracies with their *jus edicendi* survived during the period of the Empire, but they at once came to be dependent upon the *princeps*. For this reason the edict became rigid; new provisions became rare, and were undertaken only in accordance with the approval of the *princeps* which were previously obtained. Hadrian caused a revision of all the edicts to be undertaken by the jurist Salvius Julianus, about which we have scanty information from reports of a much later period. As Justinian tells us, the Emperor, by means of a *senatus consultum* caused the formation of this revised edict, which included the edict of the *adiles*, and the provincial edict as well as the prætorian edict. The legal character of the edict was not altered thereby however. It was still in force from that time on as the edict of the magistrate and not as a *senatus consultum*. This *senatus consultum* had an administrative significance only. It enacted a standard edict and it obliged the magistrates to proclaim this alone as their edict, and to obtain from higher authority approval of such amendments as might be contemplated by them. For this reason the edict from this time on



such changes and modifications as experience had shown to be necessary. It thus became the living voice of civil law. This edict with the commentaries which were written upon it, was one of the growing points of the Roman law.

By the specific provisions of the Articles of War the President has power to make regulations which he may modify from time to time in which he may prescribe the procedure including modes of proof in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals. Such regulations must not be contrary to the Articles of War or inconsistent with them, and they must be laid before Congress annually.<sup>29</sup> By virtue of this power the President has declared much of the mili-

is, in its content, only the expression of the will of the senate and the Emperor; while in form, it still remains the edict, that is to say, the law which proceeds from the office of the magistrate. But even under these conditions it is formally the prætor and not the senate who promises actions, exceptions, etc.

"From this edict, the content of which has now been fixed, and which in this sense is the *perpetuum edictum*, of Hadrian, there has been borrowed that which we now find in Justinian's codification as the edict. The newest and best attempt to restore the edict is that by Lenel: *The Edictum Perpetuum*, 1883, ed. II, 1907 (Bruns. 211 *et seq.*") CZYHLARZ, *INSTITUTIONEN DES RÖMISCHEN RECHTES*, § 8. See also MUIRHEAD, *HISTORICAL INTRODUCTION TO THE PRIVATE LAW OF ROME*, 2 ed., Pt. III. Chap. II, § 49, pp. 238-42. MELVILLE, *MANUAL OF THE PRINCIPLES OF ROMAN LAW*, Pt. I, Chap. I, § 5, p. 24 *et seq.* WALTON, *HISTORICAL INTRODUCTION TO ROMAN LAW*, 2 ed., Chap. XXII. SALKOWSKI, *INSTITUTES AND HISTORY OF ROMAN PRIVATE LAW* (Whitfield's translation), Introduction, Pt. II, § 7, pp. 34-36. SOHM, *INSTITUTES OF ROMAN LAW* (Liedlie's translation), 3 ed., Pt. I, Chap. II, § 15, p. 73 *et seq.* KUHLENBECK, *ENTWICKLUNGSGESCHICHTE DES RÖMISCHEN RECHTS*, Bk. II, Chap. III, § 3, p. 219 *et seq.* GIRARD, *SHORT HISTORY OF ROMAN LAW* (translated by Lefroy and Cameron), Chap. II, § 11, 2 (II), p. 80 *et seq.* LEAGE, *ROMAN PRIVATE LAW*, 11 *et seq.* 2 CUQ, *LES INSTITUTIONS JURIDIQUES DES ROMAINS*, Bk. I, Chap. II (V), p. 31 *et seq.* ESMARCH, *RÖMISCHE RECHTSGESCHICHTE*, 3 ed., Bk. II, Chap. IV, §§ 93 *et seq.* VOIGT, *RÖMISCHE RECHTSGESCHICHTE*, § 19. For the revision and consolidation of the perpetual edict under Hadrian, see also MUIRHEAD, *HISTORICAL INTRODUCTION TO THE PRIVATE LAW OF ROME*, 2 ed., Pt. IV, Chap. I, § 58, pp. 289-91. SALKOWSKI, *INSTITUTES AND HISTORY OF ROMAN PRIVATE LAW* (Whitfield's translation), Introduction, Pt. II, § 8, IV, p. 45. KUHLENBECK, *ENTWICKLUNGSGESCHICHTE DES RÖMISCHEN RECHTS*, Bk. III, Chap. I, § 1, C, p. 293. VOIGT, *RÖMISCHE RECHTSGESCHICHTE*, § 84.

<sup>29</sup> *MANUAL FOR COURTS-MARTIAL* [U. S. ARMY] (corrected to April 15, 1917), paragraphs 198, 199; Thirtieth Article of War (Rev. STAT. U. S., § 1342).

If the growing movement to confer upon the courts ample power over pleading, practice and procedure; and to reduce legislation on these points to the minimum, succeeds, our courts will have some resemblance to the prætor's court when he determined the formula which was submitted to the *judex*. The early common-law judges, before the day when their practice had stiffened by precedent, exercised a similar power, as Holdsworth sees it. See W. S. Holdsworth, "The Year Books," 22 L. QUART. REV. 360, 369.

tary law in advance. In the Manual for Courts-Martial the chapter on Evidence<sup>30</sup> prescribes the modes of proof which includes rules of admissibility for witnesses and other evidence. This chapter is not in the form of a statute but rather in the form of a text book. It refers to the Digest of the Opinions of the Judge-Advocate-General, to cases which have been decided by federal and state courts, to text writers, and to statutes. Principles are illustrated by hypothetical cases. We have here an instance in which at military law the President as Commander-in-Chief lays down in advance broad principles of law which are but a modification of the common-law rules of evidence, not for any specific case but for all cases which may arise in the future and which may involve the application of such principles.

## V

In discussing the resemblances of military law to Roman law, no reference has been made to its content. There is but little in common between a criminal code which makes scourging and crucifixion its ordinary punishments and one which forbids punishment by flogging, branding, marking or tattooing; and which imposes death as a penalty, but without torture or degradation, except as conviction of crime, may amount to a declaration of an existing degradation. The early English Articles of War, no doubt, were much more savage in their nature than modern English or United States articles and more like Roman law, but, even for them, there is little need to invoke any theory of direct borrowing. It is quite likely that, in view of the relation of the King of England to his continental possessions, some continental ideas upon military law were embodied in the English Articles of War. It is probable that as far as he could, the King ordained the same Articles of War for his army whether in England or on the Continent, and whether it was raised in England or in Aquitaine. If the continental military codes influenced the content of the early English Articles of War and if they cause the slightest infusion of Roman ideas, it was probably the debased popular Roman law man and not the classic law.<sup>31</sup>

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<sup>30</sup> MANUAL FOR COURTS-MARTIAL [U. S. Army] (corrected to April 15, 1917), paragraphs 194-289.

<sup>31</sup> Interesting collections of Military Ordinances and Codes are to be found in

Our problem, however, is not one of the content of military law but one of its form and its methods of growth. What explanation can we give of the origin of this alien intruder into our law? Why has military law burned what the common law has adored, and why has it adored what the common law has burned? Why has military law, in its method of development, differed from the common law and agreed with the Roman law, on every point?

The theory of direct borrowing has the same place in comparative law that Noah's Flood once had in geology. It is a first aid to all difficulties, and, if our knowledge is sufficiently limited, it will explain all our troubles. Sometimes, moreover, it is the correct theory as tested by further investigation into the facts. Shall we invoke it here? It is an explanation that is obvious and simple, but it gives no aid to the solution of this puzzle. The stream of *responsa* had ceased to flow and the prætor's edict had become petrified some three centuries before Justinian's compilation and a thousand years before any influence upon English military law could have been exerted. Those who administered military law probably had no idea of the method by which Roman law had grown. At the revival of the study of Roman law, the Digest was thought of rather as Justinian's legislation than of a summing up in an enucleated form, of the result of centuries of gradual growth.

Is this a case in which like causes have produced like results in different ages, separated in time by hundreds of years; and in different places, separated in space by hundreds of miles? In both cases we have an Aryan race of marked genius for law, and organized on a military basis; for Rome was a military state, and in England, military law existed solely for the government of the army. In both cases we have the administration of a formal technical law and not the administration of popular custom in a tribal assembly. In both cases we have the administration of this technical formal law by a court which is not a permanent court, and which is not a technically trained body organized

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WINTHROP, MILITARY LAW AND PRECEDENTS, 2 ed., appendices I to XVI inclusive; in GROSE, MILITARY ANTIQUITIES RESPECTING A HISTORY OF THE ENGLISH ARMY. Early codes are also given in whole or in substance in CLODE, THE ADMINISTRATION OF JUSTICE UNDER MILITARY AND MARTIAL LAW.

primarily for the purpose of adjudicating cases. In both cases the court does not know the law in theory, and frequently does not know it in fact. The key to the development of military law is probably to be found in the position of the Judge-Advocate-General. The fact that the Judge-Advocate-General, and not the commanding officer of the court-martial was the trained legal expert, has caused the Judge-Advocate-General to take the place in military law which in Roman law was occupied by the *juris-consultus*; while the commanding officer who has power to convene the court-martial roughly takes the place of the prætor; and the court-martial itself takes the place of the *judex*.

Back of this is another question for the student of comparative law. Is the Roman method of declaring and developing law, the normal method of the Aryan when he rises above the tribal custom into technical law? The development of political authority in England caused a partial separation of powers. The very essence of military organization is a concentration of powers. The fundamental idea of the administration of government in Rome was the *imperium*; now concentrated in the person of the king; now scattered among the different high officers of Rome; and finally concentrated again in the hands of the emperor. Is it the concentration of military power in the hands of the President as Commander-in-Chief which has resulted in his exercise of authority to declare law in advance? Has the development of law in England, departed from the normal method that Rome followed because of its political and constitutional history? Has equity followed this distorted method of development of the common law because of its desire to follow the analogies of the common law except as far as this might be inconsistent with the peculiar and essential principles of equity? Is our enormous mass of judicial precedent and the sharp separation between the law which is made by legislation and the law which grows by judicial decision, a part of the price which we have to pay for democracy? Roman law developed in a manner more symmetrical and with better coördination than our own, although the symmetry of Roman law is more apparent than it is real. But Rome was at all times an autocracy although the autocratic power was sometimes put in commission among a number of different officers. Can we work out a means of developing our own law

so as to secure a comprehensive and symmetrical development like that of the Roman law and at the same time so as to preserve the life and vigor of an industrial democracy? Are co-ordination and coöperation between the legislative power and the judicial power inconsistent with free government? Is it possible to secure a centralization of administration which will give us a symmetrical development of our law, and at the same time to avoid such a centralization as will result in autocracy?

Democracy is entitled to the best of law. It needs it. Does a comparison of Roman law and of military law tend to show that after all we must elect between that which is most nearly ideal in its method of development and that which can develop in harmony with democratic institutions? It is to be hoped that we do not have to make this election. If possible, let us choose the advantages of both. To those of us who have been striving for a means of seeking a simpler, freer development of our law, these questions, however, present new complications. If we cannot secure a coördination between the legislative and the judicial, together with a comprehensive and symmetrical development of our law, and at the same time preserve our free government and our democracy, shall we not prefer our unwieldy jumble of judicial precedent and legislation to any other system of law however symmetrical, uniform and comprehensive it may be?

Many of us have for the last year and a half been teaching military law as a patriotic duty. May we not also learn from it a valuable lesson in comparative law?

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## INDIRECT ENCROACHMENT ON FEDERAL AUTHORITY BY THE TAXING POWERS OF THE STATES.<sup>1</sup> VI

### II. REGULATIONS OF INTERSTATE COMMERCE (*continued*)

#### 2. *Taxes not Discriminating Against Interstate Commerce* (*continued*)

##### C. TAXES ON ACTS, OCCUPATIONS, OR INCOME.

THIS study has now reached a point where the remaining cases can most profitably be considered under the somewhat omnibus rubric chosen for this section. We have seen that the Supreme Court has not been meticulous in inquiring whether the statute under which a tax is imposed calls it a tax on property or on a franchise or on capital stock or "on the corporation itself." If a rose by another name would smell sweeter, it has sometimes been rechristened and found sweet enough to accept. "Literal adherence to particular nomenclature should not be allowed to control construction in arriving at the true intention and effect of state legislation,"<sup>2</sup> observed Chief Justice Fuller in a passage already quoted.<sup>3</sup> In spite of the rule that earnings from interstate commerce may not be taxed directly, such earnings have been accorded recognition in assessing the amount of taxes on privileges or property. Most of the cases have dealt with valuations that regarded a capitalization of net earnings.<sup>4</sup> But *Maine v. Grand Trunk Railway*

<sup>1</sup> For preceding instalments of this discussion see 31 HARV. L. REV. 321-72 (January, 1918); *Ibid.*, 572-618 (February, 1918); *Ibid.*, 721-78 (March, 1918); *Ibid.*, 932-53 (May, 1918); and 32 HARV. L. REV. 234-65 (January, 1919).

<sup>2</sup> *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 700, 15 Sup. Ct. Rep. 268 (1895).

<sup>3</sup> 32 HARV. L. REV. 249.

<sup>4</sup> *The Delaware Railroad Tax*, 18 Wall. (U. S.) 206 (1873), 32 HARV. L. REV. 236; *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. Rep. 961 (1888), 32 HARV. L. REV. 239; *Massachusetts v. Western Union Telegraph Co.*, 141 U. S. 40, 11 Sup. Ct. Rep. 889 (1891), 32 HARV. L. REV. 239; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. Rep. 876 (1891), 32 HARV. L. REV. 240; *Cleveland, C., C. & St. L. Ry. Co. v. Backus*, 154 U. S. 439, 14 Sup. Ct. Rep. 1122 (1894), 32 HARV. L. REV. 244; *Pittsburgh, C. C. & St. L. Ry. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. Rep. 1114 (1894), 32 HARV. L. REV. 248; *Western Union Telegraph*

Co.,<sup>5</sup> *Erie Railroad v. Pennsylvania*<sup>6</sup> and *Henderson Bridge Co. v. Kentucky*<sup>7</sup> accepted the measure of gross earnings, some or all of which were from interstate commerce.

To an untutored mind, taxes measured by gross earnings are a form of income taxes; and from now on it will be convenient to treat them as such, no matter by what name courts or legislatures may choose to call them. It will help towards seeing things as they are, if we emulate the attitude of Mr. Justice Holmes in his illuminating essay on "The Path of the Law,"<sup>8</sup> in which, in order to point to the distinction between law and morals, he looks to the mental and emotional processes of the "bad man." For our purposes we may invoke that more estimable person whom we know as the "business man." This pecuniary creature will think that he is taxed on his income when his tax varies directly with the ups and downs of his income, even though judges and scholars may assure him that he is taxed on something entirely different. He will be primarily interested in knowing when and why such a tax must be paid and when and why it can be escaped. He will care less what such a tax is called by those versed in legal niceties than what its effect will be on his balance sheet. To him, at least, we may look for forgiveness for such imperfect coördination as may be indulged in by treating together all taxes measured by income, whether they are formally taxes on income or taxes on occupations, franchises or property.

For a decade after the Ohio Express cases,<sup>9</sup> there was comparative quiet among those subjected to taxes that took account of earnings from interstate commerce. *Parke, Davis & Co. v. Roberts*<sup>10</sup> sustained a tax on that part of the capital stock of a foreign corporation which was regarded as employed within the state, although

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Co. v. Taggart, 163 U. S. 1, 16 Sup. Ct. Rep. 1054 (1896), 32 HARV. L. REV. 248; *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 17 Sup. Ct. Rep. 305 (1897), 166 U. S. 185, 17 Sup. Ct. Rep. 604 (1897), 32 HARV. L. REV. 251; *Adams Express Co. v. Kentucky*, 166 U. S. 171, 17 Sup. Ct. Rep. 527 (1897), 32 HARV. L. REV. 258, note 104.

<sup>5</sup> 142 U. S. 217, 12 Sup. Ct. Rep. 121 (1891), 31 HARV. L. REV. 579-80, 32 HARV. L. REV. 242.

<sup>6</sup> 158 U. S. 431, 15 Sup. Ct. Rep. 896 (1895), 32 HARV. L. REV. 249.

<sup>7</sup> 166 U. S. 150, 17 Sup. Ct. Rep. 532 (1897), *Ibid.*, 258, note 104.

<sup>8</sup> 10 HARV. L. REV. 457-78.

<sup>9</sup> *Adams Express Co. v. Ohio State Auditor*, note 4, *supra*.

<sup>10</sup> 171 U. S. 658, 19 Sup. Ct. Rep. 58 (1898).

the corporation was engaged partly in interstate commerce and the tax was graduated according to the annual dividends. Mr. Justice White did not sit, and Justices Harlan and Brown dissented; but their objections were confined to what they regarded as a discrimination against interstate commerce because the tax was imposed only on corporations not "wholly engaged" in business within the state.<sup>11</sup>

In 1900 the court unanimously sustained a tax on the total capital stock of a domestic corporation owning an interstate bridge, which was in addition to a tax on its tangible property.<sup>12</sup> Three years later *Western Union Telegraph Co. v. Missouri*<sup>13</sup> sanctioned Missouri's application of the unit rule to the property of the Western Union within the state. Mr. Justice Brewer concurred only in the result, and Justices White and Peckham dissented; but whether on the main point of the case or on the subordinate one that a complaint against discriminatory overvaluation cannot be raised in an action at law, does not appear, as there is no dissenting opinion.

Meanwhile other cases had sanctioned assessments of property employed in interstate commerce, which did not take account of

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<sup>11</sup> The majority recognized that "if the object of the law in question was to impose a tax upon products of other States while exempting similar domestic goods from taxation, there might be room to contend that such a distinction was constitutionally objectionable as tending to affect or regulate commerce between the States" (171 U. S. 658, 662, 19 Sup. Ct. Rep. 58). But the tax was said not to be directly on the articles brought into the state or on their sale, nor on property in other states. It was conceded that the tendency of the law might be "to encourage manufacturing corporations which seek to do business in that State to bring their plants into New York" (*Ibid.*, 665); but the absence of any distinction between domestic and foreign corporations was thought to cure any evil lurking in this design.

The majority cannot be said to have dealt satisfactorily with the contentions of the minority. Mr. Justice Shiras refers to the Ohio Express cases and others to show "the distinction between corporations organized to carry on interstate commerce, and having a quasi-public character, and corporations organized to conduct strictly private business" (*Ibid.*). The drug concern before the court was said to come within the doctrine of *Paul v. Virginia*, 8 Wall. (U. S.) 168 (1869), and *Horn Silver Mining Co. v. New York*, 143 U. S. 305, 12 Sup. Ct. Rep. 403 (1892), and therefore to be subject to the arbitrary power of the state with respect to any exaction on its local business. This ground of the decision is now completely undermined by *Looney v. Crane Co.*, 245 U. S. 178, 38 Sup. Ct. Rep. 85 (1917), 31 HARV. L. REV. 601-18.

<sup>12</sup> *Keokuk & Hamilton Bridge Co. v. Illinois*, 175 U. S. 626, 20 Sup. Ct. Rep. 205 (1900).

<sup>13</sup> 190 U. S. 412, 23 Sup. Ct. Rep. 730 (1903).



earnings. Two of these were Colorado<sup>14</sup> and Utah<sup>15</sup> assessments of refrigerator cars, which determined by count the average number of cars within the state and fixed a valuation of \$250 per car. Two were *ad valorem* assessments of interstate bridges.<sup>16</sup> *Western Union Telegraph Co. v. New Hope*<sup>17</sup> and *Atlantic & Pacific Telegraph Co. v. Philadelphia*<sup>18</sup> sanctioned license fees on telegraph companies based on the number of poles and of miles of wire, in spite of the fact that it was conceded that the exactions might yield some surplus over the cost of supervision on which the license was professedly based. The state and municipal requirements sustained in these cases make it clear that it is not necessary to measure property taxes by a capitalization of earnings. Since it is feasible to assess cars and bridges and telegraph lines in ways that do not make the tax vary with the income from their use, it is difficult to contest the position that taxes based on a valuation of capital stock or on dividends or gross receipts are in substance a species of income taxes. The sublimation by which earnings are transmuted into a valuation of capital stock need not deceive us.

### I. Taxes Measured by Gross Receipts.

There is no dispute that gross receipts from interstate commerce are not taxable directly as such.<sup>19</sup> The Supreme Court will not swallow a gross-receipts pill unless it is fiction-coated. Our task is to discover what coating is necessary to make it palatable. In the section on taxes on privileges we have already dealt with *Maine v. Grand Trunk Railway Co.*,<sup>20</sup> which sustained a gross-receipts

<sup>14</sup> *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 Sup. Ct. Rep. 599 (1899).

<sup>15</sup> *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 20 Sup. Ct. Rep. 631 (1900).

<sup>16</sup> *Pittsburgh, C. C. & St. L. Ry. Co. v. Board of Public works*, 172 U. S. 32, 19 Sup. Ct. Rep. 90 (1898); *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 19 Sup. Ct. Rep. 553 (1899).

<sup>17</sup> 187 U. S. 419, 23 Sup. Rep. 204 (1903).

<sup>18</sup> 190 U. S. 160, 23 Sup. Ct. Rep. 817 (1903).

<sup>19</sup> *Fargo v. Michigan*, 121 U. S. 230, 7 Sup. Ct. Rep. 857 (1887); *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. Rep. 1118 (1887); *Western Union Telegraph Co. v. Alabama Board of Assessment*, 132 U. S. 472, 10 Sup. Ct. Rep. 161 (1889); *Western Union Telegraph Co. v. Texas*, 105 U. S. 460 (1881).

<sup>20</sup> 142 U. S. 217, 12 Sup. Ct. Rep. 121 (1891), 31 HARV. L. REV. 579-80, 32 HARV. L. REV. 241.

tax nominally on the privilege of exercising corporate franchises within the state. The theory of the majority was that the measure of the tax did not matter, as the state had absolute and arbitrary power over such privileges as it might in its discretion grant or withhold. In 1910 this theory was abandoned,<sup>21</sup> so that the Maine case must now find some other leg to stand on or must fall. We shall see that the necessary prop was supplied<sup>22</sup> two years before the original foundation was destroyed.

At the same term in which the Maine case was decided, *Ficklen v. Shelby County Taxing District*<sup>23</sup> sustained a gross-receipts tax without the justification of arbitrary power over corporate privileges. The tax was not in terms on the gross receipts and thus was distinguished by the majority from taxes levied on receipts from interstate commerce "as such." Mr. Justice Harlan was the only one to dissent. He insisted that receipts from interstate commerce cannot be included in the measure of any tax on an occupation. He professed to believe that his eight colleagues would have agreed with him, had the Taxing District expressly required that a license to do a general commission business should be withheld until the applicant had paid a percentage of his gross commissions from interstate sales during the preceding year. The different method which had been adopted was characterized as "a very clever device to enable the Taxing District of Shelby County to sustain its government by taxation upon interstate commerce."<sup>24</sup>

This so-called "device" took the form of a requirement that all who desired to do business as general brokers, etc., should take out a license, pay a fee of \$50, and in addition pay ten cents for every \$100 of capital invested in the business, or, in the absence of such invested capital, give a bond conditioned on the payment of two and one half per cent on the gross commissions during the year for which the license was desired. Complainants had no capital. They had given the required bond. It chanced that the business of Ficklen during the year 1887 had consisted entirely of negotiating interstate sales, and that nine-tenths of the sales and commissions

<sup>21</sup> *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. Rep. 190 (1910); *Pullman's Palace Car Co. v. Kansas*, 216 U. S. 56, 30 Sup. Ct. Rep. 232 (1910).

<sup>22</sup> In *Galveston, H. & S. A. Ry. Co. v. Texas*, 210 U. S. 217, 28 Sup. Ct. Rep. 638 (1908), considered *infra*, 385, et seq.

<sup>23</sup> 145 U. S. 1, 12 Sup. Ct. Rep. 810 (1892).

<sup>24</sup> *Ibid.*, 28.

of the other complainant had been interstate. Both sought a license for the ensuing year without fulfilling the obligation assumed in the bond given the preceding year. The court found that the subject taxed was the privilege of doing a general brokerage business, including intra-state as well as interstate, and that it was therefore taxable. It recognized that a different question would have arisen if the complainants "had not undertaken to do a general commission business, and had taken out no licenses therefore, but had simply transacted business for non-resident principals."<sup>25</sup>

Here obviously is the simple case of a tax on local business, measured by gross receipts from all business, with the only additional element that this measure of receipts was to be used only in case the business was done without capital. Had the complainants seen fit to employ \$100 of capital, they would have paid ten cents each instead of a percentage of their receipts. This element in the case was accorded weight, for Chief Justice Fuller remarked:

"We presume it would not be doubted that, if the complainants had been taxed on capital invested in the business, such taxation would not have been obnoxious to constitutional objection; but because they had no capital invested, the tax was ascertained by reference to the amount of their commissions, which when received were no less their property than their capital would have been."<sup>26</sup>

It is to be noted, however, that this observation appears in the final paragraph of the opinion, and that the preceding discussion conveys no hint that the tax on the gross receipts would not have been quite as proper if it had not been the alternative of a tax on capital. After quoting from Mr. Justice Bradley's opinion in *Philadelphia & Southern M. S. S. Co. v. Pennsylvania*<sup>27</sup> that "the corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State,"<sup>28</sup> Chief Justice Fuller adds that "this of course is equally true of the property, the business, and the income of individual citizens of a State."<sup>29</sup> And later, after discussing *Maine v. Grand Trunk Railway Co.*,<sup>30</sup> he declares:

<sup>25</sup> 145 U. S. 24, 12 Sup. Ct. Rep. 810 (1892).

<sup>26</sup> *Ibid.*, 24.

<sup>27</sup> Note 19, *supra*.

<sup>28</sup> 122 U. S. 326, 345, 7 Sup. Ct. Rep. 1118 (1887), quoted in 145 U. S. 1, 22, 12 Sup. Ct. Rep. 810 (1892).

<sup>29</sup> *Ibid.*

<sup>30</sup> Note 20, *supra*.

"Since a railroad company engaged in interstate commerce is liable to pay an excise tax according to the value of the business done in the State, ascertained as above stated, it is difficult to see why a citizen doing a general business at the place of his domicil should escape payment of his share of the burdens of municipal government because the amount of his tax is arrived at by reference to his profits."<sup>31</sup>

The Chief Justice insists that "this tax is not on the goods or on the proceeds of the goods, nor is it a tax on nonresident merchants,"<sup>32</sup> and then invokes the familiar and convenient slogan that "if it can be said to affect interstate commerce in any way it is incidentally, and so remotely as not to amount to a regulation of such commerce."<sup>33</sup>

By this decision Shelby County appears to have achieved indirectly what it would be forbidden to attain directly. It used receipts on which it could not impose a tax as the measure of a tax on something else. It was on the nature of that something else that the court fixed its attention. Had the county declared that no business at all might be done without a license, a broker would then come within the fangs of the law by doing interstate commerce alone, and the tax would have been held to be one on a subject that is interstate commerce itself.<sup>34</sup> But here it was the broker, and not county, that wrapped interstate and local commerce in the same package. The Chief Justice admonishes Mr. Ficklen that he has only himself to blame for his predicament, since he asked for a license to do a "general" business, and did not restrict his professions to interstate business.

"The tax was not laid on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business; and complainants voluntarily subjected themselves thereto in order to do a general business."<sup>35</sup>

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<sup>31</sup> 145 U. S. 1, 24, 12 Sup. Ct. Rep. 810 (1892).

<sup>32</sup> *Ibid.*, 24.

<sup>33</sup> *Ibid.*, 24.

<sup>34</sup> *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 Sup. Ct. Rep. 592 (1887); *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380 (1888); *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. Rep. 851 (1891); *Williams v. Talladega*, 226 U. S. 404, 33 Sup. Ct. Rep. 116 (1912); *Barrett v. New York*, 232 U. S. 14, 34 Sup. Ct. Rep. 203 (1914). In all but the first of these the complainant was engaged in local as well as interstate commerce, and was therefore taxable under a statute or ordinance properly drawn.

<sup>35</sup> 145 U. S. 1, 22, 12 Sup. Ct. Rep. 810 (1892).

Thus the court preserved the fiction that interstate commerce cannot be taxed, and contented itself with finding that the "subject" on which the burden was imposed was not interstate commerce and in holding that therefore a tax on that subject is not a tax on interstate commerce.

The next gross-receipts taxes to come before the court were ones imposed by North Dakota on the Northern Pacific Railroad. A statute of 1883 provided that "all railroad companies, except railroads operated by horse power, owned and operated within the territory, should pay two per centum on the gross earnings of their railroads for a period of five years, and thereafter three per centum on the gross earnings, in lieu of all other taxes upon said railroads and the capital stock thereof."<sup>36</sup> The law was changed in 1889 so as to give the road the option of paying the gross-earnings tax or of having its property subjected to *ad valorem* assessments like those on other property in the state. The Northern Pacific accepted the Act of 1889, but did not pay in full the gross-earnings tax due in that year. Some of its lands were assessed for local taxation, and the company brought a bill to enjoin their sale for nonpayment of the tax. Relief was denied in *Northern Pacific R. R. Co. v. Clark*<sup>37</sup> on the ground that the company had no standing in equity until it had paid what was due under one or the other of the two modes of assessment. The road had contended that it was liable under neither. It argued that by accepting the Act of 1889 it gained exemption from ordinary taxation on its lands, and that it was excused from paying the gross-receipts tax by reason of the subsequent repeal of the statute under which it was imposed. The court held, however, that the Act of 1889 contemplated no exemption of any property, but merely offered two optional modes of assessment of that property. Though the case passed on no constitutional question, it figures in the family tree of the distinction subsequently drawn between taxes on gross receipts in addition to other demands and the same taxes as a substitute for other impositions.

Other lands of the railroad had been sold for nonpayment of local taxes assessed prior to 1889. These were lands not adjacent

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<sup>36</sup> Stated by Mr. Justice Jackson in *Northern Pacific R. R. Co. v. Clark*, 153 U. S. 252, 264, 14 Sup. Ct. Rep. 809 (1894).

<sup>37</sup> 153 U. S. 252, 14 Sup. Ct. Rep. 809 (1894).

to the right of way, which had been taxed locally on the assumption that the compulsory gross-earnings tax imposed by the law of 1883 was in lieu only of taxation on lands which actually contributed to the earnings through their use in the business. In *McHenry v. Alford*<sup>38</sup> the receivers of the road brought a bill to have the tax deeds declared invalid, since the gross-receipts tax had been fully paid. The purchasers defended on the grounds that the gross-receipts tax had no bearing on the local taxation of lands not adjacent to the right of way and, further, that it was not a valid tax and so could not operate to exempt the lands from other demands. Neither position was accepted by the court, although only the first was formally passed upon. As to this it was declared that, since the lands not adjacent to the right of way had been pledged for the payment of bonds issued to build and equip the road, and thus helped to make the earnings possible, their relation to the road and its operation was such that it was a proper classification to include them in all the property of the company which was relieved from local assessments and subjected to the gross-earnings tax, and that this was what the statute intended.<sup>39</sup>

The court was relieved from the necessity of passing explicitly on the question whether the gross-earnings tax was unconstitutional as a regulation of interstate commerce, because it found that the Act of 1889 was in the nature of a compromise which, when accepted by the company and complied with to the extent of paying all arrearages due under the Act of 1883, operated as an implied release from any other taxes assessed for any period which the gross-earnings tax covered. Nevertheless Mr. Justice Peckham

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<sup>38</sup> 168 U. S. 651, 18 Sup. Ct. Rep. 242 (1898).

<sup>39</sup> Mr. Justice Peckham said that the language of the Act of 1883 "gives great reason to doubt the correctness of the construction which would levy the tax upon the earnings derived from interstate commerce" (168 U. S. 651, 670). The doubt did not have to be resolved, since the company had paid all that had been assessed against it, and could not be in a worse position in recovering its lands because of the chance that it might have paid more than the legislature had intended to exact. The construction of Mr. Justice Peckham is strained and is inconsistent with the declaration in the Act of 1889 which reads: "Any company which has not complied with the provisions of chapter 99 of the Session Laws of 1883 by paying all taxes claimed on gross earnings, both territorial and interstate, or by filing an account of gross earnings, both territorial and interstate, shall prepare and file such account in the manner therein provided . . . and pay one half of the entire amount due. . . ." 168 U. S. 651, 656, 18 Sup. Ct. Rep. 242 (1898).

intimated rather strongly that the court thought the tax constitutional. This he did by way of distinguishing it from those declared invalid in *Fargo v. Michigan*<sup>40</sup> and *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*.<sup>41</sup> His comment is as follows:

"In those cases there was a distinct tax upon the gross earnings without reference to any other tax, and not in substitution or in lieu of another tax, while in this case the act plainly substitutes a different method of taxation upon the property of the railroad company. It is a tax upon the lands and all the other property of the company, but instead of placing a valuation upon the lands and other property, and apportioning a certain amount upon such valuation directly, as was the old method, a new one is established of taking a percentage upon the gross earnings as a fair substitute for the former taxes upon all the lands and property of the company, and when it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings."<sup>42</sup>

A gross-earnings tax, then, is a property tax, if it is imposed in lieu of a property tax. This sounds somewhat like saying that what is exempted is taxed, and what is taxed is not taxed. By a little logodædaly, things are not what they seem to be. Since taxes on property measured by receipts are valid, and taxes on receipts are not valid, taxes on receipts in lieu of taxes on property must be called taxes on property in order to sustain them. North Dakota had given to the pertinent section of the law of 1883 the heading: "*Percentages of gross earnings to be paid in lieu of other taxes.*"<sup>43</sup> The Act of 1889, in referring to taxes "due under the assessments under said law of 1883," had called them "taxes on both territorial and interstate earnings."<sup>44</sup> But the Supreme Court did not see its way clear to accept the designation and to declare that taxes on receipts from interstate commerce are not regulations of that com-

<sup>40</sup> Note 19, *supra*.

<sup>41</sup> Note 19, *supra*.

<sup>42</sup> 168 U. S. 651, 671, 18 Sup. Ct. Rep. 242 (1898).

<sup>43</sup> *Ibid.*, 654.

<sup>44</sup> Note 39, *supra*.

merce, provided there is no exemption of intra-state receipts and provided further that the tax is in substitution for and not in addition to other taxes. This would have been a more direct and realistic solution of the issue. It is of course but another way of stating the solution actually reached. Whichever way the doctrine is stated, there still remains the question whether a gross-receipts tax, where there is no property to exempt, would be constitutional provided it can be called something else than a tax on receipts from interstate commerce "as such." *Ficklen v. Shelby County Taxing District*<sup>46</sup> may be thought to answer the question in the affirmative, provided the gross-earnings tax may be called a tax on a local "occupation." But the tax sustained in that case, though not in lieu of a property tax, was in default of one. We shall consider later whether this makes a difference.

Though the Dakota cases did not definitely pass on the constitutional question, its final settlement was not long delayed. Wisconsin imposed a gross-receipts tax in lieu of other taxes on railroads and its demand was sustained in *Wisconsin & M. Ry. Co. v. Powers*,<sup>46</sup> decided in 1903. The opinion of the court by Mr. Justice Holmes was devoted almost entirely to denying the contention that the tax violated contract rights of the complainant. The commerce question was given this terse answer:

"We need say but a word in answer to the suggestion that the tax is an unconstitutional interference with interstate commerce. In form the tax is a tax on 'the property and business of such railroad corporation operated within the State,' computed upon certain percentages of gross income. The *prima facie* measure of the plaintiff's gross income is substantially that which was approved in *Maine v. Grand Trunk Railway Co.*, 142 U. S. 217, 228. See also *Western Union Telegraph Co. v. Taggart*, 163 U. S. 1." <sup>47</sup>

The Taggart case was one sustaining a tax measured by the value of total capital stock. The Maine case proceeded on a theory of absolute power over privileges enjoyed by foreign corporations. Neither case is so direct an authority in support of the Wisconsin tax as is the decision in the Ficklen case and the strong *dictum* in *McHenry v. Alford*.<sup>48</sup>

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<sup>46</sup> Note 23, *supra*.

<sup>46</sup> 191 U. S. 379, 24 Sup. Ct. Rep. 107 (1903).

<sup>47</sup> *Ibid.*, 387-88.

<sup>48</sup> Note 42, *supra*.



Reference has already been made <sup>49</sup> to the difference of opinion among the judges as to the Texas gross-receipts tax on railroads that came before the court in *Galveston, H. & S. A. Ry. Co. v. Texas* <sup>50</sup> in 1907. The tax was imposed on all railroads whose lines lay wholly within the state, and the amount demanded by the law was a sum "equal to one per cent of their gross receipts." This included receipts from interstate commerce, since roads whose termini were both within the state nevertheless carried passengers and goods destined for extra-state points over connecting lines. Mr. Justice Harlan for the minority took a position which is in substance in flat contradiction to the one he elaborated in his solitary dissent in the Ficklen case. In seeking to distinguish the Pennsylvania gross-receipts tax declared unconstitutional in *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania* <sup>51</sup> from the Texas gross-receipts tax before the court, he says:

"Here there is no levying upon receipts as such from interstate commerce. The State only measures the occupation tax by looking at the entire amount of the business done within its limits without reference to the source from which the business comes. It does not tax any part of the business because of its being interstate. It has reference equally to all kinds of business done by the corporation in the State. Suppose the State as, under its Constitution it might do, should impose an income tax upon railroad corporations of its own creation, doing business within the State, equal to a given per cent of all income received by the corporation from its business, would the corporation be entitled to have excluded from computation such of its income as was derived from interstate commerce? Such would be its right under the principles announced in the present case. In the case supposed the income tax would, under the principles or rules now announced, be regarded as a direct burden upon interstate commerce. I cannot assent to this view." <sup>52</sup>

The learned dissident cites no authority for his contention. He argues that the operation of the tax "on interstate commerce is only incidental, not direct," <sup>53</sup> and points out that the state constitution authorizes the imposition of occupation taxes on corporations and natural persons, and that "the plaintiff in error is a Texas

<sup>49</sup> 31 HARV. L. REV. 583.

<sup>50</sup> 210 U. S. 217, 28 Sup. Ct. Rep. 638 (1908).

<sup>51</sup> Note 19, *supra*.

<sup>52</sup> 210 U. S. 217, 229, 28 Sup. Ct. Rep. 638 (1908).

<sup>53</sup> *Ibid.*, 229.

corporation."<sup>54</sup> Then follows the indisputable assertion that "it cannot be doubted that the State may impose an occupation tax on one of its own corporations, provided such tax does not interfere with the exercise of some power belonging to the United States." The absence of such interference is predicated on the analysis that the receipts were not taxed as such, but were merely the measure of the tax.

With Mr. Justice Harlan agreed Chief Justice Fuller and Justices White and McKenna.<sup>55</sup> The majority, who held the tax unconstitutional, consisted of Mr. Justice Holmes, who wrote the opinion, and Justices Brewer, Peckham, Day and Moody. At first glance this seems a strange alignment, for Mr. Justice Brewer had been foremost in sustaining property taxes measured more or less by income in part from interstate commerce; and Justices Harlan and White had most strenuously opposed such a measure. Occupation taxes measured by gross receipts seem to bear much more directly on interstate commerce than does a property tax which merely takes account of the value contributed by net earnings. The mystery may be thought to deepen when we compare the division in the Galveston case with that in the Western Union case<sup>56</sup> decided two years later. Here Justices Harlan and White return to their stand against allowing a state to do indirectly what it is forbidden to do directly. Justices Brewer, Day and Moody join them, although in the Galveston case they were in the opposite camp. Justices Holmes and Peckham favor an excise tax measured by total capital stock, but oppose an occupation tax measured by gross receipts. Only Chief Justice Fuller and Mr. Justice McKenna seem to be consistent throughout. They supported the state taxes in all the cases in which they sat.

A closer analysis may resolve some of the perplexity. The opposition of Justices Harlan and White to Ohio's application of the unit rule to express companies and to the Kansas tax on total capital stock is based largely on the conviction that in each case the state was reaching after values not attributable to business or property within its borders.<sup>57</sup> This opposition is not inconsistent

<sup>54</sup> 210 U. S. 228, 28 Sup. Ct. Rep. 638 (1908).

<sup>55</sup> *Ibid.*, 228-29.

<sup>56</sup> Note 21, *supra*.

<sup>57</sup> See 32 HARV. L. REV. 254. Chief Justice Fuller and Justices Brewer and Day dissented in *Fargo v. Hart*, 193 U. S. 490, 24 Sup. Ct. Rep. 498 (1904), which upset an

with approval of the Texas tax on gross receipts from business within the state, where the evil of extraterritoriality is absent. Justices Holmes and Peckham based their approval of the Kansas tax on the theory of the absolute and unlimited power of a state over the local business of a foreign corporation,<sup>58</sup> which precludes inquiry into the effect on interstate commerce of an exercise of that absolute power. They are at liberty to question the Texas tax, since it does not purport to be an excise tax on a privilege completely within the power of the state.

The remaining apparent shifts of opinion demand further explanation. It may be frankly recognized that the only conceivable consistency between Mr. Justice Harlan's disapproval of the Maine excise tax and the Shelby County occupation tax, both of which were measured by gross receipts, and his approval of the Texas occupation tax, similarly measured, is the consistency of dissent. Since Mr. Justice Brewer opposed him in all three cases, these two jurists may appear to be exemplars of the famous political leader who was said to have caught his opponents in bathing and run off with their clothes. We hasten to add that the parallel is at most an intellectual, and not a moral, one; for such change of habiliments as was effected by the wearers of the ermine was not a theft but a swap which appears to have given mutual satisfaction. Mr. Justice Brewer's approval of the Maine excise on gross receipts and his disapproval of the Texas occupation tax on such receipts may be reconciled on the ground that the former had the ostensible justification of a tax on a privilege within complete state control. But this justification the learned justice withheld from the Kansas excise on total capital stock, so that he invites us to seek further for his line of thought. This quest leads us to the arguments of counsel against the Texas occupation tax and to the acceptance of those arguments in the majority opinion in the Galveston case.

Counsel for the railroad apparently make no effort to distinguish the Ficklen case from that before the court. This case is naturally relied on by the state, but it is not mentioned in the available abstract of the brief for the road. To the Maine case, however,

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application of the unit rule on the ground that the total capital stock taken as a base included the value of a large amount of personal property in other states not used in the express business and therefore not contributing to any values located in the state. See 31 HARV. L. REV. 772.

<sup>58</sup> See *Ibid.*, 585-88.

Messrs. Garwood and Everts devote considerable attention. They insist that the excise there sustained was like that considered in *Postal Telegraph Cable Co. v. Adams*<sup>59</sup> and *McHenry v. Alford*;<sup>60</sup> "that is to say, it was what this court calls a commutation tax levied in lieu of all other taxes; and therefore, in its essential nature, a property tax, or a means resorted to by the state for ascertaining the entire value of the property situated in the state and not otherwise taxed."<sup>61</sup>

As distinguished from such a tax,

"in the case at bar the state has already assessed and equalized for purposes of taxation the properties of the plaintiff in error, and at the time of the levy of this tax, and for long years prior thereto, they had paid taxes, and were paying taxes, to the state upon the full value thus ascertained."<sup>62</sup>

Counsel later seek to restrict the Maine case on grounds which apply also to the Ficklen case, though that inconvenient decision is not mentioned. They argue as follows:

"It never was the intention of the justices who concurred in the decision in *Maine v. Grand Trunk R. Co.* . . . to hold that a state could levy an occupation tax on a corporation engaged in the transportation of interstate commerce, or could levy a so-called occupation tax on such corporation, and ascertain the amount thereof by a percentage on the gross receipts of the interstate and foreign commerce; but in fact the tax was there sustained as a property or commutation tax in lieu of all other taxation."<sup>63</sup>

It is clear that the Maine case did not sanction an occupation tax where the element of an exercise of arbitrary power over the enjoyment of corporate privileges was lacking or not relied on. But the Ficklen case appeared to do exactly this. In the Ficklen case, the opinion was flavored slightly with the thought that the tax was sort of a substitute for a property tax; but in the Maine case the

<sup>59</sup> Note 2, *supra*. In February, 1904, Professor Joseph H. Beale, in criticising the ground on which the Maine case was placed by the court, suggested that a "more tenable ground . . . will probably be found in the later case of *Postal Telegraph Cable Co. v. Adams*." See his article on "The Taxation of Foreign Corporations," 17 *Harv. L. Rev.* 248, 263.

<sup>60</sup> Note 38, *supra*.

<sup>61</sup> 52 L. Ed. 1032.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*, 1033. These excerpts from the briefs are not contained in the abstract printed in the official edition of the reports.

point was not mentioned by either the majority or the minority. When we turn, however, to the Maine statute, as printed in the margin of the report of the decision,<sup>64</sup> we find that counsel have correctly analyzed the nature of the tax imposed. From this it appears that all buildings of the road and all land and fixtures outside of its located right of way were taxed locally, and that this tax and the excise measured by gross receipts were "in lieu of all taxes upon such railroad, its property and stock."<sup>65</sup> The gross-receipts tax was the only one levied on account of the rolling stock, the land, ties and rails on the right of way, the capital or intangible property of the company and the economic interests of the shareholders. From the amount thus received by the state, each town in which stock of the road was held was to receive an amount equal to one per cent on the par value of such stock.

This view of the Maine case presented by counsel is accepted by the majority of the court. Mr. Justice Holmes concedes that the case "seems at first sight like a reaction from the Philadelphia and Southern Mail Steamship Company case."<sup>66</sup> He adds not over-confidently: "But it may not have been."<sup>67</sup> Then he proceeds to reinterpret it:

"The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the State was to reach that value, and not to fasten on the receipts from transportation as such was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local taxes were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together may fairly be called a commutation tax."<sup>68</sup>

Then follow references to *Postal Telegraph Cable Co. v. Adams*<sup>69</sup> which sustained a privilege tax, assessed at \$1 per mile with a

<sup>64</sup> 142 U. S. 217, 218, 12 Sup. Ct. Rep. 121 (1891).

<sup>65</sup> *Ibid.*

<sup>66</sup> 210 U. S. 217, 226, 28 Sup. Ct. Rep. 638 (1908).

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> 155 U. S. 688, 15 Sup. Ct. Rep. 268 (1895). See 32 HARV. L. REV. 249.

maximum of \$3,000, in lieu of other taxes, as in substance a property tax; to the passage in *McHenry v. Alford*<sup>70</sup> which is quoted on page 382, *supra*; and to a portion of the majority opinion in the Ficklen case which said that in the Maine case

"it was held that the reference by the statute to the transportation receipts and to a certain percentage of the same, in determining the amount of the excise tax, was simply to ascertain the value of the business done by the corporation, and thus to obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied." <sup>71</sup>

Attention should be called to the fact that Mr. Justice Holmes did not refer to the page in the opinion in the Ficklen case which suggested that the occupation tax might be regarded as a substitute for a property tax.<sup>72</sup> As has already been pointed out, the tax imposed on Mr. Ficklen was rather in default of a property tax than in lieu of one, since he had no property devoted to his occupation and so escaped nothing else by paying the tax on gross receipts. The only distinction in this respect between the Ficklen case and the Galveston case is that the railroad did have property in Texas used in its occupation and that this property was taxed.<sup>73</sup> On this ground the two cases may be distinguished, so that it cannot be said that the latter overrules the former; nor does the opinion in the latter attempt to reinterpret the former. The present health of the Ficklen case will be diagnosed later.<sup>74</sup> If it is not yet moribund, the scope for gross-receipts taxes is somewhat wider than that plotted in Mr. Justice Holmes' reinterpretation of the Maine case. We shall inquire later whether, in order to impose a gross-receipts tax, there must be some other recognized subject of state taxation which is exempted from other burdens than the payment

<sup>70</sup> Note 38, *supra*.

<sup>71</sup> 145 U. S. 1, 23, 12 Sup. Ct. Rep. 810 (1892), referred to, but not quoted, in 210 U. S. 217, 226, 28 Sup. Ct. Rep. 638 (1908).

<sup>72</sup> 145 U. S. 1, 24, 12 Sup. Ct. Rep. 810 (1892). This passage is quoted on page 379, *supra*.

<sup>73</sup> Another distinction which is possibly material in other connections is that the Shelby County tax was only on those who desired to do a "general business," while the Texas tax was on all railroads whose lines lay wholly within the state. The Texas tax would fall by its terms on such a corporation which confined itself to interstate commerce. As a practical matter, however, this distinction is negligible, since no railroad whose lines lay wholly within the state would confine itself to interstate commerce.

<sup>74</sup> See pages 409-16, *infra*.

of a percentage of gross-receipts, or whether it is sufficient that the gross-receipts tax is not a drain on any economic interest that is making other contributions to the state treasury, *i.e.*, whether a gross receipts tax in default of other taxes is as good as one in lieu of them.<sup>75</sup>

Another question that presents itself is whether a gross-receipts tax must be in lieu of all taxation on tangible property or some part thereof, or whether it is saved from sin if the valuation of the tangible property does not include its value as part of a "going concern," that is, does not include the contribution of the business in which the property is employed. The Galveston case does not answer this question. In the Maine case the road-bed and rolling stock contributed nothing to the state except the excise on gross receipts. In the Galveston case, no property of the road went unassessed because of the gross-receipts tax. But it was not because no property went unassessed that Mr. Justice Holmes distinguished the Texas tax from that of Maine. It was because "another tax on the property of the railroad is upon a valuation of that property, *taken as a going concern*."<sup>76</sup> The value of the business had already been reached by the subjection of the company's franchise to an *ad valorem* tax as property. This value of the business is what the Supreme Court calls the "intangible property." Texas took toll from this intangible property by a tax on the valuation of the franchise and by the gross-receipts tax as well. Plainly a

<sup>75</sup> See pages 414-16, *infra*.

<sup>76</sup> 210 U. S. 217, 228, 28 Sup. Ct. Rep. 638 (1908). Italics are writer's. In the opinion, this passage is not preceded by "because," but by the statement: "On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the state that," etc. In the opinion of the state court, Judge Brown, in distinguishing some earlier Texas decisions, said: "The fact that the franchise is subjected in this state to an *ad valorem* tax as property does not militate against the right to tax the persons or the corporations using that property as an occupation any more than would the taxing of the physical property of the railroads, as the tracks, right of ways, cars, etc., operate to prevent the imposition of occupation taxes for the use of them as instruments of transportation. There is nothing in the case cited which intimates a prohibition against levying an occupation tax upon the company which may use the franchises taxed as property. As well might it be held that an *ad valorem* tax upon a storehouse, fixtures, and goods would preclude an occupation tax upon the merchant for pursuing the business of selling goods." *State v. Galveston, H. & S. A. Ry. Co.*, 100 Texas, 153, 172, 97 S. W. 71 (1906). The Texas court sustained the tax on the authority of the Maine case and of the Home Insurance case on which the Maine case had been based. The later legislation and judicial decision in Texas are referred to in 31 HARV. L. REV. 762, note 156.

different question would have been presented had the gross-receipts tax been the only effort to draw sustenance from the "intangible property," even though all tangible property was subjected to *ad valorem* assessments.

*Henderson Bridge Co. v. Kentucky*,<sup>77</sup> decided in 1897, appears to be a case in which a tax on the "intangible property" of an interstate bridge company was assessed by capitalizing the gross receipts and then deducting the value of the tangible property. The majority did not notice the fact that gross, rather than net, receipts were used. Chief Justice Fuller contented himself with saying that the authorities cited in the Ohio Express cases sanctioned the method of taxation prescribed by the Kentucky statute, and that the tax was not on the interstate business carried on over the bridge, because the company did not carry on that business but merely received tolls from its lessee, thus bringing the case within *Erie Railroad v. Pennsylvania*.<sup>78</sup>

The Erie case seemed to go on the ground that tolls received for rental were not receipts from interstate commerce although the lessee paying the tolls was engaged in interstate commerce, thus treating rent from a leased railroad like rent from a leased office building. The statute, as paraphrased in the opinion of Mr. Justice Shiras, imposed "a tax of eight-tenths of one per centum upon the gross receipts of said company for *tolls and transportation*."<sup>79</sup> No reference is made in the statement of facts or in the opinion to any other features of the state taxing system. Mr. Justice Shiras recognizes that receipts from interstate commerce cannot be taxed directly, but says that "the tax complained of is not laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on."<sup>80</sup> The only hint that the tax was one in lieu of a property tax is contained in the succeeding sentence which says: "It is a tax upon the corporation on account of its property in a railroad, and which tax is measured by a reference to the tolls received."<sup>81</sup>

In the Galveston case Mr. Justice Holmes refers to this passage

<sup>77</sup> Note 7, *supra*.

<sup>78</sup> Note 6, *supra*.

<sup>79</sup> 158 U. S. 431, 435, 15 Sup. Ct. Rep. 896 (1895).

<sup>80</sup> *Ibid.*, 438.

<sup>81</sup> *Ibid.*, 439.



without quoting it, seeming to imply thereby that the tax in the Erie case was in lieu of others. No reference is made to the Henderson Bridge case. This case and the Erie case can both be rested on the doctrine that receipts from rent are not receipts from interstate commerce.<sup>82</sup> In the Henderson Bridge case the receipts were not the direct measure of the tax on intangible property; they were merely used by the assessors as a guide in fixing the value of that property. Plainly, therefore, neither of these cases can be securely relied on to support the contention that a gross-receipts tax is a good substitute for an assessment of the intangible property of the taxpayer, even though no tangible property has been relieved from the ordinary *ad valorem* tax. But such a contention is not foreclosed by either of these cases or by the Galveston case. The possible distinction between taxes on gross and on net receipts will be considered later in connection with the cases dealing with the net income taxes of Wisconsin and of the federal government.<sup>83</sup>

Those who before 1908, when the Galveston case was decided, had struggled in vain to reconcile the decisions on the subject under consideration may still remember vividly the relief afforded by Mr. Justice Holmes' opinion in that case. It would perhaps be too much to say that he straightens out the tangle; but at any rate he tells us what methods will hinder and what will help in accomplishing the task. He makes it clear that no mechanical logic can minister to our needs. He frees us from the tyranny of terms. He exposes the assumption that there is any magic in words. He tells us that "regulation" is a word of art, which the court uses, not for all that regulates, but only for that which regulates too much or in some disapproved way.

"It being once admitted, as of course it must be, that not every law that affects commerce, among the States is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines."<sup>84</sup>

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<sup>82</sup> This doctrine appears to be now abandoned, at least with respect to rental for the use of cars which journey in interstate commerce. See the sentence from Mr. Justice Van Devanter quoted on page 402, *infra*.

<sup>83</sup> See pages 415-16, *infra*.

<sup>84</sup> 210 U. S. 217, 225, 28 Sup. Ct. Rep. 638 (1908).

The absence of a sharp antithesis between the taxes that have been approved and those that have been condemned is frankly recognized:

"As the property of companies engaged in such commerce may be taxed . . . , and may be taxed at its value as it is in its organic relations, and not merely as a congeries of unrelated items, taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged. . . . Since the commercial value of property consists in the expectation of income from it, and since taxes ultimately, at least in the long run, come out of income, obviously taxes called taxes on property and those called taxes on income or receipts tend to run into each other somewhat as fair value and anticipated profits run into each other in the law of damages. The difficulty of distinguishing them became greater when it was decided, not without much debate and difference of opinion, that interstate carriers' property might be taxed as a going concern."<sup>86</sup>

Then follows the reinterpretation of the Maine case and a quotation from *Postal Telegraph Cable Co. v. Adams*:<sup>87</sup>

"By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."<sup>87</sup>

The question before the court is said to be "whether this is such a tax."<sup>88</sup> Mr. Justice Holmes paves the way for an answer by the following recapitulation and analysis:

"It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a

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<sup>86</sup> 210 U. S. 225-26, 28 Sup. Ct. Rep. 638 (1908).

<sup>87</sup> Note 69, *supra*.

<sup>88</sup> 155 U. S. 688, 697, 15 Sup. Ct. Rep. 268 (1895); quoted in 210 U. S. 217, 227, 28 Sup. Ct. Rep. 638 (1908). This same passage from the opinion in the *Postal Telegraph* case, together with what immediately precedes it, is quoted by Mr. Justice Day in *United States Express Co. v. Minnesota*, 223 U. S. 335, 347-48, 32 Sup. Ct. Rep. 211 (1912). See page 402, *infra*.

<sup>89</sup> 210 U. S. 217, 227, 28 Sup. Ct. Rep. 638 (1908).

legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form." <sup>89</sup>

These canons were not difficult to apply to the Texas tax before the court. The value of the property as a going concern had already been reached by other taxes. To the argument of counsel for the state that "'equal' implies, not identity, but duality," <sup>90</sup> Mr. Justice Holmes replied:

"The distinction between a tax 'equal to' one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute taken by itself." <sup>91</sup>

The tax in question was said to be "merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'" <sup>92</sup> It was added that "of course, it does not matter that the plaintiffs in error are domestic corporations or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the State." <sup>93</sup>

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<sup>89</sup> 210 U. S. 227, 28 Sup. Ct. Rep. 638 (1908).

<sup>90</sup> *Ibid.*, 223.

<sup>91</sup> *Ibid.*, 227.

<sup>92</sup> *Ibid.*, 228.

<sup>93</sup> *Ibid.*, 228. Mr. Justice Harlan, on behalf of the minority, implied that it did matter that the corporation was a domestic one, for he says: "The plaintiff in error is a Texas corporation, and it cannot be doubted that the State may impose an occupation tax on one of its own corporations, provided such tax does not interfere with the exercise of some power belonging to the United States" (*Ibid.*, 229-30). The proviso of course weakens the statement in logic, if not in judicial psychology; but later on page 229 in the passage quoted on page 385, *supra*, the dissenting opinion invokes the supposition that the state might impose on railroad corporations "of its own creation" an income tax, thus again implying that the domesticity of the corporation was a material element in the case.

It will be remembered that one of the grounds on which State Tax on Railway

The tax, then, was on the interstate business and not on the property at its value as a going concern. When we seek for the reason why this tax was not on the property as a going concern, we find that it is because there was another tax on the property as a going concern. The reason is not completely satisfying. Disregarding words and looking to substance, we do not readily perceive why one tax as well as the other cannot be on the property as a going concern, nor why one as well as the other is not on the business. There is ample reason why the legitimacy of one may depend on the presence or absence of the other, and there is no just ground for complaint because the court picked for slaughter the one that was before it. Since the state should not have both, but either would be allowable if alone, the designation of the good and the bad is wisely determined in accordance with the formal line of demarcation which the court had previously established. Mr. Justice Holmes correctly states the traditional theory that the state can tax the property at its value as a going concern, but cannot tax

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Gross Receipts, 15 Wall. (U. S.) 284 (1872), proceeded was that the corporation was a domestic one, and that this ground of the decision was not overruled in the Philadelphia Steamship case, note 19, *supra*. In 1875, Railroad Co. v. Maryland, 21 Wall. (U. S.) 456 (1874), considered in 31 HARV. L. REV. 578-79, sustained a charter provision requiring an interstate railroad corporation to pay to the chartering state semi-annually one-fifth of its total gross passenger receipts. Ashley v. Ryan, 153 U. S. 436, 14 Sup. Ct. Rep. 865 (1894), 31 HARV. L. REV. 580-81, and Kansas City, M. & B. R. R. Co. v. Stiles, 242 U. S. 111, 37 Sup. Ct. Rep. 58 (1916), 31 HARV. L. REV. 599-600, sustained charter provisions requiring a charter fee or an annual excise measured by total capital stock. The idea in these cases seemed to be that a state can put any price it pleases on the grant of a charter to be a corporation. International & G. N. Ry. Co. v. Anderson County, 246 U. S. 424, 38 Sup. Ct. Rep. 370 (1918), however, implies that provisions of a police character in corporate charters may by reason of changed conditions become invalid regulations of interstate commerce.

These cases, however, do not bear on the question involved in the Galveston case, because the tax there in issue was not a franchise tax, nor was it, so far as appears, on the statute book when the complainant was incorporated. The franchise was taxed as property under another statute. Though Texas had avoided naming the "subject" it had selected for taxation, it had by selecting certain kinds of corporations engaged in a certain kind of occupation, imposed an occupation tax. The state court had called it an occupation tax, and had strongly implied, if not specifically declared, in a passage in the opinion immediately preceding that quoted in note 76, *supra*, that this construction was necessary in order to sustain the tax under the state constitution. The exaction, therefore, had to stand or fall as an occupation tax, quite independently of any peculiar power of a state over its own corporate creatures. The Philadelphia Steamship case, note 19, *supra*, at pages 342-43, shows that where a state seeks to justify its exaction as one on the franchise of domestic corporations, it must clearly indicate that this is the power and the only power that it is exercising.

the interstate business. The gross-receipts tax before the court did not profess to be a property tax, whereas by another statute the franchise was subjected to an *ad valorem* tax as property.<sup>94</sup> The state itself had chosen to call one a property tax and the other something else. It can hardly complain that the court accepts its designations in choosing which one to reject, and decides that it is less likely to effect injurious regulation of interstate commerce by the tax which it calls a property tax than by the one which is more directly on interstate receipts.

This traditional theory, as Mr. Justice Holmes announces, posits two necessities that do not admit of logical reconciliation. This is because a tax on the value of the property as a going concern is a tax on the value of the going concern, and the value of the going concern is the value of the business. It would make for simplicity and directness to recognize that a tax on the value of the business is a tax on the business. The business may be worth more or less than the reconstruction cost of the property less depreciation. Where the property has no alternative uses, its value, whatever its cost, cannot exceed the value of the business which it serves. In the case of that part of the property of a railroad which is permanently and inseparably devoted to the business, it would be difficult if not impossible to find its value except through the value of the business. But this does not apply to migratory cars or to the wagons, horses and pouches owned by the express companies in Ohio. With respect to such property it is readily apparent that a tax on the value of the property as a going concern is a tax on the business. This conclusion is fortified rather than disguised by resort to the notion that what the state is taxing is "intangible property." Intangible property has a familiar connotation which is quite distinct from the enjoyment or anticipation of business profits.

The logical nebule which the opinions have exhaled by insisting that taxes on business were taxes on something else was by no means inevitable. It must be dispelled before we can see clearly. It is a legal doctrine that a state cannot tax interstate business, but it is not on economic fact. We might have been saved from wearisome confusion if the court had long ago declared that under some circumstances and by some methods a state may tax interstate business,

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<sup>94</sup> See note 76, *supra*.

and that under other circumstances and by other methods it may not. Such a declaration would have turned attention more directly to the circumstances and to the methods. The rules of law might then have been worked out on matter-of-fact lines which avoided logical inconsistency by avoiding fictions and the semblance of generality when the generality was shadow and not substance.

We have already considered the reasons why it is as wise and necessary to allow the states to tax interstate commerce as to allow them to tax property employed in interstate commerce.<sup>96</sup> Exemption of such commerce from burdens which local commerce must bear would be equivalent to a bounty on interstate commerce. The withholding of such a bounty from interstate commerce ought not in wisdom to be regarded as "a regulation of it in a constitutional sense." But the court must be zealous to restrain the states from obtaining revenue from extraterritorial sources or from imposing cumulative exactions on interstate business without similarly burdening all local business. Owing to the ubiquity of property taxation and to the fact that the value of real estate and of stocks and bonds and similar obligations bears a close relation to the income from such property, a state "is less likely to attempt to or effect injurious regulation," when it "is trying simply to value property" than "when it is aiming directly at the receipts from interstate commerce."<sup>96</sup> On the other hand, the states have been more sporadic and selective in their impositions on occupations and on income. They must therefore be held to strict account when they tax income from interstate commerce. They must establish that the burden is a general and not a discriminatory one.

The court is satisfied when the state shows that the income is taken as a fair measure of the value of property assessed for taxation, or when a tax on income is in substitution for a tax on property. It was satisfied in the Ficklen case when gross receipts were taxed in the absence of taxation on property because there was no property to tax. It has been satisfied more recently with a state-wide income tax measured by net rather than gross receipts.<sup>97</sup> In the presence of

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<sup>96</sup> 32 HARV. L. REV. 260-62.

<sup>96</sup> From Mr. Justice Holmes' opinion in the *Galveston* case, quoted on page 394, *supra*.

<sup>97</sup> *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 38 Sup. Ct. Rep. 499 (1918). See pages 415-16, *infra*.

these safeguards against discrimination, taxes substantially on interstate business have been sustained. Thus the state may aim directly at gross or net receipts from interstate commerce, if it restrains itself from other shots at the same economic interest, or at net receipts if it aims equally at all receipts from all sources within the state. The law may be stated in this way with little or no fiction, word-juggling or logical inconsistency. Such a mode of statement has the further advantage that it throws the spotlight on the "practical lines" by which the limits of the practical conception of regulation are fixed, and which divide all factual regulations of interstate commerce into those that are, and those that are not, regulations of that commerce "in a constitutional sense."

The distinction set forth in the *Galveston* case and retroactively applied to the earlier cases acquits Mr. Justice Brewer of the charge of inconsistency. The gross-receipts tax of which he disapproved was in addition to another tax on the same business value; those which he favored were not. This distinction is the basis of the difference between the decisions in *Meyer v. Wells, Fargo & Co.*<sup>98</sup> and *United States Express Co. v. Minnesota*,<sup>99</sup> both of which were rendered on February 19, 1912. Both involved gross-receipts taxes on nonresident express companies. The Texas tax held invalid in the *Meyer* case was declared by the statute to be "in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets of such corporation."<sup>100</sup> The Minnesota tax held rightfully exacted from the United States Express Company was "in lieu of all taxes upon its property."<sup>101</sup> Both decisions were unanimous.

The greater part of the receipts taxed by Minnesota were held not to be from interstate commerce. These were from carriage between points within the state over a route which passed through a portion of another state. The state court had subtracted that portion of these receipts which the carriage in the intervening state bore to the total carriage. Whether such deduction was necessary the Supreme Court was not called upon to say. It sustained the balance on the authority of *Lehigh Valley R. R. Co. v. Pennsyl-*

<sup>98</sup> 223 U. S. 298, 32 Sup. Ct. Rep. 218 (1912).

<sup>99</sup> 223 U. S. 335, 32 Sup. Ct. Rep. 211 (1912).

<sup>100</sup> 223 U. S. 298, 299, 32 Sup. Ct. Rep. 218 (1912).

<sup>101</sup> 223 U. S. 335, 339, 32 Sup. Ct. Rep. 211 (1912).

vania,<sup>102</sup> on which the state court had relied.<sup>103</sup> In the Lehigh case, Pennsylvania had confined itself to the receipts from that part of the transportation which took place within its borders, so that the decision does not affirm that it could not have used the receipts from the entire journey.<sup>104</sup> Chief Justice Fuller stated that the

<sup>102</sup> 145 U. S. 192, 12 Sup. Ct. Rep. 806 (1892).

<sup>103</sup> *State v. United States Express Co.*, 114 Minn. 346, 349-50, 131 N. W. 489 (1911). Of the Lehigh case, Judge Bunn observed: "It perhaps does not appear as clearly as it might whether the recovery in that case was allowed for the entire earnings, or for a proportion thereof based upon the mileage within the state; but we interpret the decision as allowing a recovery of taxes upon that proportion of the earnings derived from the carriage wholly within the state. This seems to us the safer rule, and avoids any question of taxing interstate commerce, and we adopt and apply it to this case. Nine per cent of the taxes recovered on this class of earnings should be deducted from the amount of the recovery" (page 350).

Judge Bunn is warranted in finding the Lehigh case somewhat deficient in clarity. From the statement of facts it appears that the auditor-general of the state had "settled an account" with the company for its taxes on gross receipts, which account included, in addition to receipts from carriage entirely within the state and from carriage between two termini within the state passing en route through another state, five other classes of receipts all of which were from interstate commerce, with the possible exception of class three which was made up of receipts from "transportation by continuous carriage from points in a foreign state to other points in the same state passing through the state of Pennsylvania." The other receipts taken were from interstate commerce originating or ending in Pennsylvania, or passing through Pennsylvania between termini in two other states, or commerce not traversing Pennsylvania at all.

In all instances the total receipts for the entire carriage were taken, and this amount was then reduced to a fraction which corresponded to the fraction of the company's total mileage which lay within the state. The state court relieved the company from any inclusion in the assessment of the last five classes enumerated. So far as appears, the state made no endeavor to amend the account so as to levy on all the receipts in the first two classes. Plainly there was no necessity that it should restrict itself to less than all of the receipts from commerce wholly within the state. Its use of the fraction was part of another plan which the state court frustrated. It is evident, however, it was only the fraction of the receipts from commerce between points in the state passing through the intervening state that came to the Supreme Court, for Chief Justice Fuller states that "the tax under consideration here was determined in respect of receipts for the proportion of the transportation within the State . . ." (145 U. S. 192, 201).

<sup>104</sup> The natural inference from the opinion of Chief Justice Fuller is that the whole trip was an intra-state trip, so far as taxation is concerned, since he answers in the negative the question whether "the mere passage over another State renders that business foreign, which is domestic." *Ewing v. Leavenworth*, 226 U. S. 464, 33 Sup. Ct. Rep. 157 (1913), allowed a state to impose a flat fee on this kind of commerce. In *New York ex rel. Cornell Steamboat Co. v. Sohmer*, 235 U. S. 549, 35 Sup. Ct. Rep. 162 (1915), it was held that no deduction from receipts for transportation on the Hudson River between New York points was necessary because the route traversed water within the jurisdiction of New Jersey or because the tows which carried the com-



question "is simply whether, in the carriage of freight and passengers between two points in one State, the mere passage over the soil of another State renders that business foreign, which is domestic,"<sup>106</sup> and he answered that, "we do not think such a view can reasonably be entertained."<sup>106</sup>

The remaining receipts levied on by Minnesota, to which the United States Express Company objected, were from that part of interstate commerce which it carried on within Minnesota, including carriage to or from points within the state and carriage through the state between termini in other states. All this business was received by the complainant at a point within the state, either from the shipper or from connecting carriers in other states, and was delivered within the state either to the consignee or to a connecting carrier. For some reason Minnesota did not claim taxes upon such interstate receipts "where the same express company performs the transportation service both within and without the State."<sup>107</sup> That this self-denial was imposed by benevolence and

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merce were made up in New Jersey. Whether there was any distinction in this respect between transportation over water and that over land was not considered.

In the case of land transportation, the state of termini has been forbidden to regulate the rates of carriage which traverses an intervening state. *Hanley v. Kansas, etc. Ry.*, 187 U. S. 617, 23 Sup. Ct. Rep. 214 (1903). The state is also forbidden to direct that a carrier shall ship between two points in the state by a route which is wholly within the state rather than by one which dips into another state. *Northern Pacific Ry. Co. v. Solum*, 247 U. S. 477, 38 Sup. Ct. Rep. 550 (1918). On the other hand, California was allowed to regulate rates for carriage between two points in the state traversing the high seas en route. *Wilmington Transportation Co. v. Railroad Commission*, 236 U. S. 151, 35 Sup. Ct. Rep. 276 (1915). See editorial notes in 27 HARV. L. REV. 686, and 28 HARV. L. REV. 634. Here of course there was no intervening state whose jurisdiction was in any way interfered with.

The Cornell Steamboat case, *supra*, if applicable to land transportation, would allow a state to extract revenue from receipts from transit which is not within its own police protection and which is likely to cause expense to its neighbor within whose borders it takes place. In the Lehigh Valley case, Chief Justice Fuller thought it important to say that "it should be remembered that the question does not arise as to the power of any other State than the State of the termini" (page 202). This carries the possible implication that the transit in the intervening state is interstate commerce, so far as its powers of taxation are concerned. Quite aside from the commerce clause, a grave question arises whether a state should tax receipts from extra-territorial transit. The difference between land and water transportation seems sufficient to warrant the restriction of the Cornell Steamboat case to the particular kind of transportation there before the court.

<sup>106</sup> 145 U. S. 192, 202, 12 Sup. Ct. Rep. 806 (1892).

<sup>106</sup> *Ibid.*, 202.

<sup>107</sup> 223 U. S. 335, 341, 32 Sup. Ct. Rep. 211 (1912).

not by the Constitution is evident from *Cudahy Packing Co. v. Minnesota*,<sup>108</sup> decided last April, in which the Supreme Court sustained a similar gross-receipts tax imposed by the same state on receipts earned within its borders from refrigerator cars which ran in and out of the state.

The packing company which owned the cars received a "compensation or rental"<sup>109</sup> of one cent a mile from the railroads which transported them, and paid the railroads the usual tariff rates for the transportation of its own products, allowing the roads to carry the products of others on the return trip. Mr. Justice Van Devanter concluded his opinion by saying that, "we think the tax is not distinguishable from that sustained in *United States Express Co. v. Minnesota*,"<sup>110</sup> without referring to the fact that in that case "the transportation in connection with such shipments outside of the state of Minnesota was performed by connecting companies other than the defendant."<sup>111</sup> Nor did the opinion refer to the possibility of applying the point made in *Erie Railroad v. Pennsylvania*<sup>112</sup> and *Henderson Bridge Co. v. Kentucky*<sup>113</sup> that the receipts were from rental of property rather than from interstate carriage. It stated, however, that if the tax "is laid on the earnings as such, they being derived largely from interstate commerce, it is an unconstitutional restraint or burden on such commerce and void,"<sup>114</sup> thus abandoning the doctrine of the earlier cases without noticing that it had done so.

Both of these Minnesota taxes were treated as property taxes measured by gross receipts. It appears, however, that from all "receipts for business done within the State by such company in connection with other companies" the United States Express Company was allowed to deduct "the amounts paid for transportation to railroads within the State."<sup>115</sup> No mention of this concession was made in Mr. Justice Day's opinion. From the *Cudahy Packing* case it appears that the railroads were allowed to deduct their

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<sup>108</sup> 246 U. S. 450, 38 Sup. Ct. Rep. 373 (1918).

<sup>109</sup> *Ibid.*, 451.

<sup>110</sup> *Ibid.*, 456.

<sup>111</sup> 223 U. S. 335, 341, 32 Sup. Ct. Rep. 211 (1912).

<sup>112</sup> Note 6, *supra*.

<sup>113</sup> Note 7, *supra*.

<sup>114</sup> 246 U. S. 450, 453, 38 Sup. Ct. Rep. 373 (1918).

<sup>115</sup> 223 U. S. 335, 339, 32 Sup. Ct. Rep. 211 (1912).

payments for the use of the cars from their "gross earnings" used as the measure of another tax not before the court. This was referred to as disclosing "a purpose to avoid taxing the same property twice or at more than its value, measured by what it earns."<sup>116</sup> The Cudahy people contended that the cars were taxed twice because the railroad paid on their earnings to them less the one cent a mile paid as rental, but Mr. Justice Van Devanter answered:

"The contention apparently assumes that the receipts from such shipments arise solely from the use of these cars, whereas they arise in part from the use of the tracks, locomotives, fuel, labor and the like provided by the railroads. Not improbably only a minor part is fairly attributable to the use of cars. In any event, the company has an interest in the car line which yields it a rental of one cent for each mile of travel. This interest is taxable and the State values it for that purpose by the rental received."<sup>117</sup>

It is obvious that a gross-receipts tax on selected kinds of property may be used as a device to tax property employed in interstate commerce more heavily than the great bulk of property which is assessed by the *ad valorem* method. Unless some curb is set to the rate of assessment on the gross receipts, a state may easily extract from interstate commerce more than its proportional contribution to the public revenues. The court has appreciated this danger. In the United States Express case Mr. Justice Day quotes from the opinion in *Postal Telegraph Cable Co. v. Adams*<sup>118</sup> as follows:

"Doubtless, no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce; but the value of property results from the use to which it is put, and varies with the profitableness of that use, and by whatever name the exaction may be called, *if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto*, it is not open to attack as inconsistent with the Constitution."<sup>119</sup>

<sup>116</sup> 246 U. S. 450, 456, 38 Sup. Ct. Rep. 373 (1918).

<sup>117</sup> *Ibid.*, 456.

<sup>118</sup> Note 69, *supra*.

<sup>119</sup> 155 U. S. 688, 697-98, 15 Sup. Ct. Rep. 268 (1895); quoted in 223 U. S. 335, 347-48, 32 Sup. Ct. Rep. 211 (1912). Italics are writer's. Another portion of Chief Justice Fuller's opinion in the Postal Telegraph case (not referred to by Mr. Justice

Mr Justice Day then adds:

"We think the tax here in question comes within this principle. There is no suggestion in the present record, as was shown in *Fargo v. Hart*, 193 U. S. 490, that the amount of the tax is unduly great, having reference to the real value of the property of the company within the State and the assessment made." <sup>120</sup>

The evil that appeared in *Fargo v. Hart* <sup>121</sup> was necessarily absent in the United States Express case, for it consisted of including in the total value of property assessed by the unit rule a large amount of property outside the state not used in the express business and therefore not properly distributable on a mileage basis among the various states in which the express business was carried on. The unit rule was not used in taxing the United States Express Company, since its transportation in question was confined to the limits of the state. The only objection open to the company was that the rate of six per cent on the gross receipts made the tax relatively high as compared with general property taxation. This objection does not appear to have been made.

The point was, however, urged by the Cudahy Packing Company. It appeared that the average number of cars in the state per day ranged from ten to twelve and that "the cash value of each car, as a separate article of tangible property, is from \$700 to \$900." <sup>122</sup> The contention of the complainant and its dismissal is stated by Mr. Justice Van Devanter as follows:

"Because the usual tax rate if applied to the cash value of the cars taken separately, would result in an appreciably lower tax, it is insisted that the tax imposed is in excess of what would be legitimate as an ordinary tax on the property. But the contention proceeds on an

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Day in the United States Express case) bears on the same point: "But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, *if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon)*, and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes." 155 U. S. 688, 696. Italics are writer's.

<sup>120</sup> 223 U. S. 335, 348, 32 Sup. Ct. Rep. 211 (1912).

<sup>121</sup> Note 57, *supra*.

<sup>122</sup> 246 U. S. 450, 452, 38 Sup. Ct. Rep. 373 (1918).

erroneous assumption. The State is not confined to taxing the cars or to taxing them as separate articles. It may tax the entire property, tangible and intangible, constituting the car line as used within its limits and may tax the same at its real value as part of a going concern. The record makes it reasonably certain that the property, valued with reference to its use and what it earns, is worth considerably more than the cash value of the cars taken separately — enough more to indicate that the tax is not in excess of what would be legitimate as an ordinary tax on the property taken at its real or full value.”<sup>123</sup>

An interesting variant of the same question is raised in the *Ohio Tax Cases*.<sup>124</sup> Before the decision in the Galveston case, Ohio had a statute under which railroads were required to pay one per cent of their gross earnings from all commerce within the state. After the Galveston decision, the Ohio law was amended so that the gross-receipts tax was limited to intra-state receipts. The rate on railroads however, was increased from one to four per cent. Counsel for the company contended that this increase

“was due to the fact that it was conceived that about three-fourths of their business was interstate, and that therefore a tax of 4% on the intrastate earnings would be about equal to a tax of 1% on the total; in other words, that the tax rate was increased fourfold because such utilities were engaged in interstate commerce.”<sup>125</sup>

The argument was that a disproportionate rate on the intra-state receipts of companies whose business was preponderantly interstate was in effect an effort to tax the interstate receipts.

The Ohio tax was not in lieu of a property tax, so that, in view of the general trend of recent decisions, there was strong reason to believe that the court would hold it unconstitutional if, under the guise of levying on receipts from local commerce, it in substance reached those from interstate commerce. The complaint of the companies was like that made unsuccessfully in *Pullman Co. v. Adams*<sup>126</sup> and *Allen v. Pullman's Palace Car Co.*<sup>127</sup> in which it was urged that a specific tax of \$3,000 and a tax of \$100 plus twenty-five cents per mile, imposed nominally on intra-state commerce, were in

<sup>123</sup> 246 U. S. 455-56, 38 Sup. Ct. Rep. 373 (1918).

<sup>124</sup> 232 U. S. 576, 34 Sup. Ct. Rep. 372 (1914).

<sup>125</sup> *Ibid.*, 592.

<sup>126</sup> 189 U. S. 420, 23 Sup. Ct. Rep. 494 (1903). See 31 HARV. L. REV. 582.

<sup>127</sup> 191 U. S. 171, 24 Sup. Ct. Rep. 39 (1903). See 31 HARV. L. REV. 582-83.

effect on interstate commerce because the local commerce was unremunerative. The contention was rejected on the ground that the companies were free to abandon the intra-state commerce and thus avoid the tax. This ground of decision was later discountenanced in *Western Union Telegraph Co. v. Kansas*,<sup>128</sup> and *Looney v. Crane Co.*<sup>129</sup> at least in its application to taxes in substance on extraterritorial values. It does not appear that it was open to the companies before the court in the *Ohio Tax Cases*.<sup>130</sup> Presumably they were not, like the Pullman companies in Mississippi and Tennessee, expressly relieved from the common-law duty to serve all, and therefore could not abandon the local commerce unless they withdrew from the business entirely.<sup>131</sup>

It would seem that counsel for the railroads in Ohio raised a point of undoubted merit, provided it was supported by the facts. The rates on other public utilities less likely to be engaged in interstate commerce were less than half of those on railroads and pipe lines. Plainly there was evidence of a process of artificial selection which, if carried far enough, might effectively impose discriminatory burdens on interstate commerce. The court's treatment of the issue thus raised seems somewhat evasive. Mr. Justice Pitney contents himself with saying:

"The present act does not on its face manifest a purpose to interfere with interstate commerce, and we are unable to accept the historical

<sup>128</sup> Note 21, *supra*.

<sup>129</sup> 245 U. S. 178, 38 Sup. Ct. Rep. 85 (1917).

<sup>130</sup> Note 124, *supra*.

<sup>131</sup> For a different view on this point see *Northern Pacific Railway Co. v. Gifford*, 25 Idaho, 196, 136 Pac. 1131 (1913), 31 HARV. L. REV. 737. See also 31 HARV. L. REV. 762, note 156. Even though a carrier might be permitted by a state to abandon a local business that excessive taxation made unprofitable, such economically enforced abandonment ought on the doctrine of the *Western Union* case and the *Looney* case (notes 21 and 129, *supra*) to be held an unconstitutional burden on interstate commerce. Those were cases in which a state had measured its tax by extraterritorial values, but the same unpleasant effect on interstate commerce may be produced by picking for exceptionally high taxation on local business those corporations that are engaged also in the kind of interstate commerce that can be economically conducted only by being carried on in connection with local commerce. For an able discussion of this point see Gerard Carl Henderson, "The Position of Foreign Corporations in American Constitutional Law," 2 HARVARD STUDIES IN JURISPRUDENCE, Cambridge, Harvard University Press, 1918, chapter 7, especially pages 130-31. Mr. Henderson's contribution is of exceptional merit and importance. Its consideration of the struggle between the "restrictive" and the "liberal" theories of the nature of corporations at home and abroad, and of their shifting fortunes, throws a most helpful light on the cases in this series of articles which deal with state excises on domestic or foreign corporations.

facts alluded to as sufficient evidence of a sinister purpose, such as would justify this court in striking down the law. We could not do this without in effect denouncing the legislature of the State as guilty of a conscious attempt to evade the obligations of the Federal Constitution. Assuming the law was changed in 1910 because of a fear that the Cole Law would be held unconstitutional, the mere fact that, while excluding interstate earnings from the multiplicand, the multiplier was increased, is not of itself deemed sufficient evidence of an unlawful effort to burden a privilege that is not a proper subject of state taxation."<sup>122</sup>

This method of dismissal does not close the door to similar objections founded on economics and mathematics rather than on history. The record of state legislatures in the field of indirect action against interstate commerce is hardly one to blind the court to the possibility that now and then some state Solons may be "guilty of a conscious attempt to evade the obligations of the federal Constitution." Without venturing into the precarious enterprise of attempting to analyze motives, we may see signs in the cases reviewed in this discussion that state legislatures have not infrequently sought to attain in roundabout ways what there was good reason to believe might not be accomplished directly.<sup>123</sup>

<sup>122</sup> 232 U. S. 576, 593, 34 Sup. Ct. Rep. 372 (1914).

<sup>123</sup> Objections based by complainants on the state constitution have a bearing on the commerce question. One road contended that the tax was confiscatory because the gross earnings from intra-state business were not sufficient to pay the actual operating expenses due to that business. Another road adduced in support of the same objection the allegations that it was not "able to earn, from interstate or intrastate business, or both combined, after paying necessary and proper expenses, including taxes other than the excise tax, a return on the investment in its railroad, or on the value thereof, equal to the current rate of return on legitimate high-grade investments at all times readily available in the market" (232 U. S. 576, 588). Reliance was placed on declarations of the Ohio court in earlier cases to the effect that certain provisions in the state constitution "are implied limitations upon the power of taxation of privileges and franchises, and limit such taxation to the reasonable value of the privilege or franchise conferred originally, or to its continued value from year to year," and that "these limitations prevent confiscation and oppression under the guise of taxation, and the power of taxation cannot extend beyond what is for the common or public welfare, and the equal protection and benefit of the people; but the ascertaining and fixing of such values rests largely in the general assembly, but finally in the courts" (*Ibid.*, 588-89).

To this the Supreme Court answered that the state court in the cases relied on "dealt with a general law and its operation on all corporations of given classes throughout the State, and not with its effect upon specific financially weak corporations; that it was not intended to hold that the courts as final arbiters might overthrow a law imposing a tax on privileges and franchises merely because in isolated cases such law

Only two more cases on gross-receipts taxes remain to be considered. Both were decided during the 1917 term of court. The Wisconsin demand in issue in *Northwestern Life Insurance Co. v. Wisconsin*<sup>124</sup> was in lieu of all others except taxes on real estate, and was sustained as a commutation tax. Income from real estate was not included in the assessment. The court did not find

"it necessary to decide whether the so-called foreign investment business of the company does or does not of itself amount to interstate commerce,"<sup>125</sup>

since it held that,

"if it amounts to commerce of that character no burden is cast upon it by such tax as is here involved, since the gross receipts coming from that character of business are used only as a measure of the value of the property and franchise lawfully taxable in the State."<sup>126</sup>

The Supreme Court [accepted the state court's "views of the nature and effect of the law," recognizing that they were not conclusive upon it, but finding "no reason to reject them."<sup>127</sup> Touching the effect of the tax, the state court had found that it did not appear from the allegations in the complaint "that the plaintiff now pays substantially greater sums than it would pay under either the income taxation system or the former personal property taxation system."<sup>128</sup> The rate of levy was three per cent. Nothing in the decision or the opinion closes the door to future contentions that the effect of a gross-receipts tax on selected property or businesses or corporations is to impose disproportionate burdens on interstate commerce and so to amount to a regulation of that commerce "in a constitutional sense." There is every reason to be-

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might impose a hardship, but only that those excise laws whose general operation is confiscatory and oppressive are unconstitutional" (*Ibid.*, 589). Mr. Justice Pitney added that it is not "to be inferred that the franchises of plaintiffs in error are valueless merely because it appears that the present earnings of the railroads are not sufficient to pay more than can be derived from legitimate high-grade investment securities that are readily available on the market, or (in the case of one of the roads) are not even sufficient to pay operating expenses. Upon this point we are content to refer to, without repeating, the language employed by Mr. Justice Miller, speaking for this court in *State Railroad Tax Cases*, 92 U. S. 575, 606."

<sup>124</sup> 247 U. S. 132, 38 Sup. Ct. Rep. 373 (1918).

<sup>125</sup> *Ibid.*, 138.

<sup>126</sup> *Ibid.*, 138.

<sup>127</sup> *Ibid.*, 137.

<sup>128</sup> *Ibid.*, 137.



lieve that the Supreme Court will insist that a gross-receipts tax, imposed as a substitute for property taxes, must be a fair substitute, and must not through excessive rates of levy take disproportionate toll from a selected class of taxpayers engaged in interstate commerce.

The gross-receipts tax declared invalid in *Crew Levick Co. v. Pennsylvania*<sup>139</sup> was imposed under the following provision of the statutes:

"Each wholesale vender of or wholesale dealer in goods, wares and merchandise shall pay an annual mercantile license tax of three dollars, and all persons so engaged shall pay one-half mill additional on each dollar of the whole volume, gross, of business transacted annually."<sup>140</sup>

The state court had called the tax one "upon the business of vending merchandise."<sup>141</sup> The complainant during the year in question had received about \$47,000 from intra-state sales, so that there was no doubt that it was subject to an occupation tax. It confined its objections to the levy on receipts of about \$430,000 from customers in foreign countries, insisting that a tax on such receipts was both a regulation of foreign commerce and an impost upon exports. Of these objections Mr. Justice Pitney said that

"although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms."<sup>142</sup>

The decision may therefore be treated as one on the law of interstate commerce.

The Crew Levick case insistently demands comparison with *Ficklen v. Shelby County Taxing District*<sup>143</sup> on which the Commonwealth of Pennsylvania unsuccessfully relied. Formal distinctions between the statutes in the two cases readily suggest themselves. Mr. Ficklen would not have been subject to the Shelby County law if he had not asked for a license to do a general business, but had held himself out to do only interstate business. The Crew Levick Company would have been taxed under the Pennsylvania statute

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<sup>139</sup> 245 U. S. 292, 38 Sup. Ct. Rep. 126 (1917).

<sup>140</sup> *Ibid.*, 293.

<sup>141</sup> *Ibid.*, 295.

<sup>142</sup> *Ibid.*, 295.

<sup>143</sup> Note 23, *supra*.

though it had notoriously restricted its solicitations and ministrations to customers beyond the seas. By no limitation of its enterprise less than a complete abandonment could it exclude itself from the terms of the Pennsylvania law. Nor did it have the possibility enjoyed by Mr. Ficklen of having the exaction measured by the amount of capital employed in the business rather than by the gross receipts therefrom. From every dollar received from interstate or foreign commerce Pennsylvania inexorably demanded that it render tribute unto Caesar. Formally and technically, therefore, the Supreme Court was quite correct in saying that the authority of the Ficklen case "would have to be stretched in order to sustain such a tax as is here in question."<sup>144</sup> Hence formally and technically the Crew Levick case does not overrule the Ficklen case.

In substance, however, the situations of Mr. Ficklen and of the Crew Levick Company were approximately the same. If the Pennsylvania law had been identical with that of Shelby County, the Crew Levick Company would undoubtedly have asked for the same kind of license that Mr. Ficklen did. It would hardly have cut itself off from \$47,000 of local business in order to avoid a tax of \$215 on its receipts from foreign business. Nor would it be likely to suffer less by having the tax measured by the capital used in the business. Ten cents on each \$100 of its capital would amount to more than \$215 as soon as that capital exceeded \$215,000. It would not appear to be material that the capital of the Crew Levick Company may be otherwise taxed by Pennsylvania, for there is no indication that Mr. Ficklen would have escaped the ordinary property tax on his capital if he had been fortunate enough to possess any.

Looking through form to substance, both Shelby County and the Commonwealth of Pennsylvania imposed an occupation tax measured by gross receipts from all business whether foreign or local. Had the Crew Levick Company, like Mr. Ficklen, done no local business whatever during the year in question, it would still have been within the terms of the Pennsylvania statute, but clearly would not have been engaged in a taxable occupation, and so would not have been caught, as he was caught, by reason of the peculiar provision of the Shelby County Law whereby taxability depended upon professions and not upon events. But here by the course of

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<sup>144</sup> 245 U. S. 292, 296, 38 Sup. Ct. Rep. 126 (1917).

events the Crew Levick Company was engaged in a taxable occupation. It was taxable and was taxed. The only dispute was over the measure of the tax. The Supreme Court disallowed that part of the measure which embraced receipts from commerce not confined to the state. It did not hold the Pennsylvania law void. If later the Pennsylvania court interprets the law as not applicable to concerns that refrain from local business,<sup>146</sup> the Supreme Court will have difficulty in applying the Crew Levick case without definitely overruling the Ficklen case.

In the absence of such a restrictive interpretation by the state court, the Supreme Court followed established practice<sup>146</sup> in refusing to rewrite the state law so as to bring it within the doctrine of the Ficklen case. Taking the Pennsylvania law as it reads, it plainly taxes interstate as well as local occupations; and, in so far as it makes the former a subject of taxation, it easily comes within the condemnation visited on those imposts which are "on interstate commerce itself" or on receipts from such commerce "as such."<sup>147</sup> Pennsylvania had not encased its demand in the fiction coating which is essential to bring it within those levies on interstate commerce which have been regarded as "merely incidental or indirect." At times this coating has seemed to need no other ingredient than words. The Crew Levick case naturally excites our curiosity whether a merely verbal compound can in these days turn poison into meat.

Mr. Justice Pitney's opinion indicates that it cannot. Not a little that he says is quite as applicable to the tax sustained in the Ficklen case as to that held invalid in the Crew Levick case. Of the former he says that "undoubtedly that case is near the border

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<sup>146</sup> For an instance of such construction by a state court of a statute imposing license taxes varying in amount according to the population of the towns and cities in which business was carried on, see *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. Rep. 214 (1897). In the cases of taxes on gross receipts the federal courts will make the necessary separation, when it is feasible, and hold void only that part on interstate receipts. *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411, 8 Sup. Ct. Rep. 1127 (1888). But where a specific fee is imposed, the Supreme Court will not assume that the subject taxed is local business only if the language of the statute applies to any or all business. See cases cited in note 146.

<sup>146</sup> *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380 (1888); *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. Rep. 851 (1891); *Williams v. Talladega*, 226 U. S. 404, 33 Sup. Ct. Rep. 116 (1912).

<sup>147</sup> See cases cited in note 19, *supra*.

line."<sup>148</sup> One distinction which he draws is so frail that a breath of thought would disintegrate it. "Besides," he says,

"the tax imposed in the *Ficklen Case* was not directly upon the business itself or upon the volume thereof, but upon the amount of commissions earned by the brokers, which, although probably corresponding with the volume of the transactions, was not necessarily proportionate thereto. For these and other reasons the case has been deemed exceptional."<sup>149</sup>

This assumed distinction is no more than that the Crew Levick Company sold their own products, while Mr. Ficklen was a somewhat independent intermediary between seller and purchaser. It is the distinction between receipts from commissions on sales and receipts from sales. One is quite as likely not to be necessarily proportional to the volume of the transactions, if this means the quantity of goods sold, as is the other. Even if by "volume of the transactions" Mr. Justice Pitney means the volume as measured by gross receipts, it cannot be important that the broker's commissions were not exactly proportional to the prices paid the seller. If the broker's part in the transaction is regarded as interstate commerce, his receipts are from interstate commerce, and whether he were paid by the day or the deal or by a percentage can hardly matter. In so far as there is any validity to the distinction suggested, it relates to the nature of the business involved in the different cases and not to the character of the statutes.

It is not unlikely that it is a distinction between the businesses that the learned Justice has in mind. This can hardly be gathered from the opinion in the Crew Levick case, but it finds support in an earlier opinion of the same Justice in *United States Fidelity & Guaranty Co. v. Kentucky*<sup>150</sup> which sustained a specific tax upon a mercantile agency engaged in reporting the financial responsibility of merchants who bought goods from without as well as from within the state. In that opinion Mr. Justice Pitney says:

"The present case has no close parallel in former decisions, but in some of its aspects it bears a resemblance to the case of a tax imposed upon a resident citizen engaged in a general business that happens to include a considerable share of interstate business. *Ficklen v. Taxing District*, 145 U. S. 1. Or the business of the live stock exchange that was under

<sup>148</sup> 245 U. S. 292, 296, 38 Sup. Ct. Rep. 126 (1917).

<sup>149</sup> *Ibid.*, 297.

<sup>150</sup> 231 U. S. 394, 34 Sup. Ct. Rep. 122 (1913).

consideration in *Hopkins v. United States*, 171 U. S. 578, 592. Or the business of a cotton broker dealing in futures or options. *Ware v. Mobile County*, 209 U. S. 405."<sup>181</sup>

The Hopkins case and the Ware case held that the acts in question were not acts of interstate commerce. The collocation suggests that the broker who is a mere intermediary is less intimately connected with commerce than a vendor or his regular drummers. It is not likely that the court would go so far as to hold that such a sales broker, like the broker who furnishes exchange,<sup>182</sup> is not himself engaged in the commerce which he facilitates. But the passage above quoted has the aroma of the idea that Mr. Ficklen was a degree or two removed from direct participation in interstate commerce, and that therefore the tax which was sustained against him must be subjected to more rigid tests if ever it is sought to be imposed on those whose receipts are from interstate commerce instead of being receipts from receipts from interstate commerce. To the extent that the Ficklen case is now sought to be explained or apologized for on any such notion, it is excluded from the class of cases with which we are concerned and, from the standpoint from which we are considering it, is abandoned.

We hardly need, however, to enter upon such refinements to discern that, even if the Ficklen case still lives, its working days are over: Of the tax from which the Crew Levick Company was relieved, Mr. Justice Pitney says:

"It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the State, a part of every dollar received in such transactions. That it applies to internal as well as to foreign commerce cannot save it; . . . That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it."<sup>183</sup>

This would be quite as applicable to a tax specifically imposed on a local occupation but measured by receipts from all sources. To sustain a tax on interstate receipts, something more is now needed than the declaration of the state that it is merely using the receipts as the measure of a tax on something else that is taxable. The

<sup>181</sup> 231 U. S. 399, 34 Sup. Ct. Rep. 122 (1913).

<sup>182</sup> *Nathan v. Louisiana*, 8 How. (U. S.) 73 (1850).

<sup>183</sup> 245 U. S. 292, 297-98, 38 Sup. Ct. Rep. 122 (1917).

court now demands that behind that declaration there must be something more substantial than words. The verbal distinction on which *Maine v. Grand Trunk Railway Co.*<sup>154</sup> originally rested has been replaced by substance. The Ficklen case, which leaned strongly on the Maine case for support, must be similarly reinterpreted before its foundations are solid, unless the court is willing to preserve an anomaly out of respect for *stare decisis*.

The only possible reinterpretation of the Ficklen case which can make it applicable to all kinds of interstate commerce is one which treats it as sanctioning the use of gross receipts to measure the "intangible property" of the taxpayer, and thus to estimate values not reached by any other tax. This possibility finds some recognition in Mr. Justice Pitney's comment on the Pennsylvania tax to the effect that "it bears no semblance of a property tax, or a franchise tax in the proper sense; nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise."<sup>155</sup> The Shelby County tax was not one that could be regarded as "on" a franchise or "on" property, unless a gainful occupation is to be deemed "intangible property." This notion of "intangible property" has not been entertained by the court except where the intangible has inhered in or been conceptually fused with something that was tangible. If pushed further and applied where nothing tangible is present, the so-called "intangible property" becomes so patently nothing but the value of an occupation or business that the court must inevitably recognize it as such.

Such recognition still leaves a loophole for the Ficklen case. It might conceivably squeeze through the opening left by the statement in the Crew Levick case that the tax there in issue is not "an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise."<sup>156</sup> This leaves room for the notion that an occupation tax imposed on carrying on local business might be measured by receipts from all business, subject to the restriction that the expedient taxes but once and without discrimination the values contributed by interstate commerce. There is no reason, as we have seen,<sup>157</sup> why such values should go com-

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<sup>154</sup> Note 5, *supra*.

<sup>155</sup> 245 U. S. 292, 297, 38 Sup. Ct. Rep. 122 (1917).

<sup>156</sup> Cited in note 155, *supra*.

<sup>157</sup> 32 HARV. L. REV. 260-62, and *Ibid.*, 398.

pletely untaxed. Where they arise from business unconnected with any use of property, they do go untaxed unless some form of income tax is allowed. The question must be whether Shelby County's form of income tax should be approved, or whether the states should be driven to adopt some other method less likely to invade the realm which the states must not enter.

The latest utterance of the Supreme Court indicates that the latter alternative is to be chosen. In sustaining the general income tax of Wisconsin, measured by net income, the opinion in *United States Glue Co. v. Oak Creek*<sup>158</sup> laid stress on the difference between gross receipts and net income. After contrasting the Crew Levick case with *Peck & Co. v. Lowe*,<sup>159</sup> which held that the federal income tax was not a tax on exports when measured by net income from an exporting business, Mr. Justice Pitney observed:

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or so to diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large."<sup>160</sup>

Here is wisdom that cannot be gainsaid. It applies so palpably to any occupation tax measured in whole or part by gross receipts from interstate commerce that the Ficklen case can hardly hope to survive the menace to its last remaining strength. With permission to tax net income from all commerce by a general state-wide income tax, the states can no longer complain that the death of the Ficklen case would compel them to confer a bounty on interstate commerce by exempting it from burdens which rest on local commerce. The gross-receipts taxes allowed in substitution

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<sup>158</sup> 247 U. S. 321, 38 Sup. Ct. Rep. 499 (1918).

<sup>159</sup> 247 U. S. 165, 38 Sup. Ct. Rep. 432 (1918).

<sup>160</sup> 247 U. S. 321, 329-30, 38 Sup. Ct. Rep. 432 (1918).

for *ad valorem* taxes on railroad cars and other property may be distinguished on the ground that they represent the degree of use of such property more closely than do other taxes, and that the degree of use bears a fairly close relation to the responsibilities and possible expense which such property causes or is likely to cause the taxing authority.

This subject will be adverted to again in the succeeding section dealing with taxes on net incomes "as such."

*(To be continued.)*

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# HARVARD LAW REVIEW

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Published monthly, during the Academic Year, by Harvard Law Students

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SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER

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THE ESPIONAGE CASES. — Under Title I, Section 3, of the Espionage Act as amended May 16, 1918, there seems but little room for any public discussion adverse to the war policies of the national government. The question of constitutionality seems alone to remain, and if the amended act is held to be constitutional, the power of Congress to abridge the time-honored right of freedom of speech will seem well established.

Prior to the amendment, the original Espionage Act of June 15, 1917, if properly interpreted, could well be held constitutional. But the decisions under the original act are, to say the least, unfortunate. The constitutionality of that act is not here in question. It is the construction and interpretation which the courts have put upon Title I, Section 3<sup>1</sup> to which our attention is directed. Freedom of speech, being a constitutional guaranty, cannot be abridged in times of stress and strain any more than when the country is at peace.<sup>2</sup> And it is submitted that

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<sup>1</sup> This section provides: "Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with the intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting and enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both."

<sup>2</sup> It is contended by some that the Constitution itself can be suspended during times of stringency. But the Constitution is not alone a peace document; it enumerates and restricts the powers of Congress in times of war as well as peace, and in exercising a power delegated to it by the Constitution Congress cannot so exercise that power as to violate some restrictive provision. See *Ex parte Merryman*, Taney's Reports, 246; *Ex parte Milligan*, 4 Wall. (U. S.) 2. Cf. *United States v. Stokes*, Dep't of Justice, Bulletin No. 106.

any statute which tends to limit liberty of expression ought to be construed in the light of the freedom-of-speech clause, so as not to restrict utterances any more than the actual words of the statute require.

Furthermore, the Espionage Act is a criminal statute, and it is a well-established rule of construction that criminal statutes be strictly construed. Yet some courts have included all men within the ages of 18 and 45 as part of "the military and naval forces of the United States."<sup>3</sup> Certainly the same courts would balk at holding such men, not actually in the military service, as subject to court-martial and military law and hence deprived of the right of trial by jury.<sup>4</sup> So, too, the words "recruiting and enlistment service" have been construed to include conscription under the Selective Service Act.<sup>5</sup> Congress was aware of the Draft Law at the time of the passage of the Espionage Act, and had it meant an interference therewith to be a crime under the Espionage Act, it should have said so.

The statute imposes a penalty for the wilful utterance of false statements. Such, it is submitted, means wilful false statements of facts. "This is a capitalists' war"<sup>6</sup> — "The Government is for profiteers"<sup>7</sup> — "The Selective Service Act is unconstitutional"<sup>8</sup> — are clearly statements of opinions. The causes of the war cannot be proven as facts. Yet some courts seem to think so, for the President's address to Congress recommending a formal declaration of war for the reasons therein set forth, was admitted in evidence to prove the falsity of a defendant's utterances.<sup>9</sup> To follow this to its logical conclusion would brand as seditious all utterances at variance with the statements of those in governmental positions and adverse to their war policies, and yet allow all criticisms, honest or vicious, in favor of waging a more vigorous war.

The convictions under the Espionage Act have been for attempts to cause its violation; attempts by wilful false statements to interfere with the operation of the military or naval forces, or to cause insubordination or mutiny, or for attempting wilfully to obstruct the recruiting and enlistment service. Attempts, to be punishable, must come dangerously near success and yet fall short of it.<sup>10</sup> The purchase of a gun or

<sup>3</sup> *United States v. Sugarman*, Dep't of Justice, Bulletin No. 12; *United States v. Kirchner*, *Ibid.*, Bulletin No. 69; *United States v. Stokes*, *supra*. *Contra*, *United States v. Ves Hall*, 248 Fed. 150; *United States v. Frerichs*, Dep't of Justice, Bulletin No. 85; *United States v. Hitt*, *Ibid.*, Bulletin No. 53; *United States v. Brinton*, *Ibid.*, Bulletin No. 132.

<sup>4</sup> The fifth amendment of the federal Constitution guarantees trial by jury to all those not in the military or naval forces of the United States.

<sup>5</sup> *United States v. Hitt*, *supra*; *United States v. Stokes*, *supra*; *United States v. Waldron*, Dep't of Justice, Bulletin No. 79. *Contra*, *United States v. Brinton*, *supra*. *Cf. Babbitt v. United States*, 16 Ct. Cl. 202, 213; *Lanahan v. Birge*, 30 Conn. 438, 443.

<sup>6</sup> *United States v. Pierce*, Dep't of Justice, Bulletin No. 52.

<sup>7</sup> *United States v. Stokes*, *supra*.

<sup>8</sup> *United States v. Kirchner*, *supra*.

<sup>9</sup> *United States v. Stokes*, *supra*.

<sup>10</sup> See Joseph H. Beale, Jr., "Criminal Attempts," 16 HARV. L. REV. 491, 501.

poison with the intent to kill is not a punishable attempt at murder.<sup>11</sup> The sin of discharging a gun with the intent to kill a man a thousand miles away is as great as the sin of shooting at one within range and missing, yet the former has no legal cognizance. If writing a letter from Alaska to a firm in San Francisco requesting a shipment of liquor to Alaska, the importation of which into said territory is a crime, is not an attempt to commit the crime until the liquor is brought near the borders, headlands, or waters of Alaska,<sup>12</sup> it is hard to see how addresses made before a woman's club or at a distance from army cantonments, can be held to be attempts to cause insubordination and mutiny in violation of the Espionage Act.<sup>13</sup> So, too, publications to the effect that this is a capitalists' war, or that the government is for profiteers, though such papers are likely to reach army cantonments and are sure to be read by those at home who are subject to call, can scarcely be held to be attempts.<sup>14</sup> Assuming the statements to have been false statements of facts, and assuming their utterers to have intended to cause a violation of the law, the question should have been how dangerously near success did the attempts come. True, the boys in the service at home and abroad might be cheered by a universal enthusiastic sentiment at home, but how many would ever hear or listen to such statements of a minority, much less be influenced by them? How many wives, mothers, fathers, sisters, brothers, or sweethearts would on such talk encourage their own male relatives to violate the law? The line is not an easy one to draw; each case must be decided upon its own merits. But it seems that so long as the words do not tend directly, using the objective standard, to cause insubordination or mutiny, do not tend directly to obstruct the recruiting and enlistment service, or directly to interfere with the operation of the military and naval forces, that an attempt to violate the statute has not been committed. This was the view taken by the court in *United States v. Schutte*<sup>15</sup> and by the lower court in *Masses Publication Co. v. Patten*.<sup>16</sup> In the latter case the postmaster excluded the plaintiff's publication from the mails on the grounds that it was in violation of the Espionage Act. The plaintiff sought to enjoin the postmaster from so doing, and in granting the injunction Judge Learned Hand said: "Political agitation may in fact stimulate men to break the law. De-

<sup>11</sup> These are considered mere preparations and not attempts. See *People v. Murray*, 14 Cal. 159; *Commonwealth v. Kennedy*, 170 Mass. 18, 48 N. E. 770. See also 16 HARV. L. REV. 491.

<sup>12</sup> *United States v. Stephens*, 12 Fed. 52.

<sup>13</sup> Cf. *United States v. Stokes*, *supra*; *United States v. Schutte*, 252 Fed. 212; *Masses Pub. Co. v. Patten*, 244 Fed. 535, overruled in 246 Fed. 24.

<sup>14</sup> In *United States v. Stokes*, *supra*, the court said: "There are the mothers, fathers, wives, sisters, brothers, sweethearts and friends of these men (men in the service and those registered for the draft), in fact all the complex life of communities which, in the aggregate, with others of like nature, make up the life and physical forces of the nation. If the statement made in this letter and the resulting attitude therein voiced should meet with credence and acceptance by any appreciable number of its readers, could they fail to produce a temper and spirit that would interfere, tend naturally and logically to interfere, with the operation and success of the military and naval forces of the United States?"

<sup>15</sup> 252 Fed. 212.

<sup>16</sup> 244 Fed. 535.

testation of existing policies is easily transformed into forcible resistance, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation with direct incitement to violent resistance is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the purpose to disregard it must be evident when the power exists." The Circuit Court, in overruling *Learned Hand* and in dissolving the injunction,<sup>17</sup> laid down the seemingly unsound proposition that he who utters words at any time or place with the specific intent to cause a violation of the Espionage Act, is criminally liable therefor.<sup>18</sup> In attempting to further strengthen its position the court stated that it was powerless to reverse the decision of the postmaster unless he was clearly wrong. It is true that decisions of administrative boards or officers are final as to questions of fact, and reversible by the courts only when clearly wrong.<sup>19</sup> But to exclude matters from the mails on the grounds that they are criminal attempts in violation of the Espionage Act, as it originally stood, calls for a construction of the statute, which is a judicial question, clearly reviewable by the courts and reversible unless clearly right.<sup>20</sup>

In no case was the law of criminal attempts considered, and in only a few were the ordinary established rules of construction applied. During the Civil War, when a real menace to personal liberty presented itself, the judges fearlessly applied the law.<sup>21</sup> Today there are convictions; on appeal the government confesses error without opinion;<sup>22</sup> and those who cannot appeal go to jail, some rightfully, others perhaps wrongfully. The decisions are permeated with a laudable spirit of loyalty, but true patriotism consists as much in protecting the legal and constitutional rights of individuals as it does in giving the government an undivided and whole-hearted support.<sup>23</sup>

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**INJURIES BY TRESPASSING ANIMALS.** — In the simple conception of liability that refers everything to the human will, one is held legally upon a legal transaction, in which he willed liability, or because of a wrongful act, in which he willed something culpable. But liability at one's peril for situations dangerous to the general security, without

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<sup>17</sup> 246 Fed. 24.

<sup>18</sup> The decision of the Circuit Court was so interpreted and followed by Judge Learned Hand in *United States v. Nearing*, 252 Fed. 223, and in *United States v. Eastman*, 252 Fed. 232.

<sup>19</sup> *United States v. Ju Toy*, 198 U. S. 253. See 32 HARV. L. REV. 433.

<sup>20</sup> *Chin You v. United States*, 208 U. S. 8; *Gonzales v. Williams*, 192 U. S. 1; *Gegiou v. Uhl*, 238 U. S. 620. See 32 HARV. L. REV. 433.

<sup>21</sup> See *Ex parte Merryman*, *supra*; *Ex parte Milligan*, *supra*.

<sup>22</sup> See *Baltzer v. United States*, U. S. Supreme Court, October Term, 1918, No. 320; *Head v. United States*, *Ibid.*, No. 321; *Kornmann v. United States*, *Ibid.*, No. 548.

<sup>23</sup> See Zechariah Chafee, Jr., "Freedom of Speech," 17 NEW REPUBLIC, No. 211, 66.

regard to culpability, was an obvious fact in the administration of justice. The eighteenth century was content to reconcile this form of liability with the general theory by a dogmatic fiction of representation in the case of torts of agents and servants<sup>1</sup> and a dogmatic fiction of negligence in the case of trespassing animals.<sup>2</sup> The nineteenth century remained content with the former. American courts which balked at employers' liability statutes as subversive of a fundamental principle of reason that liability can flow only from fault,<sup>3</sup> were satisfied with the liability of a principal for the tort of an agent on the ground that the culpability of the agent was in reason that of the principal.<sup>4</sup> But historical study soon showed that liability for trespassing animals was not to be explained on any theory of negligence, and so it became orthodox to explain this case and some analogous cases of liability without fault as historical survivals which were gradually disappearing as the idea of liability resulting from will was progressively realized in the administration of justice.<sup>5</sup>

In truth this attempt to state the whole law in terms of will and hence to state the whole law of torts in terms of culpability grew out of the historical and metaphysical jurisprudence of the last century, which conceived of progress in law as a progress from rules and doctrines in which duties and liabilities were involved in status or relation, to rules and doctrines in which "duties and liabilities flow from voluntary action and are consequences of exertion of the human will."<sup>6</sup> So far from being stubborn archaisms, holding on in the teeth of progress, cases of common-law liability without fault have shown positive vitality. Thus the common-law liability for trespassing cattle, which at one time seemed on the way to extinction in America, has been steadily coming back into the law.<sup>7</sup> It is now evident that the common-law rule was not rejected in our earlier decisions and our earlier legislation because it was in conflict with a fundamental principle of no liability without fault, but because it postulated a settled community, where it was contrary to the general security to turn cattle at large to graze, whereas in pioneer American communities vacant lands which were privately owned and those which were not owned

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<sup>1</sup> "‘*Qui facit per alium facit per se*’ is a simple untruth, except so far as it expresses the truism that one who deliberately carries out a design through the instrumentality of another is the active agent throughout." BATY, VICARIOUS LIABILITY, 7.

<sup>2</sup> 3 BLACKSTONE, COMMENTARIES, 211; POLLOCK, TORTS, 9 ed., 510-11.

<sup>3</sup> *Hoxie v. New York R. Co.*, 82 Conn. 352, 73 Atl. 754 (1909); *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431 (1911); *Durkin v. Kingston Coal Co.*, 171 Pa. St. 193, 33 Atl. 237 (1895).

<sup>4</sup> One may concur in Dr. Baty's demonstration that this is a dogmatic fiction and yet not think the rule of law imposing such liability is to be rejected. The fallacy of Dr. Baty's book lies in the assumption that tort liability is of necessity a correlative of fault.

<sup>5</sup> "The doctrine is a stubborn archaism." POLLOCK, TORTS, 9 ed., 510, n. p.

<sup>6</sup> Pound, "The End of Law as Developed in Juristic Thought," 30 HARV. L. REV. 201, 210.

<sup>7</sup> E. g., fencing statutes are held to have no application to cultivated land. *Hallock v. Hughes*, 42 Iowa, 516 (1876); *Randall v. Gross*, 67 Neb. 255, 93 N. W. 223 (1903).

could not be distinguished, and the grazing resources of the country were often its chief resources. Hence the common-law rule was for the time being inapplicable to local conditions. It is significant that as the conditions that made the rule inapplicable have come to an end, the rule has generally been reestablished.<sup>8</sup> A rule that can thus reassert itself is not a moribund archaism. It must have something sound behind it.

A conspicuous case of the vitality of the common-law liability-without-fault of owners of animals is liability for injuries done by trespassing animals, while on the land wrongfully, irrespective of *scienter*. On one ground or another, the current of authority has always held the owner of the animal in such cases.<sup>9</sup> In some of these cases the person injured, or whose property on the land was injured, was in possession of the land trespassed upon and was allowed to recover for the injury to person or chattel property by way of aggravation of the trespass on the land.<sup>10</sup> But in others the action was *Case*,<sup>11</sup> and in still others the injury was to another than the owner in possession of the land.<sup>12</sup> In some the trespassing animal was a dog,<sup>13</sup> and it might be material that the owner was with him.<sup>14</sup> The only decision that requires a theory of aggravation of trespass to the realty to sustain recovery for damage by a trespassing animal other than damage to the land is *Van Leuven v. Lyke*,<sup>15</sup> where it was held there could not be a recovery without either an averment of trespass upon land or an averment of *scienter*.

<sup>8</sup> *Phillips v. Bynum*, 145 Ala. 549, 39 So. 911 (1906); *Puckett v. Young*, 112 Ga. 578, 37 S. E. 880 (1901); *Bulpit v. Matthews*, 145 Ill. 345, 34 N. E. 525 (1893); *Gumm v. Jones*, 115 Mo. App. 597, 92 S. W. 169 (1906); *State v. Mathis*, 149 N. C. 546, 63 S. E. 99 (1908); *Marsh v. Koons*, 78 Ohio St. 68, 84 N. E. 599 (1908).

<sup>9</sup> *Beckwith v. Shordike*, Burr. 2092 (1767); *Lee v. Riley*, 18 C. B. N. S. 722 (1865); *McClain v. Lewiston Fair Ass'n*, 17 Idaho, 63, 79, 104 Pac. 1015 (1909); *Green v. Doyle*, 21 Ill. App. 205 (1886); *Decker v. Gammon*, 44 Me. 322 (1857); *Angus v. Radin*, 2 South (N. J.) 815 (1820); *Van Leuven v. Lyke*, 1 N. Y. 515 (1848); *Dolph v. Ferris*, 7 Watts & Sergt. (Pa.) 367 (1844); *Goodman v. Gay*, 15 Pa. St. 188 (1850); *Troth v. Wills*, 8 Pa. Sup. Ct. 1 (1898); *Chunot v. Larson*, 43 Wis. 536 (1878); *Doyle v. Vance*, 6 Vict. L. R. (Law) 87 (1880). *Contra*, *Sanders v. Teape*, 51 L. T. N. S. 263 (trespassing dog) (1884); *Bischoff v. Cheney*, 89 Conn. 1 (trespassing cat) (1914); *Peterson v. Conlan*, 18 N. D. 205, 119 N. W. 367 (1909).

<sup>10</sup> *Beckwith v. Shordike*, Burr. 2092 (1767); *Lee v. Riley*, 18 C. B. N. S. 722 (1865); *Van Leuven v. Lyke*, 1 N. Y. 515 (1848); *Dolph v. Ferris*, 7 Watts & Sergt. (Pa.) 367 (1844); *Chunot v. Larson*, 43 Wis. 536 (1878). In the last case the court says: "The ground of liability rests upon a breach of the close, and the killing of the cow is alleged by way of aggravation of damages" (p. 541). In *Van Leuven v. Lyke*, *supra*, the court says: "The breaking and entering the close . . . is the substantive allegation, and the rest is laid as a matter of aggravation only" (p. 517).

<sup>11</sup> *Decker v. Gammon*, 44 Me. 322 (1857); *Green v. Doyle*, 21 Ill. App. 205 (1886); *Angus v. Radin*, 2 South (N. J.) 815 (1820) (*certiorari* from a magistrate's court, which had no jurisdiction of trespass *quare clausum*).

<sup>12</sup> *McClain v. Lewiston Fair Ass'n*, 17 Idaho, 63, 104 Pac. 1015 (1909); *Troth v. Wills*, 8 Pa. Sup. Ct. 1 (1898).

<sup>13</sup> *McClain v. Lewiston Fair Ass'n*, 17 Idaho, 63, 104 Pac. 1015 (1909); *Green v. Doyle*, 21 Ill. App. 205 (1886); *Doyle v. Vance*, 6 Vict. L. R. (Law) 87 (1880).

<sup>14</sup> *Woolf v. Chalker*, 31 Conn. 121, 128 (1862) (*semble*).

<sup>15</sup> 1 N. Y. 515 (1848).

Of the decisions in which recovery for injury by the trespassing animal in the absence of *scienter* was denied, *Cox v. Burbidge*,<sup>16</sup> which is commonly cited as requiring *scienter* in case of an injury by a trespassing animal,<sup>17</sup> may be distinguished, as will be seen presently; *Sanders v. Teape*<sup>18</sup> was an injury by a trespassing dog, and *Bischoff v. Cheney*<sup>19</sup> an injury by a trespassing cat, so that they involve the question whether a dog or cat, going on lands by itself, may give rise to an action of trespass,<sup>20</sup> while in *Peterson v. Conlan*<sup>21</sup> the plaintiff was but a licensee on the land (and so might well be held to take risks to which the owner and his invitees would not be subject), and the value of the court's discussion is impaired by its supposition that *Rylands v. Fletcher*,<sup>22</sup> which it cites along with *Losee v. Buchanan*<sup>23</sup> as a decision to the same effect, is an authority for requiring negligence as a basis of liability.

In *Cox v. Burbidge*, defendant's horse, while running at large on the highway, kicked plaintiff. It was held there was no liability without proof of *scienter*. No doubt this might be explained on the theory that liability for trespass on land by animals is a historical anomaly, and for the rest liability must depend on proof of culpability in allowing an animal to run at large when its known disposition made it reasonable to anticipate that someone would be injured. But such an explanation does not consist with the tendency of the English courts, as shown by *Baker v. Snell*,<sup>24</sup> to insist on absolute liability in case of injuries by animals. And *Cox v. Burbidge* might be reconciled with the cases where the owner was held for injuries inflicted by the animals while trespassing on another's land by observing that so long as the horse was grazing by the roadside, even if a trespasser on the highway, if gentle it was in the ordinary run of things no danger to the general security. One who uses the highway takes the risk of many things which are normal incidents of general use of the highway.<sup>25</sup> Even if the horse was there wrongfully, the wrongful presence of a gentle horse may be a risk of the highway, when it cannot be said to be a risk taken by a landowner on his own premises. In the latter case the law requires the owner of an animal to keep his animal off of the land of others, where in the ordinary course of things they are sure to do some sort of damage, at his peril of answering for the damage actually done.

Such is in effect the result of the latest case of the sort. In *Theyer*

<sup>16</sup> 13 C. B. N. S. 430 (1863).

<sup>17</sup> E. g., POLLOCK, TORTS, 8 ed., 497.

<sup>18</sup> 51 L. T. N. S. 263 (1884).

<sup>19</sup> 89 Conn. 1 (1914).

<sup>20</sup> That trespass does not lie in such a case, *Brown v. Giles*, 1 C. & P. 118 (1823); *Woolf v. Chalker*, 31 Conn. 121, 128 (1862) (*semble*); *Bischoff v. Cheney*, 89 Conn. 1 (1914); *Buck v. Moore*, 35 Hun (N. Y.) 338 (1885); *Van Etten v. Noyes*, 128 App. Div. 406, 112 N. Y. Supp. 888 (1908); *McDonald v. Jodrey*, 8 Pa. Co. Ct. 142 (1890). See *Read v. Edwards*, 17 C. B. N. S. 245, 260 (1864). *Contra*, *Chunot v. Larson*, 43 Wis. 536 (1878).

<sup>21</sup> 18 N. D. 205, 119 N. W. 367 (1909).

<sup>22</sup> L. R. 3 H. L. 330 (1868).

<sup>23</sup> 51 N. Y. 476 (1873).

<sup>24</sup> [1908] 2 K. B. 352, 355.

<sup>25</sup> Compare what is said in *Tillett v. Ward*, 10 Q. B. D. 17, 20 (1882).

v. *Purnell*,<sup>26</sup> defendant's sheep trespassed on plaintiff's land, where they developed scab, as a result of which they were interned on plaintiff's land along with plaintiff's own sheep. Plaintiff was allowed to recover the whole damage, without proof of *scienter*. *Cox v. Burbidge* was distinguished on the ground that there the injury was not, while here it was a "natural" result of the trespass, and on the ground that there the plaintiff had no case for trespass, while here he had such a case with matter in aggravation of the damage. *Cooke v. Waring*<sup>27</sup> was distinguished on the latter ground. As to the first ground the artificiality of the uses of "natural" in this connection has been pointed out.<sup>28</sup> About all that can be made out from the decisions is that cases where a recovery has been allowed involve "natural" results, wherefore a recovery; while those in which it was not allowed do not involve such results, wherefore no recovery. As to the other ground, it seems futile to distinguish between an injury to the owner of the land, who could bring an action of trespass *quare clausum*, and one to his mother, living with him on the land, who could not.<sup>29</sup> The strongest argument against liability without *scienter* in these cases is in the dissenting opinion in *Troth v. Wills*.<sup>30</sup> But in the case there put of injury to a child of the landowner by a trespassing pet lamb or by a trespassing hen (assuming that the owner of the animal would be liable in trespass for an invasion of another's land by a hen),<sup>31</sup> if it is the duty of the owner of the animal to keep it off of the neighbor's ground, may not the latter reasonably assume that the animal will not be there, and allow the child to act accordingly? Ought we to ask the owner of land to take the risk of another's stray animal which the other is bound to keep off?

*Theyer v. Purnell*, in its result and in refusing to apply *Cox v. Burbidge*, is significant as one of many recent cases which are compelling us to revise the nineteenth-century theory of liability.

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EFFECT OF OWNERSHIP OF ALL THE STOCK OF ONE CORPORATION BY A SECOND CORPORATION; LIABILITY OF A PARENT CORPORATION FOR THE DEBTS OF A SUBSIDIARY CORPORATION; SUBSIDIARY CORPORATIONS AS AGENTS. — The recent case of *New York Trust Co. v. Carpenter*<sup>1</sup> presented the following state of facts: The Wheeling & Lake Erie Railway Company owned a controlling interest in the Wheeling, Lake Erie and Pittsburgh Coal Company. The coal company mined coal which was used as fuel by, or shipped over the lines of, the railway company. Both companies were in the hands of receivers. There were outstanding against the coal company certain mortgage bonds (and also certain

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<sup>26</sup> [1918] 2 K. B. 333.

<sup>27</sup> 2 H. & C. 332 (1863).

<sup>28</sup> MAYNE, DAMAGES, 8 ed., 77. Compare other artificial uses of this word, SALMOND, TORTS, 4 ed., § 61, note 13.

<sup>29</sup> Compare the remarks of Phillimore, J., on an analogous situation in *Dulieu v. White*, [1901] 2 K. B. 669, 684-85.

<sup>30</sup> 8 Pa. Sup. Ct. 1 (1898).

<sup>31</sup> See *State v. Neal*, 120 N. C. 613, 27 S. E. 81 (1897).

<sup>1</sup> 250 Fed. 668 (C. C. A., 6th Circ.) (1918).



obligations entitled to priority over these bonds). Pursuant to a plan of reorganization, a new railway company and a new coal company were created, to which were transferred the properties of the old companies. The new railway company received all the stock of the new coal company, and the bondholders in the old coal company received bonds executed by the new coal company and secured (subject to prior obligations) by a mortgage upon its property.

Pursuant to the plan of reorganization, two contracts were made. A mining company (which was not controlled by the railway company) contracted with the coal company to pay for ten years a royalty on production, with an annual minimum; and the railway company contracted with a trustee for the bondholders of the coal company to pay a certain amount for each ton of coal mined and shipped over its lines. It was expected that the funds so paid would keep down annual charges, discharge the prior obligations, and provide some sinking-fund for the bonds. The only outlet for the coal mined by the mining company was over the lines of the railway company, and the railway company failed to furnish cars sufficient to haul away the coal which the mining company was able to produce. Upon failure of the railway company to supply cars, the mining company mined less than the agreed minimum, and refused to pay to the coal company the agreed royalties. Thereupon there were negotiations between the mining company and the railway company, as a result of which it was agreed that the mining contract should be modified, and a modifying contract was made between the mining company and the coal company, — the coal company acting “by direction” of the railway company.

Later the new railway company and the new coal company passed into the hands of receivers. On litigation instituted for the protection of the bondholders of the coal company, it was first held<sup>2</sup> that the railway company was under an obligation, implied from the plan of reorganization and the circumstances of the case, to furnish sufficient cars to haul away at least the minimum amount which the mining company had agreed to mine by its original contract, and that for its failure so to do, it was liable in damages (which would go to the bondholders), these damages to be computed upon the basis of the sums which would have been paid by the mining company and the railway company under the two reorganization contracts, if a due number of cars had been supplied by the railway company. In other words, the railway company was declared to be liable both on the contract expressly made by it at the time of the reorganization, and also upon a contract impliedly made by it at that time.

Pending the ascertainment of these damages, the mortgage upon the property of the coal company was foreclosed. It brought only enough to satisfy the prior obligations. There was a deficiency judgment for the full amount of the bonds, with interest. The question was then presented whether this deficiency judgment was provable as a claim against the new railway company. The District Court held that it was; the Circuit Court of Appeals held that it was not. The District Court found that the coal company was organized and at all times managed and

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<sup>2</sup> *Wheeling, etc. R. Co. v. Carpenter*, 218 Fed. 273 (C. C. A., 6th Circ.) (1914).

controlled by the railway company "as an adjunct to or agency of" the railway company.

A corporation may of course act as agent for the legal unit or units who hold its stock. The relation of agent to principal may arise by reason of any facts sufficient to create that relation under the general rules of law applicable to agents. But the relation of corporation to stockholder is not the relation of agent to principal. A stockholder, *qua* stockholder, is not a principal. When an agent does an act creating a liability to a third person, ordinarily that is not the liability of the agent, but is the liability of the principal alone; and even if the circumstances are such that the third person can subject the agent to liability, he can usually also subject the principal to liability. But when a corporation does an act creating a liability to a third person, ordinarily that liability is the liability of the corporation alone, and is not the liability of its stockholders. On the vital matter of liability for acts done, the relation of corporation to stockholder is not the same, or even similar, to the relation of agent to principal. These two relations are altogether different relations, — the one relation producing results which are the exact opposite of those produced by the other relation. The agent is not liable, and the corporation is liable; the principal is liable, and the stockholder is not liable.

When a corporation is duly created, a legal unit is formed which can incur liabilities which are solely the liabilities of that legal unit. The corporation will be in the control of the stockholders, and through this control the stockholders will benefit by the asserts which the corporation acquires; they will receive dividends from time to time, and upon the dissolution of the corporation they will receive their shares of the assets; the assets, to the extent that they exceed the liabilities, ultimately reach the stockholders. But the converse is not true; the liabilities, to the extent that they exceed the assets, do not ultimately burden the stockholders. This is the most important advantage derived from incorporation, — there is a legal unit controlled by stockholders, so that they ultimately profit by its profit, and yet the liabilities of this legal unit are its liabilities alone.

In *Salomon v. Salomon & Co. Ltd.*,<sup>3</sup> Salomon transferred a business to a limited company, and became the owner, absolutely or beneficially, of all the shares which the company issued. The company became insolvent. Vaughan Williams, J., held that Salomon was personally liable for the debts of the company, saying that the company was "a mere nominee of Salomon's; and the case is to be dealt with as if the nominee, instead of being the company, had been some individual agent of Salomon's to whom he had purported to sell this business. In that case the trustee in bankruptcy of the agent would have had a right to make Salomon indemnify the agent against the debts which he had contracted by the direction of his principal. The right of the liquidator is precisely the same." But this reasoning was discredited by the House of Lords, and Salomon was held not liable. "In a popular sense," said Lord Herschell, "a company may in every case be said to carry on business for and on behalf of its shareholders, but this certainly does not in

<sup>3</sup> [1897] A. C. 22.

point of law constitute the relation of principal and agent between them, or render the shareholders liable to indemnify the company against the debts which it incurs."

Where all the stock of a corporation is owned by one human being, the question arises whether there is any objection to such concentration of stock ownership. The usual situation is that creditors look solely to the assets of the corporation for payment, and, in such case, it is immaterial to them how many persons will be entitled to what assets remain after the creditors are satisfied. Therefore legislatures have been slow to prohibit concentration of stock ownership in one person. Where all the stock of a corporation is owned by a second corporation, and such ownership is *intra vires* of the second corporation, the situation is the same as where all the stock is owned by one human being. And there is no more justification for saying that a corporation is the agent of its sole stockholder, than for saying that a corporation is the agent of its many stockholders.

It has already been noted that of course a corporation may become the agent for its stockholder or stockholders by reason of any facts sufficient to create that relation under the general rules of law applicable to agents. Tested by these rules, there were no subsidiary facts in the principal case justifying a finding that the coal company was the agent of the railway company.

There was, however, an admission in the pleadings which should be noticed. The railway company, and its receiver, in their answers admitted that the railway company was "the real lessor" of the coal properties. The bondholders might well urge that, if the railway company was the "real" maker of the lease, then, by like reasoning, it must have been the "real" maker of the bonds. What is reality? There was a legal unit named the coal company; the legal title to the coal properties was vested in it, and no conveyance of those properties, by lease or otherwise, could have been made except by the action of that legal unit. The coal company was controlled by another legal unit, called the railway company, and the action of the coal company was taken because the railway company desired it to be taken, — corporations usually act as those who control them desire them to act. (1) The lease was made by the coal company. (2) The bonds were made by the coal company. (3) The coal company was controlled by the railway company, through ownership of all its stock. All three of these facts were realities. On these facts the question arises whether the fact that the coal company was so controlled by the railway company makes the railway company liable on the bonds made by the coal company. And we have seen that it is of the essence of the corporate franchise that control of a corporation, through stock ownership, does not expose the stockholder or stockholders to liability for the acts of the corporation. The admission that the railway company was "the real lessor" lacked legal certainty and, in any event, was the admission of a legal conclusion.

In dealing with cases similar to the principal case, judges have characterized the controlled corporation by a variety of words or phrases, — "paper company," "alter ego," "alias," "device," "dummy," "nominee," "tool," "instrumentality," "adjunct." But the use, even the

liberal use, of epithets does not constitute argument. Of course a corporation is useful to those who control it, — it acts "for" its stockholders. Now if one legal unit acts "for" a second legal unit, the second legal unit is usually liable for the act of the first unit; the importance of the corporate franchise lies precisely in the fact that, although the corporation acts "for" its stockholders, its stockholders are not liable for its acts. If this distinction is not kept bright, but is clouded by the use of double-meaning words, the law of corporation will lose much, if not most, of its usefulness. The legislative grant of the privilege to control a legal unit, but to be unburdened by the liabilities of that unit, is a matter of substance, and not of mere form.

In the principal case, the bondholders were content in the reorganization to take the bonds of the coal company. They recognized the railway company as a distinct legal unit, and the trustee for the bondholders contracted with the railway company for the payment, not of the bonds in their entirety, but of a fund which it was expected would discharge the prior obligations and provide something toward the payment of the bonds. The bondholders later contended successfully that the railway company was under an implied liability to supply cars, so that the expected fund should be forthcoming. The action of the bondholders in seeking to treat the bonds themselves as the obligations of the railway company was inconsistent both with the bargain made in the reorganization and also with the relief obtained against the railway company in the prior phases of the litigation.

In *Marsch v. Southern N. E. R. Corp.*<sup>4</sup> the plaintiff sought to hold the Grand Trunk Railway Company of Canada liable for the breach of a contract which the plaintiff had made with the Southern New England Railroad Corporation, practically all of the stock of which was owned by the first corporation, on the ground that the second corporation, being so controlled, was but the "alter ego" of the first corporation. The Massachusetts court denied, with fitting brevity, the right of the plaintiff to subject the first corporation to liability on this ground.

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RATE STATUTE — CHANGE OF DECISION — RIGHT OF CARRIER TO RECOVER EXCESS VALUE OF SERVICES. — A statute prescribing a schedule of maximum rates to be charged for hauling lignite coal was passed in 1907 by the legislature of North Dakota. The carriers declined to comply with it: but their violation was successfully enjoined.<sup>1</sup> On supersedeas the statutory rate did not go into operation until March, 1910, when the Supreme Court of the United States affirmed the decision below. The case was later reopened in accordance with the terms of the Supreme Court's decree "without prejudice." The North Dakota court again held the rates to be reasonable,<sup>2</sup> but on appeal

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<sup>4</sup> 120 N. E. 120 (1918).

<sup>1</sup> North Dakota *ex rel. McCue v. Northern Pacific Ry. Co.*, 19 N. D. 45, 120 N. W. 869, 216 U. S. 579.

<sup>2</sup> North Dakota *ex rel. McCue v. Northern Pacific Ry. Co.*, 26 N. D. 438, 145 N. W. 135.

the Supreme Court held them to be confiscatory.<sup>3</sup> One of the carriers then brought action against a shipper for the difference between the rate prescribed by the statute and a reasonable rate. And the North Dakota court has recently held that it is not entitled to recover.<sup>4</sup> The carrier, of course, had contended that the rates had always been unreasonable; that therefore it had, during the period covered by the statutory rates, been serving the shipper at an unjust and illegal compensation; that to the extent of the excess of value of service over prescribed rate, it under mistake or duress had given value in return for no consideration; in short, that the shipper was unjustly enriched at its expense. On the other hand, the reasoning of the court is that there was no contract, express or implied in fact, on the part of the shipper to refund in case the Supreme Court later found the rates to be confiscatory; that so far as recovery was to be based upon unjust enrichment, the situation of the carrier was similar to that of the plaintiff in *Windbiel v. Carroll*.<sup>5</sup> There the plaintiff paid the defendant's claim insisting that he did not owe it, and later found a receipt conclusively showing that his belief was correct; yet he was unable to recover. The court distinguished between payment in ignorance of a fact and payment in ignorance of the means of proving a fact. If a plaintiff cannot produce the requisite proof of what he knows to be true, the law will not aid him. This principle, generally regarded as settled,<sup>6</sup> may conceivably, however, not extend to the principal case, where the only way of ascertaining the facts of a complicated situation is by a period of experimentation. The North Dakota court further found that, so far as the Supreme Court had in the past interpreted the decree, "without prejudice," that decree provided for future conditions that might arise and did not permit overthrowing what was already concluded.

It is commonly stated that money paid under a mistake of law cannot be recovered. If this principle were sound, it would be a strong argument in favor of the North Dakota decision. It is not the present purpose to discuss the correctness of this doctrine, which has been attacked by text-writers,<sup>7</sup> is not accepted in all jurisdictions,<sup>8</sup> and is subject to so many exceptions as to create a doubt as to its existence.<sup>9</sup> Irrespective of its soundness the principal case may be supported. In *Henderson v. Folkstone Waterworks Co.*,<sup>10</sup> the plaintiff paid a water tax which had been held to be legal. Later the House of Lords held the

<sup>3</sup> 236 U. S. 585.

<sup>4</sup> *Minneapolis & St. P. & S. S. M. Ry. Co. v. Washburn L. C. Co.* (N. D.) 168 N. W. 684.

<sup>5</sup> 16 Hun (N. Y.), 101.

<sup>6</sup> WOODWARD, QUASI CONTRACTS, § 13; KEENER, QUASI CONTRACTS, 27.

<sup>7</sup> WOODWARD, QUASI CONTRACTS, § 36; KEENER, QUASI CONTRACTS, 85-95; Stadden, "Error of Law," 7 COL. L. REV. 476; 2 POMEROY, EQ. JUR., §§ 841-51.

<sup>8</sup> *Northrop v. Graves*, 19 Conn. 548; *Scott v. Board of Trustees*, 132 Ky. 616, 116 S. W. 788.

<sup>9</sup> *Erkens v. Nicolin*, 39 Minn. 461, 40 N. W. 567; *Varnum v. Highgate*, 65 Vt. 416, 26 Atl. 628; *Marcotte v. Allen*, 91 Me. 74; 39 Atl. 346, *County of Wayne v. Reynolds*, 126 Mich. 231, 85 N. W. 574; *Haven v. Foster*, 9 Pick. (Mass.) 112 (1829). *In re Ainsworth*, [1915] 2 Ch. 96; *Culbreath v. Culbreath*, 7 Ga. 64.

<sup>10</sup> 1 T. L. R. 329 (1885).

tax illegal; yet the plaintiff was unable to recover. Lord Coleridge said: "Here at the time the money was paid, which was before Dobbs's case, the law was in favor of the company, and there was no authority to show that it could be recovered back on account of a judicial decision reversing the former understanding of the law." The case has been followed in the United States,<sup>11</sup> though there are opinions to the contrary.<sup>12</sup> The true theory of such cases is not that decisions of the courts are evidence of the law, that the earlier decision is merely a poor exposition of the rule, that the law was always in accordance with the later judgment, and that money paid under mistake of law is lost to the payer; but that decisions of the courts make the law,<sup>13</sup> that the payment was in truth a legal payment at the time it was made, and, there being no mistake, it cannot be recovered. The view of the analytical jurists, that the judges make the law, has as much application where a court has vacillated in considering the constitutionality of a statute, as where it has changed its mind on a principle of the common law.<sup>14</sup> Nor can the carrier claim that it rendered the services under duress and that value so given without consideration may be recovered. For, if the duress is according to law at the time exercised, the defendant can stand on his legal rights then acquired, although the highest court later sees fit to change the rule for the future.

It is true that the decree of the Supreme Court of the United States under which the North Dakota carriers rendered the statutory services was peculiar in that it contained the provision "without prejudice." The court's own opinion of the nature of this decree, however, seems to be that it is final as to transactions between it and any subsequent decree prescribing a different rule. Whether the object of the reservation is — as ordinarily — to give the carrier or the state, as the case may be, an opportunity to demonstrate by actual practice a question difficult of proof without experiment,<sup>15</sup> or to leave a loophole for change of circumstances,<sup>16</sup> the Supreme Court has felt this qualification "not to leave open the controversy as to the period with which the decree dealt and which it concluded."<sup>17</sup>

<sup>11</sup> *Metzger v. Greiner*, 9 Ohio C. Ct. R. (N. S.) 364; *Kenyon v. Welty*, 20 Cal. 637. And see *Hardigree v. Mitchum*, 51 Ala. 151; *Pittsburgh Co. v. Lake Co.*, 118 Mich. 109, 76 N. W. 395; *Lejon v. Richmond*, 2 Johns. Ch. (N. Y.) 51; *Harris v. Jex*, 55 N. Y. 421 (1874).

<sup>12</sup> *Centre School Township v. State*, 150 Ind. 168, 49 N. E. 961.

<sup>13</sup> GRAY, *NATURE AND SOURCES OF THE LAW*, §§ 465-512, 535-50; 2 AUSTIN, *JUR.*, 4 ed., 655; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349. For the view that judicial decisions are merely evidence of preëxisting law see 1 BLACKSTONE, *COMMENTARIES*, 68-71, 4 ILL. L. REV. 533; *Swift v. Tyson*, 16 Pet. (U. S.) 1.

<sup>14</sup> *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175.

<sup>15</sup> *Knoxville v. Water Co.*, 212 U. S. 1, 19; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 54, 55; *Northern Pacific Ry. v. North Dakota*, 216 U. S. 579, 581; *Louisville v. Cumberland Tel. & Tel. Co.*, 225 U. S. 430, 436; *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 173.

<sup>16</sup> *Minnesota Rate Cases*, 230 U. S. 352, 473.

<sup>17</sup> *Missouri v. C. B. & Q. R. R.*, 241 U. S. 533, 541. Here statutory rates had been enjoined by the United States Circuit Court. On appeal to the Supreme Court the injunction was dissolved without prejudice. The state then brought original action in the Supreme Court for excess fares paid by the officers. The carrier again at-

On the whole, then, the recent North Dakota decision seems sound. The result in this instance throws the expense of the experiment on the carrier. But it is not the first time the carrier has been so burdened.<sup>18</sup> And, had the earlier decision declared the rates unconstitutional and the later declared them fair, the principle could have been invoked by the carrier to throw laboratory expenses upon the state.

## RECENT CASES

**ANIMALS — TRESPASS ON LAND — DAMAGES.** — Defendant's sheep trespassed on plaintiff's land and while wrongfully there developed scab, in consequence of which they were detained two and a half months in a barn and meadow on plaintiff's land under the provisions of a statute. Plaintiff's sheep which had been in contact with the trespassing sheep were also detained. There was no evidence that defendant knew the sheep were diseased. *Held*, distinguishing *Cox v. Burbidge*, 13 C. B. N. S. 430 and *Cooke v. Waring*, 2 H. & C. 232, that plaintiff might recover as damages for the trespass the keep of the sheep, depreciation of plaintiff's sheep, expense of dipping the sheep, and loss of profits. *Theyer v. Purnell*, [1918] 2 K. B. 333.

For discussion of this case, see NOTES, page 420.

**ASSIGNMENTS — PRIORITIES — TRUSTS — RULE IN *DEARLE VERSUS HALL* NOT APPLICABLE IN DETERMINING PRIORITY BETWEEN *CESTUI QUE TRUST* AND SUBSEQUENT ASSIGNEE.** — Solicitors executed a declaration of trust in favor of defendant in respect of a mortgage debt secured by a deed upon a reversionary interest in a share of personalty settled by a will. In breach of trust the solicitors purported to assign the same interest to the plaintiff, a *bond fide* purchaser. The plaintiff gave notice to the trustees under the will, and, having received possession of the title deeds, claims priority over defendant who had not given notice of his interest. *Held*, that the *cestui que trust* prevails, the rule in *Dearle v. Hall* having no application to a beneficiary under a declaration of trust. *Hill v. Peters*, [1918] 2 Ch. 273.

In England and in some American jurisdictions the obligee of a legal debt cannot transfer it to a *bond fide* purchaser free of latent equities. *Penn v. Browne*, Freem. C. 214; *In re European Bank*, L. R. 5 Ch. App. 358; *Bush v. Lathrop*, 22 N. Y. 535. *Contra*, *Murray v. Lyburn*, 2 Johns. Ch. (N. Y.) 441; *Winter v. Montgomery Gas-Light Co.*, 89 Ala. 544, 7 So. 773. By the weight of authority the assignee of an equitable interest likewise takes subject to all equities; and this is held even by courts which reject the rule in regard to legal obligations. *Clouette v. Story*, [1911] 1 Ch. 18; *Henry v. Black*, 213 Pa. 620, 63 Atl. 250. The principal case presents the question whether the fact that the assignee has given notice to the trustee or obligor, the *cestui que trust* not having done so, gives him priority in spite of the above rule. Where the question is between successive assignees for value in good faith, England and a number of American jurisdictions hold that the first to give notice prevails. *Dearle v. Hall*, 3 Russ. Ch. 1; *Jenkinson v. N. Y. Finance Co.*, 79 N. J. Eq. 247, 82 Atl. 36. *Contra*, *West Texas Lumber Co. v. Green County*, 188 S. W. 283 (Tex. Civ. App.). This rule rests upon the analogy to the duty of a vendee of chattels to take possession in order to make his title indefeasible. See *In re Phillips' Estate*, 205 Pa. 515, 522, 55 Atl. 213, 215. See also 25

tempted to show the rates confiscatory; but on motion this defense was stricken out. The court declined to pass in advance on the main question in the case.

<sup>18</sup> Compare the Adamson Law. *Wilson v. New*, 243 U. S. 332.

HARV. L. REV. 728. A *cestui que trust*, however, often has no right to the possession of the *res*; and moreover the purpose of a trust is to relieve the beneficiary of all duties. The principal case properly protects the *cestui* in his reliance upon the trustee.

CARRIERS — RATES — RECOVERY OF BY CARRIER. — In 1907 the legislature prescribed maximum rates for the carriage of coal. The carriers refused to comply with the act, and the state brought an action to enjoin its continued violation. An injunction was issued and affirmed without prejudice by the United States Supreme Court in March, 1910. After a period of experimentation the carrier reopened the case, and the injunction was dissolved by the United States Supreme Court in June, 1915. The carrier now seeks to recover from the shipper the difference between the statutory rate and an alleged reasonable rate for shipments made between the dates of the first and second decree of the United States Supreme Court. *Held*, that carrier could not recover. *Minneapolis, St. P. & S. S. M. Ry. Co. v. Washburn L. C. Co.*, 168 N. W. 684 (N. D.).

For a discussion of the principles involved see NOTES, page 428.

CONFLICT OF LAWS — JURISDICTION FOR DIVORCE — DOMICILE IN EXTRATERRITORIAL COMMUNITY. — The husband's domicile of origin was England, but since marriage the spouses had resided in the British Protectorate of Egypt with intent to make it their permanent home. On the wife's petition for divorce in England, *held* that the husband had acquired a domicile of choice in Egypt, and that the English court had no jurisdiction to entertain the proceeding. *Casdagli v. Casdagli*, 146 L. T. J. 3 (1918).

During the rule of the East India Company in India, the English courts held that a person of British nationality in the service of the company could acquire an Anglo-Indian domicile. *Bruce v. Bruce*, 2 B. & P. 229, note; *Forbes v. Forbes*, 23 L. J. (Ch.) N. S. 724; *Hepburn v. Skervig*, 9 W. R. 764. The doctrine was extended to cases of persons who went to India not in the service of the company but on private business of their own. *Attorney General v. Fitzgerald*, 25 L. J. (Ch.) N. S. 743; *Allardice v. Onslow*, 33 L. J. (Ch.) N. S. 434. But the cases of Anglo-Indian domicile were later held to be anomalous. See *Jopp v. Wood*, 34 L. J. (Ch.) N. S. 212, 219; *Ex parte Cunningham*, 13 Q. B. D. 418, 425; DICEY, DOMICIL, 140, 141, 337. Accordingly, until the decision in the principal case, the English doctrine has been that a British citizen could not acquire a domicile in a foreign country which granted extraterritorial privileges. *In re Tootal's Trusts*, 23 Ch. D. 532; *Abd-ul-Messih v. Farra*, 13 A. C. 431. Cf. *The Derflinger*, 1 B. & C. P. C. 386; *The Lut-zow*, 1 B. & C. P. C. 528. In breaking away from this doctrine, the court in the principal case is to be commended. Given an abandonment of the domicile of origin, the selection of a new place of residence, and the *animus manendi*, it would seem immaterial that the community in question does not possess the sovereign territorial power. *In re Allen's Will*, U. S. COURT FOR CHINA, SHANGHAI TERM, 1907, PAMPHLET; *Mather v. Cunningham*, 105 Me. 326, 74 Atl. 809. See PIGGOTT, EX-TERRITORIALITY, 1907 ed., 224-26; JACOBS, DOMICIL, § 361. Accordingly, in the principal case, the husband acquired an Egyptian domicile and became subject to that part of the Egyptian law which under the Protectorate was applicable to British subjects. See HALL, FOREIGN JURISDICTION OF THE BRITISH CROWN, 185-86; WESTLAKE, PRIVATE INTERNATIONAL LAW, 5 ed., 345-46; HUBERICH, DOMICILE OF PRIVILEGED FOREIGNERS, 24 L. QUART. REV. 448. Since the husband had lost his English domicile, the English court had no jurisdiction to grant the wife's petition for divorce. *Le Mesurier v. Le Mesurier*, 1895 A. C. 517; *Bater v. Bater*, [1906] P. 209. See 26 HARV. L. REV. 447.



**CONSTITUTIONAL LAW — SELECTIVE SERVICE REGULATIONS — DECISION BY LOCAL BOARD — JUDICIAL POWER OF REVIEWING ADMINISTRATIVE DETERMINATIONS.** — The Selective Draft Act provided that the local and district boards finally decide exemption claims under regulations prescribed by the President. (ACT OF MAY 18, 1917, c. 15, 40 STAT. 76.) In filling out his questionnaire an alien friend by mistake waived his claim to exemption, and in ignorance of his right to have his questionnaire corrected, allowed the local board to induct him into service. After having been directed to appear for entrainment, he requested that his case be reopened and his questionnaire corrected. This was denied as, after induction, the local board could not reopen a case, the only remedy under the Selective Service Regulations being an appeal to the commanding officer of the mobilization camp. (SELECTIVE SERVICE REGULATIONS, §§ 99, 100, 139.) Advised that he was being unlawfully deprived of his liberty he refused to report, was arrested, and now applies for a writ of *habeas corpus* for his discharge. *Held*, that the petitioner be remanded. *Ex parte Kuswieski*, 251 Fed. 977 (Dist. Ct., N. Dist., N. Y.).

The Selective Draft Act delegating to the President power to prescribe rules for the local and district boards in determining exemption claims, which determination was to be final, was a valid grant of administrative power. *Arver v. United States*, 245 U. S. 366, 38 Sup. Ct. 159. Administrative determinations of executive officials may be made final on questions of fact. *United States v. Ju Toy*, 198 U. S. 253; *Zakonaite v. Wolf*, 226 U. S. 272. *Cf. American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94. An appeal, however, lies on questions of law. *Gonzales v. Williams*, 192 U. S. 1; *Grogiov v. Uhl*, 239 U. S. 3. See 29 HARV. L. REV. 215. Otherwise the only requisite is that a fair hearing or sufficient opportunity for one be given. *Chin Yow v. United States*, 208 U. S. 8. *Ex parte Lam Pui*, 217 Fed. 456. In the principal case the Selective Service Regulations were passed affording sufficient opportunities for the reopening and rehearing of cases. (SELECTIVE SERVICE REGULATIONS, §§ 99, 100.) But the petitioner failed to take advantage of such opportunities, and so was not denied a fair hearing. Thus, the decision having been made final by statute, the case falls within the doctrine that in such cases there is no judicial power of review on the ground that such procedure is in violation of the Fourteenth Amendment. *Franke v. Murray*, 248 Fed. 865; *In re Chan Foo Lin*, 156 C. C. A. 3, 243 Fed. 137; *United States v. Ju Toy*, *supra*. See 2 WILLOUGHBY, CONSTITUTION, 1278 *et seq.*

**CONTRACTS — ILLEGALITY — CONTRACT MADE AS PART OF A SCHEME THE EXECUTION OF WHICH WOULD RESULT IN THE DISRUPTION OF AN ESSENTIAL WAR PLANT.** — B, C, and D were essential employees, under contracts terminable at will, in the only factory in the country engaged in making gas masks. A, in order to disrupt the factory from a spirit of revenge against its owners, secured contracts from B, C, and D, whereby they agreed to work for A and for no one else for two years. In a suit by A for specific performance of the negative covenants, B, C, and D set up the defense of illegality and counterclaim for cancellation of the contracts as against public policy. *Held*, the contracts are voidable as against public policy and equity will order them canceled. *Driver v. Smith*, 104 Atl. 717 (N. J., 1918).

Contracts which tend to embarrass the government in its relations with foreign states, *e. g.*, by encouraging insurrection in such states, are against public policy. *Kennett v. Chambers*, 14 How. (U. S.) 38; *Gandolfo v. Hartman*, 49 Fed. 181. Trading with the enemy in time of war is illegal at common law. *Montgomery v. United States*, 15 Wall. (U. S.) 395; *Griswold v. Waddington*, 16 Johns. (N. Y.) 438. As regards internal affairs, a contract which tends to pervert or corrupt governmental machinery or officials is il-

legal. *Trist v. Child*, 21 Wall. (U. S.) 441; *Rhodes v. City of Tacoma*, 97 Wash. 341; 166 Pac. 647; *Kaufman v. Catzen*, 94 S. E. 388 (W. Va.). Contracts directly or indirectly interfering with the administration of justice are also against public policy. *Holsberry v. Clark*, 242 Fed. 831; *Ives v. Culton*, 197 S. W. 619 (Tex. Civ. App.). However, the paramount public policy is to enforce contracts as made. Accordingly the courts hesitate to declare contracts invalid. Cf. *Cherry v. City State Bank*, 159 Pac. 253 (Okla.); *Stuart v. Greenbrier County*, 16 W. Va. 95. Especially is this true of contracts alleged to be in unreasonable restraint of trade. Cf. *Ford Motor Co. v. Boone*, 244 Fed. 335 (1917). But where the purpose or necessary effect of a contract is to corrupt government, or clearly to embarrass the activities of the state in war or peace, it would seem from the above examples to be unenforceable as against public policy. Although unique in its facts, the principal case clearly comes within this principle.

CONTRIBUTORY NEGLIGENCE — DEGREE OF CARE REQUIRED OF CHILDREN — EVIDENCE OF PERSONAL ABILITY. — Children found dynamite caps in a locker of a steam shovel on the railroad's right of way in a lonesome place in the woods. While the plaintiff, a thirteen-year-old boy, was hammering a cap it exploded and he was injured. *Held*, on the question of contributory negligence, evidence of his scholarship and knowledge of right and wrong was admissible. *Farrand v. Houston & T. C. R. Co.*, 205 S. W. 905 (Tex.).

A landowner owes no duty to an unperceived, unanticipated trespasser, which was the status of the plaintiff in the present case. *Wilmes v. Chicago Gr. Western Ry. Co.*, 175 Iowa, 101, 156 N. W. 877; *Pastorello v. Stone*, 89 Conn. 286, 93 Atl. 529. Moreover, this case is not within the attractive nuisance theory because the alleged attractive machinery, the steam shovel, located in a secluded place, did not cause the injury. *McDermott v. Burke*, 170 Ill. App. 415, 100 N. E. 168. And see *O'Connor v. Brucker*, 117 Ga. 451, 453, 43 S. E. 731, 732. Aside from the attractive nuisance theory, American courts establish a minimum age as to capacity for contributory negligence; or follow the Roman theory of a conclusive presumption of incapacity for contributory negligence below seven years, and a tentative presumption from seven years to fourteen; or else the courts decide each case on its merits. *Casper v. Geck*, 185 Ill. App. 155; *Chicago, Rock Island, & Pacific Ry. Co. v. Wright*, 161 Pac. 1070 (Okla.); *Thomas v. Oregon Short Line R. Co.*, 47 Utah, 394, 154 Pac. 777. While logically a child *sui juris* should be held to the degree of care of the ordinary reasonable child of its age, the growing tendency is to consider the abilities and experience of each child in determining the degree of care required of him. *Illinois Iron & Metal Co. v. Weber*, 196 Ill. 526, 63 N. E. 1008. In admitting evidence of the plaintiff's scholarship and knowledge of right and wrong the court follows this tendency.

CORPORATIONS — STOCKHOLDERS: INDIVIDUAL LIABILITY TO CORPORATION AND CREDITORS — EFFECT OF OWNERSHIP OF ENTIRE STOCK BY ANOTHER CORPORATION — SUBSIDIARY CORPORATIONS AS AGENTS. — A railway company owned the entire stock in a coal company. Of necessity the whole output of the coal company was shipped over said railway company's lines, and there were various contracts relating thereto. A mortgage on the coal company's property was foreclosed and a deficiency judgment rendered. Holders of the bonds, secured by the mortgage, set up this judgment as a claim against the railway company. *Held*, that the railway company is not liable. *New York Trust Co. v. Carpenter*, 250 Fed. 668 (C. C. A., 6th Circuit).

For a discussion of this case, see NOTES, page 424.

CRIMINAL LAW — ATTEMPTS — THE ESPIONAGE CASES. — The postmaster of the city of New York, under Title 12, Section 1 of the Espionage Act of

June 15, 1917, excluded the plaintiff's publication from the mails on the grounds that such publication was in violation of Title 1, Section 3 of the same act. Plaintiff sought an injunction. *Held*, refused. *The Masses Pub. Co. v. Patten*, 246 Fed. 24 (C. C. A., 2d Circuit).

For a discussion of the principles involved, see NOTES, page 417.

**DAMAGES — BREACH OF CONTRACT — LOSS OF PUBLICITY.** — The plaintiff was an artist of rising renown, and had entered into a four-year contract with the defendant, the conductor of a well-known London music hall. There was no express term assuring the plaintiff opportunity to perform. But other clauses provided that the artist should not, for specified periods, perform at any other place of amusement within a specified radius of the music hall, etc. Defendant repudiated the contract during the first year of its intended duration, and the plaintiff sues for loss of salary and loss of publicity. *Held*, damages for loss of publicity are too remote to be recoverable. *Tuppin v. Victoria Palace, Limited*, [1918] 2 K. B. 539.

For breach of contract damages are either those naturally resultant, or what might reasonably be supposed to have been in the contemplation of both parties, at the time they contracted, as the probable result of the breach of it. *Hadley v. Baxendale*, 9 Exch. 341. But express terms are not necessary. *Marzetti v. Williams*, 1 B. & A. 415, 423. A contemplated term of contract is often inadvertently omitted where the happening of the event is unlikely, or where the term does not favor the party drawing up the contract. In saying that the contract is a good business arrangement without such contemplated term, the court fails to appreciate the importance of the contemplation of the parties. The peculiar value of publicity to a rising artist of such an engagement, in a city known as the key to artistic fame, is beyond question. Moreover, the articles of contract contemplate action, not inaction. Though perfectly possible for a contract to contemplate a "pinch hitter" or an "understudy" whose services are to be solely within the discretion of the employer, the principal case warrants a contrary decision. The exact point raised in the principal case was essential to the decision of a case of recognized authority and therein the peculiar situation of an actor was distinguished. *Fletcher v. Montgomery*, 33 Beav. 22. In failing to distinguish between the purely incidental tortious element in breach of contract and a uniquely valuable consideration, the court unfortunately contradicted the good precedents it admits as law, and, in an important case, drew the line on the wrong side.

**ELECTIONS — INELIGIBILITY OF CANDIDATE RECEIVING HIGHEST VOTE — NOTICE TO ELECTORS.** — The Direct Primary Law provided that no candidate who failed to receive the highest number of votes for the nomination of the political party with which he was affiliated thirty-five days before election should be entitled to be the candidate of any other political party. (1917 CAL. STATS. 1356). The candidate in question failed to receive the highest number of votes as candidate for Republican nominee, but did receive the highest number of votes as candidate for Democratic nominee. *Held*, that there was no nomination by the Democratic party. *Heney v. Jordan*, 175 Pac. 402 (Cal.).

The English and American authorities are agreed that if the candidate at an election who receives the highest number of votes is ineligible, and his ineligibility is not known to the voters at the time of casting their votes, such votes are not considered as nullities, but are effective to prevent the election of the candidate receiving the next highest number. *The King v. Bridge*, 1 M. & S. 76; *The Queen v. Hiorns* 7, A. & E. 960; *State ex rel. Goodell v. McGeary*, 69 Vt. 461, 38 Atl. 165; *Heald v. Payson*, 110 Me. 204, 85

Atl. 576. Some English and Irish cases, however, hold that if the electors merely have notice of the facts on which the candidate's ineligibility is based, they are presumed to know the law, and votes cast for such candidate are considered as thrown away. *Trench v. Nolan*, Ir. R. 6 C. L. 464; *Beresford-Hope v. Lady Sandhurst*, 23 Q. B. D. 79. See *Drinkwater v. Deakin*, L. R. 9 C. P. 626. Cf. *The Queen v. Mayor of Tewkesbury*, L. R. 3 Q. B. 629. In the United States, however, votes cast for an ineligible candidate are not considered as nullities unless the electors are aware not only of the facts creating the disqualification but also of the law which makes the facts operate to disqualify. *People ex rel. Furman v. Clute*, 50 N. Y. 451; *Woll v. Jensen*, 36 N. D. 250, 162 N. W. 403; *Sanders v. Rice*, 102 Atl. 914 (R. I.). *Contra Gulick v. New*, 14 Ind. 93. Cf. *State ex rel. Clawson v. Bell*, 169 Ind. 61, 82 N. E. 69. Under the primary law in the principal case, the candidate who was duly affiliated with the Republican party could become Democratic nominee only if he also became Republican nominee. Nevertheless, at the time the votes were cast, the candidate in question was conditionally eligible and so, it seems, the court properly treated the votes cast for the highest candidate as effective to prevent the election of the next highest candidate. See 24 HARV. L. REV. 393.

**INJUNCTIONS — INTERFERENCE WITH EMPLOYMENT.** — The plaintiff sought to restrain a Local Draft Board from certifying him for military service, claiming as a basis for equity jurisdiction, that the interruption of his employment would deprive him of a property right. *Held*, that the right of employment is in no sense a property right. *Bonifaci v. Thompson*, 252 Fed. 878 (Dist. Ct. W. D. Wash. N. D.).

In labor controversies, one's employment is considered a property interest and an interference may be enjoined at the instance of the employee, though there be no contract of employment. *Erdman v. Mitchell*, 207 Pa. St. 79, 56 Atl. 327; *Fairbanks v. McDonald*, 219 Mass. 291, 106 N. E. 1000. Further, it has been held unconstitutional for a statute to provide that the right to do work as an employee shall be construed to be a personal and not a property right. *Bogni v. Perrotti*, 224 Mass. 152, 112 N. E. 853. Had the plaintiff been pursuing some occupation, an interference would also warrant an injunction.

*Grannan v. Westchester Racing Assn.*, 16 App. Div. 8, 44 N. Y. Supp. 790. The plaintiff may have held a public office, in which case no property interest would be involved. *Butler v. Pa.*, 10 How. (U. S.) 402. But to insist that the right to an employment in general is not based on a property interest seems to be placing too narrow a construction on the term "property." See Pound, "Equitable Relief Against Defamation and Injuries to Personality," 29 HARV. L. REV. 640. The decision, however, may be upheld on the ground that the court would not interfere with a board exercising functions under another department of the government.

**JUDGMENTS — RES ADJUDICATA — JURISDICTION — DIVERSITY OF CITIZENSHIP.** — The county of X in Missouri issued certain bonds. Y, a citizen of another state, sued on the bonds in a federal court, though the real owners were citizens of Missouri. Y secured judgment and kept it alive by subsequent judgments thereon. The last judgment was assigned to the relators, who applied for a writ of mandamus to compel the county judges to levy for and pay the last judgment. The defendants claim the judgments are void because of the colorable diversity of citizenship. *Held*, the writ will issue. *Bunch v. United States*, 252 Fed. 673 (C. C. A., 8th Circuit, Mo.).

In a second suit between the same parties, and on the same cause of action, every matter which had or might have been offered as a defense is ren-

dered *res adjudicata* by a former judgment on the merits. *St. Louis K. C. & C. R. R. Co. v. Wabash R. Co.*, 152 Fed. 849; *Dowell v. Applegate*, 152 U. S. 327. But the defense of lack of jurisdiction is ordinarily not rendered *res adjudicata*. The judgment would be void. See 32 HARV. L. REV. 177. A decree, however, of a federal court lacking jurisdiction only because of no diversity of citizenship is not a mere nullity. *McCormick v. Sullivan*, 10 Wheat. (U. S.) 192; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U. S. 552. The principal case would be correct even if such a decree were held void. On this assumption it would follow that if one of the parties fraudulently represented he was a citizen of another state, the judgment could be assailed collaterally. See 32 HARV. L. REV. 177. In the principal case, however, the parties actually were of diverse citizenship. The fraud related only to the actual ownership of the bonds. Furthermore, the case can be decided on a still shorter ground. There was a series of judgments. Even if the first judgment was void for want of jurisdiction, its owner, Y, was a non-resident and could give the federal courts jurisdiction to render a second judgment.

LEGACIES AND DEVISES — EXECUTORY DEVISES CONDITIONED ON FAILURE TO ALIENATE A FEE. — Testatrix devised property to A in fee with a gift over to B of all that remained at A's death. A predeceased the testatrix. *Held*, B is entitled to the property. *In Re Dunstan*, [1918] 2 Ch. 304.

Where an absolute devise or bequest of realty or personalty is made, a limitation on the gift is void. After an absolute interest nothing remains to be given — the limitation is repugnant. *Van Horne v. Campbell*, 100 N. Y. 287, 3 N. E. 316; *Burton v. Gagnon*, 180 Ill. 345, 54 N. E. 279. This is a doubtful rule, for the argument of repugnancy is meaningless. Furthermore a limitation over on a virtually absolute estate is valid where said estate is a life interest with a power of alienation. *Komp v. Thomas*, 81 N. J. Eq. 103, 85 Atl. 815; *Harlow v. Bailey*, 189 Mass. 208, 75 N. E. 259. So the court in the principal case properly rejected the repugnancy doctrine where it had the loophole that the first donee predeceased the testatrix — a view having judicial support. *Norris v. Beyea*, 13 N. Y. 273. See 2 REDFIELD, WILLS, § 278. This is manifestly a departure from the rule first alluded to and one that is plainly justifiable and ought to be extended to the case where the first donee does not predecease the testator or testatrix.

POWERS — EXECUTION OF POWER OF APPOINTMENT BY GENERAL DEVISE OR BEQUEST. — The testatrix in her will bequeathed "all my shares in the Halifax New Market Consolidated Stock Co." to a certain legatee and devised and bequeathed "all my real estate and all the residue of my personal property including any property over which I may have at the time of my death an absolute power of appointment to my trustees" upon certain trusts. The testatrix owned in her own name only part of the designated stock and possessed a general power of appointment over the remainder. *Held*, that the specific legatee is entitled to the stock covered by the power as against the residuary legatees. *Re Doherty-Waterhouse*, 119 L. T. R. 298 (1918).

At common law a general devise or bequest did not operate as the execution of a power of appointment unless such intention was in some way expressed in the will. *Hughes v. Turner*, 3 M. & K. 666; *Beninett v. Aburrow*, 8 Ves. Jr. 609; *Hollister v. Shaw*, 46 Conn. 248; *Patterson v. Wilson*, 64 Md. 193, 1 Atl. 68. A devise of realty which could not take effect except upon property comprised in the power, was a sufficient indication of intention to exercise the power. *Standen v. Standen*, 2 Ves. Jr. 589; *Stevens v. Bagwell*, 15 Ves. Jr. 139; *Keefer v.*

*Schwartz*, 47 Pa. 503. But with personality, the court could not look beyond the will and no examination into the circumstances of the testator's property was permitted. *Nannock v. Horton*, 7 Ves. Jr. 391; *Jones v. Tucker*, 2 Mer. 533. *Contra*, *White v. Hicks*, 33 N. Y. 383. However, the Wills Act and similar legislation in this country reversed the common-law presumption, and to-day a testamentary gift described generally operates as an exercise of a power unless the contrary intention is shown. 7 WM. IV & 1 VICT., c. 26, § 27; 1 N. Y. REV. STAT. 737, chap. 126, KY. GEN. STAT. 1888, chap. 113, § 22. Some jurisdictions have reached the same result without the aid of a statute. *Amory v. Meredith*, 7 Allen (Mass.) 397; *Emery v. Haven*, 67 N. H. 503, 35 Atl. 940. Limited powers, however, remain unaffected by the statutes and as to them the common law still applies. *Re Huddleston*, [1894] 3 Ch. 595; *Re Wilkinson*, [1910] 2 Ch. 216; *Re Glassington*, [1906] 2 Ch. 305. The principal case is clearly within the provision of the Wills Act and presents solely the question whether there was a contrary intention expressed in the residuary clause sufficient to rebut the presumption that the bequest of the stock was meant as an execution of the power. The court in deciding the question in the negative seems to have reached the correct result.

PRINCIPAL AND SURETY — JOINT AND SEVERAL CONTINUING GUARANTEE — NOTICE TO CREDITOR OF DEATH OF GUARANTOR — DISCHARGE OF GUARANTOR. — In consideration of C's agreeing or continuing to deal with P, the undersigned, G and five others, jointly and severally guaranteed payment of P's liabilities to C, present and future, and agreed that it should be a continuing guarantee until the undersigned or the executors or administrators of the undersigned should give notice not to make further advances. C was not bound to extend credit. G died and his executor gave notice purporting to terminate the liability of the estate under the guarantee. Subsequent to this further advances were made to P. *Held*, that the estate of G is liable until each and all of them, or their respective executors or administrators should give notice of termination. *Egbert v. National Crown Bank*, L. R., [1918] A. C. 903.

A mere guarantee of advances, no present consideration being given, is but an offer for successive unilateral contracts which the death of the offeror *ipso facto* terminates. *Aiken v. Lang's Adm'r*, 106 Ky. 652, 51 S. W. 154; *Hyland v. Habich*, 150 Mass. 112, 22 N. E. 765. But where a contract has been made, death does not terminate it. *Kernochen v. Murray*, 111 N. Y. 306, 18 N. E. 868; *Lloyds v. Harper*, L. R. 16 Ch. D. 290. See 13 HARV. L. REV. 216. Losing sight of this fundamental distinction seems to have led to confusion. Thus, mere guarantees have been called contracts terminable upon notice of death either by reading such a limitation into the contract or by holding the consideration divisible. *Dodd v. Whalen*, [1897] 1 Ir. 575; *Ascherson v. Tredegar Dry Dock and Wharf Co.*, [1909] 2 Ch. 401; *Valentine v. Donohoe-Kelly Banking Co.*, 133 Cal. 191, 65 Pac. 381. Where the guarantee is under seal, as an offer is merely intended, the seal, in this country, will not prevent its termination by the death of the guarantor. *Jordon v. Dobbins*, 122 Mass. 168. But some courts will require notice to the creditor. *Gay v. Ward*, 67 Conn. 147, 34 Atl. 1025; *National Eagle Bank v. Hunt*, 16 R. I. 148, 13 Atl. 115. Where, however, there is a binding contract for a definite time the only possible remedy would seem to be on equitable grounds; equity will prevent a forfeiture, unnecessary damages must be avoided. See 30 HARV. L. REV. 494. In the principal case a contract was apparently intended, but the consideration being illusory a mere offer resulted, which was *ipso facto* terminated by the guarantor's death. But assuming a valid contract, the doctrine of *Dodd v. Whalen* is inapplicable, as here notice by the guarantors or their executors is provided for. Accord-

ingly, after notice of termination by G's executor, the only relief would be on the above equitable grounds.

**PUBLIC SERVICE COMPANIES — SPECIFIC PERFORMANCE — CONDITIONS TO GRANTING RELIEF.** — The plaintiff contracted to furnish the defendant city with water and light, together with a certain number of hydrants and arc lamps for the use of which the city was to pay a specified rental. Owing to the direction in which the city had grown, certain of the hydrants and lights were useless, and others were not advantageously located. The city refused to go on with the contract. *Held*, specific performance will be granted subject to the equitable modifications of the contract that certain hydrants and lights be relocated. *La Follette v. La Follette Water, Light, & Tel. Co.*, 252 Fed. 762 (C. C. A., 6th Circuit, Tenn.).

If unforeseen contingencies produce hardship in the performance of a contract, specific performance may be granted with such modifications as justice requires. *King v. Raab*, 123 Ia. 632, 99 N. W. 306; *Wright v. Vocation Organ Co.*, 148 Fed. 209. But mere hardship resulting from foreseeable circumstances will not prevent complete relief to the plaintiff. *Franklin Tel. Co. v. Harrison*, 145 U. S. 459; *Clark v. Hutzler*, 96 Va. 73, 30 S. E. 469. On this ground the principal case is wrong. The result, however, is correct on the principle that a public utility must furnish reasonable service. A utility may not contract that it be relieved of its public duty. *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822; *Smith v. Gold & Stock Tel. Co.*, 42 Hun (N. Y.) 454. Then, as in the instant case, if the performance of a contract conflicts with the legal duty of the utility to render reasonable service, the contract is unlawful. See 32 HARV. L. REV. 74, 79. This principle is also illustrated by the regulation of fares according to the necessities of adequate service, despite prior stipulations fixing the rate. *Rogers Park Water Co. v. Fergus*, 180 U. S. 624; *Arlington Board of Survey v. Bay State St. Ry.*, 224 Mass. 463, 113 N. E. 273. Some courts, however, have put the regulation of rates under the police power. See 32 HARV. L. REV. 74, and cases cited. It would seem to follow that a special contract would have no effect whatever. But it is not futile. The consumer under the contract should be bound to accept the service of the utility, whereas if there were no contract, he could refuse. The only limitation on this service is that it be reasonable at all times.

**RES JUDICATA — WHAT JUDGMENTS ARE CONCLUSIVE — AWARD OF JUSTICES OF THE PEACE.** — A statute provided that every person who shall carelessly damage any lamp-post belonging to the Electric Light Company shall pay by way of satisfaction to the company an amount not exceeding £5, as any two justices or the sheriff shall think reasonable. The plaintiff, in his suit before the justices, was awarded £5, and now seeks to recover for the additional damage; the extent of the damage being £29. *Held*, that the award by the justices made the matter *res judicata*. *Birmingham Corporation v. Samuel Allsopp and Sons, Ltd.*, 145 L. T. 454.

The statute involved in the principal case did not preclude the plaintiff from bringing suit before a tribunal competent to award full compensation. *Crystal Palace Gas Co. v. Idris & Co.*, 82 L. T. R. 200. The case then comes within the rule that a judgment by a justice of the peace is a bar to another proceeding on the same cause of action. *Worral v. Des Moines Retail Grocers' Ass.*, 157 Iowa, 385, 138 N. W. 481; *Liscum v. Henderson Sturgis Piano Co.*, 44 Okla. 549, 145 Pac. 773. See *Brundsen v. Humphrey*, 14 Q. B. D. 141, 145. Even if the plaintiff objects that the award is inadequate, the rule is still applicable. *Wright v. London General Omnibus Co.*, 2 Q. B. D. 271. Cf. *Bilyeu v. Pilcher*, 16 Okla. 228, 83 Pac. 546; *Pilcher v. Ligon*, 91

Ky. 228, 15 S. W. 513; *Brown v. Mathewson*, 71 Misc. 110, 129 N. Y. Supp. 907. However, a justice of the peace may have no jurisdiction at all over a suit involving more than he may award; and though the plaintiff claim a less amount, the judgment has been held void. *Story v. Nicpee*, 105 S. C. 265, 89 S. E. 666. Only when the plaintiff abandons his claim to the surplus is the judgment held to be a bar. *Catawba Mills v. Hood*, 42 S. C. 203, 20 S. E. 91; *Buxton v. Nelson*, 103 Ga. 327, 30 S. E. 38. In the principal case there was no such abandonment. Yet there is jurisdiction over the cause, for the statute gives jurisdiction over every person committing the wrong; the limitation is on the damage that may be awarded and is not made a measure of the justice's jurisdiction.

SEAMEN — WAGES — INTERRUPTED VOYAGE. — Seamen were engaged "for the run" or the complete voyage. The vessel was frozen in, and the voyage was interrupted. The master requested the seamen to complete the voyage, and promised they would be paid what was proper. At the end of the voyage, when a dispute arose as to the amount due, the seamen refused to unload. They now sue for wages. *Held*, the seamen are entitled to recover on a *quantum meruit*. *The Helen Fair-Lamb*, 251 Fed. 412 (Dist. Ct. E. D., Pa.).

The old rule was that no wages were due if no freight had been earned. *Icard v. Gould*, 11 Johns. Ch. (N. Y.) 279; *Henop v. Tucker*, 2 Paine, 161. But this has been changed by statute. U. S. REV. STAT. (1878) § 4525. When the voyage is abandoned by the fault of the owner or master, seamen are entitled to wages for the full voyage. *Walker v. The City of New Orleans*, 33 Fed. 683; *The Ocean Spray*, 4 Sawy. 105. If the voyage is abandoned because of perils of the sea, seamen may recover wages up to the time of the abandonment. *Boulton v. Moore*, 14 Fed. 922. See *Hindman v. Shaw*, 2 Pet. Adm. 264. When, however, the pay is one lump sum "for the run," nothing is earned by the seamen unless the vessel receives some benefit through freight. *Stark v. Mueller*, 22 Fed. 447. In such a case, if the voyage is broken up by perils of the sea, the seamen are entitled to no wages. *Stark v. Mueller*, *supra*. They are, however, entitled to their discharge without completing the "run." *Thorson v. Peterson*, 14 Fed. 742. They may also remain with the vessel and be maintained till the voyage is completed, even though their services are of no value to the ship. See *Miller v. Kelly*, 17 Fed. Cas. 326, 328. But if, as in the principal case, they remain with the vessel at the request of the master, and render services, they become entitled to compensation on a *quantum meruit*.

TAXATION — ENTERTAINMENTS — DUTY. — The proprietors of a restaurant furnished music with service of meals during certain intervals throughout the day. Diners only were admitted, and the charges for meals were the same whether the music was being played or not. An act provided that a duty should be levied upon all paid admissions to entertainments — an entertainment being defined as including any exhibition, performance, amusement or sport. Summonses were taken out against the proprietor for admitting persons to a place of entertainment without paying the duty. *Held*, that the provision for music did not constitute an entertainment. *Lyons & Co. Ltd. v. Fox*, 145 L. T. 439 (1918).

In a recent case, under very similar facts, the English court reached the opposite result. See *Attorney-General v. McLeod*, [1918] 1 K. B. 13. In the latter case, however, the music was not purely incidental to the service of meals, but was given in the form of a concert which took place in a separate portion of the building. Again, it was easily determined in that case what part of the full admission price was paid for the privilege of hearing the music. In the principal case, however, patrons incurred the same charges whether music was being played or not, and it seems, therefore, that no distinct portion of the sum paid



by listeners for meals went as admission price for the music. The two cases seem correct and reconcilable.

**TRUSTS — RESULTING TRUSTS — WANT OF CONSIDERATION AS A GROUND FOR RESULTING TRUST IN FAVOR OF GRANTOR.** — A church congregation agreed to deed the church property to the trustees of presbytery in consideration of the assumption of a mortgage, with the privilege of redemption, and the use of the church by the grantor congregation. The deed did not specify the assumption, and was on its face absolute. *Held*, the grantee held in resulting trust. *Deutsche Presbyterianische Kirche v. Trustees of Elizabeth Presbytery*, 104 Atl. 642 (N. J.).

In the absence of unusual circumstances the prevailing American rule is that where land is conveyed by an absolute deed, with an oral agreement to hold in trust for the grantor, such agreement is unenforceable, either because contrary to the Statute of Frauds or the parol-evidence rule. *Turner v. McKown*, 242 Pa. St. 565, 89 Atl. 797; *Revel v. Albert*, 162 N. W. 595 (Ia.); *Crauford v. Workman*, 64 W. Va. 19, 61 S. E. 322. The English courts, however, impose a constructive trust on the grantee to prevent unjust enrichment of the grantee at the expense of the grantor. *Rochevoucauld v. Boustead* (1897), 1 Ch. 196. For the same reason in both England and the United States the courts treat a deed absolute on its face as a mortgage, if the parties intended it to be such. *Donlon v. Maley*, 60 Ind. App. 25, 110 N. E. 92; *Voris v. Robbins*, 52 Okla. 671, 153 Pac. 120. Logically there is no difference between an oral agreement to hold by way of mortgage or trust, and the principal case, in recognizing such and in following the English rule as to oral agreements to hold in trust, is sound.

**TRUSTS — SPENDTHRIFT TRUST CREATED BY THE CESTUI: WHETHER GOOD AGAINST CREDITORS.** — A conveyed his property to a trustee in trust for himself for life with remainder in trust for his wife and children subject to his changing the remainder by will. He further provided that the trust property and income should not be liable for his future debts. Suit by the present plaintiff, a creditor, went to judgment and execution was levied against the trustee as garnishee. *Held*, the property is liable to the plaintiff's claim. *Benedict v. Benedict*, 104 Atl. 581 (Pa.).

The authorities are in great conflict as to the validity of spendthrift trusts. *Broadway Nat. Bank v. Adams*, 133 Mass. 170; *Nichols v. Eaton*, 91 U. S. 716; *Bramhall v. Ferris*, 14 N. Y. 41. *Contra*, *Brandon v. Robinson*, 18 Ves. Jr. 429; *Tillinghast v. Bradford*, 5 R. I. 205; *Honaker v. Duff*, 101 Va. 675, 44 S. E. 900. But even where spendthrift trusts are allowed, where the beneficiary is also the grantor of the spendthrift trust, it has been held fraudulent as to subsequent creditors. But such cases are limited to instances where the donor also reserves to himself the right to change at any time the beneficiaries of the remainder. The view being taken is, that the donor has reserved to himself all the rights of ownership, but so transferred the property as to free it from the liabilities of ownership. *Scott v. Keane*, 87 Md. 709, 40 Atl. 1070; *Ghormley v. Smith*, 139 Pa. St. 584, 21 Atl. 135. But where the donor has definitely and conclusively given away the remainder while creating the trust, the courts allow the subsequent creditors to proceed merely against the life interest, the property of the donor-beneficiary. *Jackson v. Seidlitz*, 136 Mass. 342; *Schenck v. Barnes*, 156 N. Y. 36, 50 N. E. 967. This view is quite logical, for since a man having no debts can give away all his property directly, he should be able to do so by the trust arrangement, even though the part of the trust referring to his life estate misfires.

## BOOK REVIEWS

THE GOVERNMENT OF THE BRITISH EMPIRE. By Edward Jenks. Boston: Little, Brown and Company. 1918. pp. viii, 369.

The title of this book arouses hopes which are not realized. There is very little about the British Empire or even the British Isles, outside England. For example, English local government receives forty-seven pages, Scotch two, Irish one-half, colonial seven. English education fills ten pages, with no mention of the outlying regions. A purely provincial topic like church history before the Reformation gets nine pages. On the other hand, one can learn nothing here about such vital colonial matters as the right of a British subject, *e. g.*, a Hindoo, to possess full citizenship everywhere in the Empire; the legal status of the blacks in South Africa; the inclusion of natives upon Indian councils; the unfortified frontier of Canada; colonial demands to share in Imperial foreign policy; the Australian Monroe doctrine; the veto power of colonial governors and their liability to civil action for official misconduct; the relations of the various federal governments to their states or provinces. Under this last head we should like to read of the problem of *McCulloch v. Maryland* in Australia; the inability of the Privy Council to review Australian decisions on constitutional law unless allowed to do so by the Australian High Court; or the extent to which the Canadian government exercises its veto power over provincial legislation. Much is said of English political parties, nothing of the French Canadian Nationalists, the Labor party in Australia, or Sinn Fein. Out of thirty-eight pages on courts, only half a page is devoted to industrial tribunals in the Dominions.

Yet the book is valuable as a storehouse of information about English government, gathered with much effort to secure accuracy and to include the most recent developments, of which it would be very inconvenient to learn elsewhere. For example, the terms of the 1917 franchise act are given with considerable fulness. This is the book to answer those troublesome questions which continually recur to the casual reader of English political novels and articles. What does the Lord Privy Seal do? How is a budget introduced? What is the function of the various English courts, ancient and modern?

There are occasional interesting discussions of constitutional and political principles. For example, it is questioned whether the old two-party system unfits the House of Commons for a proper handling of the problems of Empire. "Secret diplomacy" is felt to be necessary in a modified form. "Crises which, if handled confidentially, can be discreetly averted, are apt to become distinctly more unmanageable when they are discussed in public with the aid of an excited Press, bent on arousing the passions of its readers." The sanest proposition, in Mr. Jenks' opinion, is a joint legislative committee on foreign relations, to which all international negotiations should be continually reported. (This frequent use of fear of the press as a check on popular control of government will perhaps one day suggest the treatment of newspapers as educational institutions instead of money-making enterprises.)

There are some features of the English Constitution, when spread out in its details, which transport us into the realms of Gilbert and Sullivan. Chapter I is devoted to "The King-Emperor," who "stands at the head of the British Empire," and to his extensive powers over army, police, courts, legislation, foreign policy. But the last paragraph warns us against the natural impression "that, the British Empire is an autocracy." All that has gone before is only make-believe, and the King-Emperor does not really rule the lives of his subjects by his personal likes and dislikes. Chapter II, "The Constitutional Monarchy," will make him safe for democracy. The curious outsider who wonders why this official exists at all is told of the immense "influence of the

Royal Family in matters of religion, morality, benevolence, fashion, and even in art and literature." Passages in "Joan and Peter" spring to mind, and Max Beerbohm's cartoon of "Mr. Tennyson reading 'In Memoriam' to his Queen." And besides, says Mr. Jenks, "it is possible that the majority of the people, even of the United Kingdom, . . . believe that the government of the Empire is carried on by the King personally." In other words, if he did not exist, it would be necessary to invent him.

It is suggested that the King-Emperor has three true political rights. The first is, to be informed by a daily letter from the Prime Minister of the public proceedings of Parliament and the secret discussions in the Cabinet. It is clear that this right has no effect in making the sovereign indispensable; if he were abolished, nobody would need the information and the Prime Minister's time would be freer. The second right is, to warn his minister privately out of the lessons of his political experience, which is continuous unlike theirs. The value of this right depends upon the certainty that the King-Emperor will be a man of political sagacity; is inheritance the best method to secure that result? The third right is, to refuse to act on the advice of his ministers in certain rare cases. Thus he can refuse to appoint an unworthy man to office or to swamp the House of Lords with newly created peers. Mr. Jenks also thinks that he can refuse to dissolve Parliament under certain circumstances, but the citation of precedents is needed on this point. A possible fourth right is not mentioned, that of deciding between two candidates from the majority party for the office of Prime Minister. On the whole, the case for continuing the monarchy in England, as presented in this book, does not appear strong.

The book is as full of survivals and exceptions as a Latin grammar. Crown colonies are under the Colonial office, but Ascension Island is under the Admiralty. The inferior clergy are still summoned to Parliament, but they never come. Indeed, an Anglican or Roman Catholic clergyman cannot sit in the House of Commons, but he can sit in the House of Lords if he happens to be a peer, while the more fortunate Methodist minister can sit anywhere. English peers belong to the House of Lords as a matter of course. Scotch and Irish peers elect some of their number to represent them there. The unlucky Scotch lord who loses the election can not even run for the House of Commons, but an Irish peer can. Every exercise of the royal authority until recently was required by statute to have three seals before the Great Seal, each imposed by a separate official, who should be entitled to charge a fee for his share in the process. "A cynical observer might say that the last provision afforded the most powerful guarantee that the statute would be obeyed." A member of Parliament can not resign, but gets appointed Bailiff of the Three Hundreds of Chiltern, and automatically ceases to be a member; then he resigns as Bailiff. County courts have nothing to do with counties. The Archbishop of Canterbury is a member of the Board of Trade. He is Primate of All England, while his brother of York is only Primate of England. When a bishop dies, the cathedral chapter receives a letter from the Crown giving them leave to elect his successor. Unfortunately for the chapter a second letter follows close, containing the name of A, the Crown candidate. It is true that B's name is also added in this letter, to keep up the appearance of a free choice. But if the chapter elected B, they would be punished with all the terrors of a *præmunire*.

All these provisions of the British Constitution seem like papers stuck into pigeonholes at random, with the hope of systematic filing, on a day that never comes. But let us be humble, and think of the electoral college. What should we do if Democratic electors voted for the Republican candidate?

We may mention some discussions of minor details which interest an American reader:

- (1) The Canadian government pays the Leader of the Opposition a salary

out of the national revenue, because of the value to the country of systematic independent criticism. (2) Under the budget system, proposals for the expenditure of money can come only from the Administration; River and Harbor Bills are impossible. (3) When higher customs duties are proposed, no opportunity is given to importers to remove goods from bond before the taxes are enacted; the higher rate is levied at once, and if the proposed increase does not become law the excess is repaid to the importers. (4) The Postmaster-general, although a business rather than a political official, is necessarily a member of Parliament, because "persistent questions in Parliament are one of the best means of bringing about reforms in a department which, by the very nature of its business, tends towards routine." Over there he must explain if he abandons pneumatic tubes because they do not pay, and then institutes an aerial mail service. (5) Each University in the United Kingdom is now represented in Parliament, and a college graduate can vote for a University member as well as for his local member. This use of an occupational as well as a geographical basis for representation is capable of wide extension. Trades-unions, bar associations, medical societies, railroad presidents, might each choose members of Congress. (6) Certain sinecure offices exist in the Cabinet, to which it is usual to appoint men whose advice is desired but who do not wish to undertake definite departmental work. We need an office like the Chancellor of the Duchy of Lancaster for Colonel House.

ZECHARIAH CHAFEE, JR.

DISCUSSION OF PROPOSED AMENDMENT OF JUDICIARY ARTICLES OF CONSTITUTION OF TEXAS. Printed under direction of a resolution of the Texas State Bar Association. 1918. pp. 151.

The judicial organization of Texas, like that of many of our states, is very complicated. It includes the Supreme Court, Courts of Civil Appeals, Court of Criminal Appeals, District Courts, County Courts, Juvenile Courts, Criminal District Courts, Commissioners' Courts and Justices' Courts. The machine is cumbersome; and it is not strange that it takes years to carry a case through to a final decision. The Supreme Court of Texas is now several years—four or five years—behind in its decisions. Certainly if justice is not denied, it is long delayed. For several years the question of reorganizing the courts of Texas has been agitated in that state. The reports of the State Bar Association are full of excellent suggestions, which have never been adopted. A thoroughgoing scheme of reorganization was presented at the meeting of the State Bar Association in July, 1918. The recently published "Discussion of Proposed Amendment of Judiciary Articles of Constitution of Texas" is a practical contribution to the subject of judicial reorganization. In each state the problem is of course somewhat different in its details, but in its essence it is the same all over the country. The solution lies in the direction of simplicity and of flexibility of organization; and the proposed amendment in Texas seems well adapted to reaching this solution.

There is always a difficulty in effecting a thoroughgoing reorganization. One difficulty is sometimes found in the vested interest of the existing incumbents of the judicial office. Any difficulty of this sort seems to be met in the proposed plan in Texas by taking care of the present judges and by increasing the emoluments and the dignity of the judicial office. It is sometimes thought by the man in the street that the lawyers also have a vested interest in retaining an organization and method which result in large business for the lawyers. In truth, as is suggested in the "Discussion," "the rightful compensation of lawyers is enormously decreased, their labors increased, and the scope of their useful activities limited by the intolerable expense, com-

plications, delays, and uncertainties inherent in the system." The only real difficulty is in the natural inertia inherent in human nature, and in particular too often in the legal mind.

To the "Discussion" is appended an interesting address by Dean Roscoe Pound of the Harvard Law School on "Judicial Organization." In 1906 Dean Pound first blazed the path which has been followed by law reformers ever since. Now, if ever, as peace again settles down upon the country, there is a duty and an opportunity to carry through a long needed legal house-cleaning.

AUSTIN W. SCOTT.

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CODE PRACTICE IN NEW YORK. By H. Gerald Chapin, Professor of Law in Fordham University. New York: Baker, Voorhis and Company. 1918. pp. xxx, 530.

The numerous and far-reaching amendments to the New York Code of Civil Procedure during the past decade have created an imperative need for a concise exposition of code practice as it is to-day in New York. More than fifteen years have passed since the publication of the last short treatise of New York practice—Miller's "Introduction to Practice" (1903), and over seventeen years since the publication of the only other works of a similarly brief character,—Disbrow's "Summary of the Code," and Alden's "Handbook of the Code"—all books essentially limited to the use of students. Professor Chapin's concise treatise, covering the subject down to October 1, 1918, is, therefore, most opportune.

The volume is unique in code literature in that it is at once a compact and comprehensive handbook of civil procedure, so simplified in style and material that it is admirably fitted for the student's needs, and yet of such wide scope and thorough treatment that it meets the demand of the lawyer for a handy reference work on practice.

The twenty chapters of the book, following a brief introduction sketching in merest outline the historical development of the code, cover the general field of civil procedure in New York. The logical arrangement suggests a threefold division:—first, the setting,— "The Courts and their Jurisdiction," "Judges, Attorneys, and Other Officers," "Actions and Proceedings," "The Parties;" second, the theme—the action carried from its commencement, through preparation for trial; the trial, and subsequent proceedings to appeal; and third,—a provost guard division, as it were, gathering in such straggling subjects as, the particular actions, state writs, special proceedings, and proceedings in the Surrogates' Court. There is a table of cases covering several pages and a good index.

The style is direct, clear and forceful, well adapted to the simple presentation of this highly technical subject. Professor Chapin is to be commended for his success in adhering closely to the wording of the code and yet producing a very readable book.

The various code sections and the provisions of the Consolidated Laws bearing upon the particular topic under discussion are brought together, and the effect of the important decisions upon the practice involved is stated in a few words, followed by the citation. The placing of all citations in parenthesis in the body of the text is quite in keeping with the character of the work as a resumé of code practice. Documents and papers employed in the various stages of code procedure are illustrated under the appropriate subjects by well-drawn forms, several having been adapted from actual cases in which they had been passed upon by the courts.

The chief criticism of Professor Chapin's book is that it is wholly neutral. It carries no message in favor of or against the present day practice under the New York Civil Code. Neither by foreword nor by footnote observations

does the author attempt a critique of code provisions, or the court decisions interpreting them, and the great struggle which has been waged during recent years by leading members of the New York Bar for a simplified procedure analogous to the English system of practice under the Judicature Acts is completely ignored. In short, Professor Chapin has given us an instantaneous picture of New York practice under the Code of Civil Procedure as it existed on the date his book went to press. To many that will undoubtedly appeal as a recommendation rather than a detriment, but in view of the present widespread agitation for procedural reform in New York this colorless attitude cannot but be disappointing to the thoughtful and forward-looking members of the bar.

The title "Code Practice in New York" is broader in scope than the content of the work, which is limited to an exposition of the practice under the Code of Civil Procedure, and does not discuss the Code of Criminal Procedure.

Professor Chapin has, however, produced a thoroughly useful book, and a refreshing one in that it is distinctly restricted to material pertinent to the subject.

GEORGE J. THOMPSON.

THE PROBLEM OF ADMINISTRATIVE AREAS. By H. J. Laski. Northampton: Smith College Studies, Vol. IV, No. 1.

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HISTORY OF ECONOMIC LEGISLATION IN IOWA. By I. L. Pollock. Iowa: Iowa Historical Society.

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# HARVARD LAW REVIEW

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VOL. XXXII

MARCH, 1919

NO. 5

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## THE RESPONSIBILITY OF THE STATE IN ENGLAND

TO ROSCOE POUND

### I

THE British Crown covers a multitude of sins. "The King," says Blackstone in a famous sentence,<sup>1</sup> "is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing; in him is no folly or weakness." A long history lies behind those amazing words; and if, as to Newman,<sup>2</sup> they seem rather the occasion for irony than for serious political speculation, that is perhaps because their legal substance would have destroyed the argument he was anxious to make. In England, that vast abstraction we call the state has, at least in theory, no shadow even of existence; government, in the strictness of law, is a complex system of royal acts based, for the most part, upon the advice and consent of the Houses of Parliament. We technically state our theory of politics in terms of an entity which has dignified influence without executive power. The King can do no wrong partly because, at a remote period of history, the place where alone the doing of wrong could best be righted was his place, and had won preëminence only after a long struggle with the courts of lesser lords. The King's courts became the supreme resort of justice simply because, in his hands, that commodity

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<sup>1</sup> 1 COM., 1813 ed., 254.

<sup>2</sup> THE PRESENT POSITION OF CATHOLICS IN ENGLAND, 27 f.

was more purely wrought and finely fashioned than elsewhere; and since it is clearly unintelligent to make a man judge in his own cause, since, moreover, the royal judges do not, in legal fact, conceal the royal presence, there seems to have been no period of history in which the King could be sued in the courts of the realm.

It is difficult to say at what precise period this non-suability of the Crown passed into infallibility. The Tudor despotism seems to have been that critical period of transition when learned lawyers like Plowden will talk what Maitland has aptly termed "metaphysiological nonsense;"<sup>3</sup> and the aggressive Coke will dispatch the Crown into a corporation sole of a kind but rarely known to previous English history.<sup>4</sup> Not, indeed, that men are not troubled by the consequences of that dual personality the Tudor lawyers called into being. Thomas Smith did not write aimlessly of an English commonwealth;<sup>5</sup> and that public which the royal burglary of 1672 forced into responsibility for the National Debt shows, clearly enough, that the fusion of Crown and state is not yet complete.<sup>6</sup> Even in the nineteenth century Acts of Parliament will be necessary to show that behind the robes of a queen can be discerned the desires of a woman.<sup>7</sup>

It is probable that the reëmergence of the dogma of divine right exercised a potent influence on this development. Certainly men could not have encountered the speech of James and his eager adherents, or the logic of that continental absolutism which is merely summarized in Bossuet, without being affected by them. Even when the Revolution of 1688 destroys its factual basis, it has become capable of transmutation into a working hypothesis of government; and anyone can see that Blackstone, who best sums up the political evolution of this creative period, writes "Crown" where the modern political philosopher would use the term "State." The vague hinterland of ancient prerogative went also, doubtless, to show that the Crown is a thing apart. The privilege of the King's household leaped to the eyes.<sup>8</sup> His

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<sup>3</sup> 3 COLLECTED PAPERS, 249.

<sup>4</sup> *Ibid.*, 244-45.

<sup>5</sup> *Ibid.*, 253.

<sup>6</sup> 1 MACAULAY, HISTORY OF ENGLAND, Everyman's edition, 170.

<sup>7</sup> 25 & 26 VICT. c. 37 (1862); 36 & 37 VICT. c. 61 (1873).

<sup>8</sup> 2 CO. INST. 631, 4 *ibid.*, 24; Rex v. Foster, 2 Taunt. 166-67 (1809); Rex v. Moulton, 2 Keb. 3.



freedom from unpleasant proximity to arrest declared the sacred character with which he was invested.<sup>9</sup> "The most high and absolute power of the realme of England," says Sir Thomas Smith, not less learned, be it remembered, in the mysteries of law than of politics,<sup>10</sup> "consisteth in the Parliament;" but even so noteworthy an assembly cannot bind the Crown by its statutes.<sup>11</sup> Indeed, its position is even more privileged since the Crown, by prerogative, takes advantage of statute.<sup>12</sup> Fictions<sup>13</sup> and estoppel<sup>14</sup> pale into insignificance before the overmastering power of its presence. Laches<sup>15</sup> and prescription<sup>16</sup> lose their meaning when the Crown has become desirous of action. It chooses its own court;<sup>17</sup> it may, save where, of its own grace, it has otherwise determined,<sup>18</sup> avoid the payment of costs.<sup>19</sup> Here, assuredly, is a power that does not need the sanction of collective terminology that men may recognize its strength.

Prerogative such as this would be intolerable did the Crown act as in theory it has warrant. But the English have a genius for illogical mitigation; and the history of ministerial responsibility enshrines not the least splendid contribution we have made to the theory of representative government. The seventeenth century in England makes definite a practice which, if irregular in its operation, can yet trace its pedigree back to the dismissal of Longchamp in 1190;<sup>20</sup> the execution of Strafford and the impeachment of Danby are only the two culminating peaks of its development. What ministerial responsibility has come to mean is that the King's ministers shall make answer for the advice they proffer and the acts which flow therefrom; and in the period in which the royal power is delegated, for practical purposes, to the Cabinet we have herein a valuable safeguard against its arbitrary abuse.

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<sup>9</sup> 3 BL. COM. 289.

<sup>10</sup> DE REPUBLICA ANGLORUM, ed. Alston, 48.

<sup>11</sup> Magdalen College Case, 11 Co. Rep. 66; *Sheffield v. Ratcliffe*, Hob. 334.

<sup>12</sup> *Rex v. Cruise*, 21 Ch. 65 (1852).

<sup>13</sup> Anon., Jenk. 287 (1613).

<sup>14</sup> *Coke's Case*, Godb. 289.

<sup>15</sup> CO. LITT., 57 b.

<sup>16</sup> *Wheaton v. Maple*, [1893] 3 Ch. 48.

<sup>17</sup> 4 CO. INST. 17; 1 BL. COM. 257.

<sup>18</sup> 23 & 24 VICT. C. 34.

<sup>19</sup> *Johnson v. Rex*, [1904] A. C. 817.

<sup>20</sup> STUBBS, CONSTIT. HIST., 6 ed., I, 539.

Yet ministers are not the Crown. What they urge and do does not, however politically unwise or legally erroneous, involve a stain upon the perfection of its character. It may be true that when they order action, the Crown has, in substance, been brought into play; but the responsibility for their acts remains their own since the King can do no wrong. The law knows no such thing as the government. When the King's ministers find their way into the courts it is still a personal responsibility which they bear. Statutory exceptions apart, no such action need cause a moment's qualms to the grim guardians of the royal treasury; the courts' decision does not involve a raid upon the exchequer.

In such an aspect, state-responsibility, in the sense in which continental theorists use that term, remains unknown. The state cannot be sued, because there is no state to sue. There is still no more than a Crown, which hides its imperfections beneath the cloak of an assumed infallibility. The Crown is irresponsible save where, of grace, it relaxes so stringent an attitude. Foreign writers of distinction have thus found it easy to doubt whether the protection the English constitutional system affords to its citizens is in fact as great as the formal claims of the "rule of law" would suggest.<sup>21</sup> For while it is clear enough that the broad meaning of this principle is the subjection of every official to definite and certain rules, in the nature of things that which gives the official his meaning and is equivalent in fact to the incorporation of the people as a whole, escapes the categories of law.

Nor is this all. Careful analysis of the responsibility of a public servant suggests that the rule of law means less than may at first sight appear. There has been unconsciously evolved a doctrine of capacities which is in its substance hardly less mystical than Plowden's speculations about the kingly person. Certain protections are offered to the King's servants which go far to placing them in a position more privileged than the theory underlying the rule of law would seem to warrant. The growth, moreover, of administrative law in the special evolution characteristic of the last few years is putting the official in a position where it becomes always difficult and often impossible for the courts to examine his acts. We have nothing like the *droit administratif* of

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<sup>21</sup> M. LEROY in *LIBRES ENTRETIENS*, 4me series, 368.

the Continent of Europe; but we are nevertheless weaving its obvious implications into the general system of our law.

It is easy to understand that in the days when the functions of government were negative rather than positive in character, the consequences of its irresponsibility should hardly have pressed themselves upon the minds of men. For it is important to have constantly before us the fact that the essential problem is the responsibility of government. Our English state finds its working embodiment in the Crown; but if we choose to look beneath that noble ornament we shall see vast government offices full of human, and, therefore, fallible men. We choose to ignore them; or rather we know them only to make them pay for errors they have not committed on their own behalf. So do we offer vicarious victims for a state that hides itself beneath an obsolete prerogative.

Public money is, of course, a trust; and it is perhaps this that has involved the retention, in relation to the modern state, of a notion the antiquarian character of which is obvious the moment the real machinery of government is substituted for the clumsy fiction of the Crown. Public money is a trust; and thus it was that until the nineteenth century things less than the state, like charitable institutions, were beyond liability for the acts of their servants. But *Mersey Docks Trustees v. Gibbs* <sup>22</sup> emphasized, half a century ago, that defective administration in any enterprise not conducted by the Crown must entail its just and natural consequence. It is but obvious justice that if the public seek benefit, due care must be taken in the process not to harm the lesser interests therein encountered. It is a matter not less of political than of economic experience that the enforcement of liability for fault, often, indeed, without it,<sup>23</sup> is the only effective means to this end. Where we refuse to take the state for what it in fact is, all we do is to make it superior to justice. Responsibility on the part of the Crown does not involve its degradation; it is nothing more than the obvious principle that in a human society acts involve consequences and consequences involve obligations. We are invested with a network of antiquarianism because the conceptions of our public law have not so far developed that they meet the new facts they encounter. We, in a word, avoid the pay-

<sup>22</sup> L. R. 1 H. L. 93 (1866).

<sup>23</sup> Cf. Laski, 26 YALE L. J. 105 f.

ment of our due debts by a shamefaced shrinking behind the kingly robe we have abstracted from the living ruler.

It is well to analyze the meaning of responsibility before we examine our remoteness from it. The modern state is, in the American phrase, nothing so much as a great public-service corporation. It undertakes a vast number of functions — education, police, poor-law, defense, insurance against ill-health and unemployment — many of which, it is worth while to note, were, in the past, provided for by private endeavor. State-acts are performed by individuals, even though the act is invested with the majesty of the Crown; for an abstract entity must work through agents and servants. To-day such acts are protected from the normal consequence of law. Often enough, indeed, the individual agent is not so protected; if he drives a mail van recklessly down the street he can be sued as a private person. But we cannot penetrate through him to the master by whom he is employed. The resources of the Postmaster-General are not at our disposal for the accidents that may be caused by the acts of his servants.<sup>24</sup> Yet, in real and literal fact, these acts are not a whit different from those of other men. The Postmaster-General may be the depositary of special powers; but that should surely cast upon him rather a greater obligation than a freedom from responsibility for their exercise.

The theory of responsibility is, in this regard, no more than a plea that realism be substituted in the place of fiction. It urges that when the action of the state entails a special burden upon some individual or class of men, the public funds should normally compensate for the damage suffered. Everyone can see that if the state took over the railways it would be unfair to refuse the continuance of actions by those who had on some account previously commenced them; nor is it less clear that if a postal van runs over Miss Bainbridge she has, in precisely similar fashion, a claim that should not go unanswered. There must, in short, be payment for wrongful acts; and the source of those acts is unimportant. We can, indeed, see that there are reasonable grounds for certain exceptions. Complete freedom of judicial expression, without any penalization of utterance, is too clear a need to demand defense. In a less degree, a member of Parliament needs protection from the normal consequence of law, if he is at all fully to perform

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<sup>24</sup> *Bainbridge v. Postmaster-General*, [1906] 1 K. B. 178.

his function; though, even here, experience suggests the value of some extra-parliamentary means whereby the member can be made to weigh his words.<sup>25</sup> Still, in general, the principle is clear. Government must pay where it wrongs. There are no arguments against it save, on the one hand, the dangerous thesis that the state-organs are above the law, and, on the other, the tendency to believe that ancient dogma must, from its mere antiquity, coincide with modern need. Dogmas, no less than species, have their natural evolution; and it may well result in serious injustice if they linger on in a condition of decay.

## II

The personal liability of the Crown to-day is, broadly speaking, not merely non-existent in law, but unimportant also in political fact. No king is likely, as in Bagehot's classic illustration, to shoot his own Prime Minister through the head; though the servants of Elizabeth and her boisterous father must not seldom have stood in fear of personal violence. The real problem here concerns itself with government departments. They are the constitutional organs of the Crown, and their acts are binding upon it. But how are they to be reached if an injured person deem that he has suffered injustice? The law is clear upon this point beyond all question. The subject cannot bring action against the Crown, because the Crown can do no wrong. A government department lives beneath the widespread cloak of that infallibility, and it cannot, unless statute has otherwise provided, be sued in the courts. The law, indeed, is thick with all manner of survivals. For practical purposes, the Elder Brethren of Trinity House are under the jurisdiction of the Admiralty and the Board of Trade; but they are, in origin, a private body, and their acts thus render them liable to answer to the law.<sup>26</sup> So, too, for certain purposes, the Secretary of State for India in Council is the successor of the East India Company, and where those purposes are concerned the courts will take cognizance of his acts;<sup>27</sup> but if the reader of Ma-

<sup>25</sup> This will be clear to anyone who follows the questions and speeches of Mr. Pemberton Billing through the Parliamentary Debates for 1917 and 1918.

<sup>26</sup> *Gilbert v. Trinity House*, 17 Q. B. D. 795 (1886); *Cairn Line v. Trinity House*, [1908] 1 K. B. 528.

<sup>27</sup> *Jehanger M. Cursetji v. Secretary of State for India in Council*, 1 L. R. 27 Bomb. 189 (1902).

caulay is tempted to think that Clive and Warren Hastings did not hesitate, on occasion, to perform sovereign functions, he yet must legally remember that the company was not technically a sovereign body.<sup>28</sup> There is thus a definite environment which surrounds each seeming exception to the general rule. If there is limitation, it is that act of grace which continental theorists have taught us to deduce from the inherent wisdom of the sovereign power.<sup>29</sup> But the exceptions are relatively few in number, and, for the most part, they cautiously reside within the narrow field of contract.

The broad result is, to say the least, suggestive. Until 1907, and then only as a result of statute, no government department could be sued for violation of the very patent of which the Crown itself is grantor.<sup>30</sup> The acts of the Lord-Lieutenant of Ireland, even when they involve the seemingly purposeless breaking of heads at a public meeting, are acts of state, and so outside the purview of the courts.<sup>31</sup> The servants of the Crown owe no duty to the public except as statute may have otherwise provided;<sup>32</sup> so that even where a royal warrant regulates the pensions and pay of the army, the Secretary of State for War cannot be compelled to obey it.<sup>33</sup> He is the agent of the Crown; and only the Crown can pass upon the degree to which he has fulfilled the terms of his agency. Yet, in sober fact, that is to make his acts material for the decision of his colleagues, and, in an age of collective cabinet responsibility, thus to make him judge in his own cause. Sir Claude Macdonald may, as Commissioner for the Nigerian Protectorate, engage Mr. Dunn as consul for a period of three years; but if he chooses to dismiss Mr. Dunn within the specified limit, even the question of justification is beyond the competence of the courts.<sup>34</sup> Nor will the law inquire whether adequate examination has been made before the refusal of a petition of right; the Home Secretary's discretion is here so absolute that the judge will even hint to him that the oath of official secrecy is jeopard-

<sup>28</sup> *Moodaly v. Moreton*, 2 Dick. 652 (1785).

<sup>29</sup> Cf. my *AUTHORITY IN THE MODERN STATE*, Chap. I.

<sup>30</sup> *Feather v. Regina*, 6 B. & S. 257 (1865).

<sup>31</sup> *Sullivan v. Earl Spencer*, Ir. Rep. 6 C. L. 173 (1872).

<sup>32</sup> *Gidley v. Palmerston*, 3 B. & B. 275 (1822).

<sup>33</sup> *Ibid.*

<sup>34</sup> *Dunn v. Macdonald*, [1897] 1 Q. B. 555.

ized when he remarks that he considered and refused the petition.<sup>35</sup> A captain of the Royal Navy may burn the schooner of a private citizen in the mistaken belief that she is engaged in the slave trade, and even if the vessel so destroyed were its owner's sole means of livelihood, he is left without remedy so far as the Crown is concerned.<sup>36</sup> Neither Mr. Beck nor Mr. Edalji had rights against the Crown for long years of mistaken imprisonment.<sup>37</sup> So, too, it did not assist Miss Bainbridge when a duly accredited agent of the Crown injured her in his progress; what was left her was a worthless remedy against a humble wage earner from whom no recovery was possible.<sup>38</sup>

It is the realm of high prerogative that we have entered; and it would be perhaps less arid if it but possessed the further merit of logical arrangement. The truth is that in its strictest rigor the system is unworkable; and from ancient times an effort has been made to mitigate the severities it involves. The origin of the Petition of Right is wrapped in no small obscurity;<sup>39</sup> but its clear meaning is an ungracious effort to do justice without the admission of a legal claim. Nor is the remedy at all broad in character, for the Crown is avaricious where to show itself generous is to compromise the Exchequer. The Petition of Right is limited to a definite class of cases. Until 1874 it could be used for the recovery of some chattel or hereditament to which the suppliant laid claim; and it was only in that year that the genius of commercial understanding by which Lord Blackburn was distinguished secured its extension to the general field of contract.<sup>40</sup> Even when judgment has been obtained no execution can issue against the Crown. The petitioner remains dependent upon a combination of goodwill and the moral pressure he may hope to secure from public opinion.

The matter is worth stating in some little detail. "The proceeding by petition of right," said Cottenham, L. C.,<sup>41</sup> "exists only for the purpose of reconciling the dignity of the Crown and the

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<sup>35</sup> *Irwin v. Gray*, 3 F. & F. 635 (1862).

<sup>36</sup> *Tobin v. Regina*, 14 C. B. (N. S.) 505 (1863).

<sup>37</sup> For a French attempt to remedy this defect, see *infra*.

<sup>38</sup> *Bainbridge v. Postmaster-General*, *supra*.

<sup>39</sup> CLODE, PETITION OF RIGHT, Chap. I.

<sup>40</sup> *Thomas v. Regina*, L. R. 10 Q. B. 31 (1874).

<sup>41</sup> *Monckton v. Attorney-General*, 2 Mac. & G. 402 (1850).

rights of the subject, and to protect the latter against any injury arising from the acts of the former; but it is no part of its object to enlarge or alter those rights." A later definition is even more precise in its limitations. "The only cases," said Cockburn, C. J.,<sup>42</sup> "in which the petition of right is open to the subject are, where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution; or, if restitution cannot be given, compensation in money; or where the claim arises out of contract as for goods supplied to the Crown, or to the public service. It is only in such cases that instances of petitions of right having been entertained are to be found in our books." The remedy is thus the obvious expression of the needs of a commercial age. The Crown must do business, and it must obey the rules that business men have laid down for their governance if it desire effective dealings with them. So leasehold property,<sup>43</sup> demurrage under a charter-party,<sup>44</sup> duties of all kinds paid by mistake,<sup>45</sup> property extended by the Crown to answer a Crown debt,<sup>46</sup> are all cases in which it is clear enough that the petition will lie; and, in various cognate directions, the privilege has been developed by statute.<sup>47</sup> In mixed cases of tort and contract the issue seems largely to depend upon the skill and subtlety of opposing counsel.<sup>48</sup>

Once the realm of contract is overpassed the remedy of petition ceases to be effective. Tort lies completely outside the region of responsibility. The negligence of Crown servants may destroy the Speaker's property,<sup>49</sup> as the zeal of a naval captain may destroy Mr. Tobin's schooner; the Crown may, without authorization, infringe Mr. Feather's patent,<sup>50</sup> or see its officers act wrong-

<sup>42</sup> *Feather v. Regina*, 6 B. & S. 257, 293 (1865).

<sup>43</sup> *In re Gosman*, 15 Ch. D. 67 (1880), confirmed in part 17 Ch. D. 771 (1881).

<sup>44</sup> *Yeoman v. Rex*, [1904] 2 K. B. 429.

<sup>45</sup> *Percival v. Regina*, 3 H. & C. 217 (1864) (probate); *Dickson v. Regina*, 11 H. L. C. 175 (1865) (excise); *Winans v. Rex*, 23 T. L. R. 705 (1907) (estate duties), are sufficient instances of the kind.

<sup>46</sup> *In re English Joint Stock Bank W. N.* 199 (1866).

<sup>47</sup> *E. g.*, under the Telegraph Acts. *Great Western Railway v. Regina*, 4 T. L. R. 383 (C. A.) (1889).

<sup>48</sup> *E. g.*, *Clarke v. Army and Navy Co-operative Society*, [1903] 1. K. B. 155-56.

<sup>49</sup> *Canterbury v. Attorney-General*, 1 Ph. 306 (1843).

<sup>50</sup> *Feather v. Regina*, 6 B. & S. 257 (1865).



fully at a court-martial;<sup>51</sup> in none of these cases will a petition lie. The Crown may ask for volunteers and form them into regiments; but the regimental funds are Crown funds and the colonel's errors do not render them liable.<sup>52</sup> Nor are these the hardest cases. Arrears of pay due to naval and military officers cannot be recovered;<sup>53</sup> an alteration in the establishment may place an army surgeon upon the half-pay list without claim of compensation;<sup>54</sup> both here and in the unreported case of *Ryan v. R.*<sup>55</sup> no inability in the petitioner was suggested. They are servants of the Crown, and the Crown has the general right to dismiss any member of the military establishment without compensation of any kind.<sup>56</sup> Not, indeed, that this power is limited to a field where a special case for expediency might perhaps be made out. The Superannuation Act<sup>57</sup> expressly reserves to the Treasury and the various government departments their power to dismiss any public servant without liability of any kind. Except where ancient office is concerned,<sup>58</sup> there is no such thing as wrongful dismissal from the service of the Crown,<sup>59</sup> and even where there is statutory provision against dismissal, the royal prerogative to abolish the office remains.<sup>60</sup> It is, clearly, impossible to make a contract that will bind the Crown against its will;<sup>61</sup> and as in the case of the French *fonctionnaires*, the Civil Service is left to its collective strength if it is to protect itself against the spider's web of public policy.<sup>62</sup>

### III

The protection taken to the Crown has not, in general, been extended to public officers. "With us," says Professor Dicey,<sup>63</sup>

<sup>51</sup> *Smith v. L. A.* 25 R. 112 (1897).

<sup>52</sup> *Wilson v. 1st Edinburgh City Royal Garrison Artillery*, [1904] 7 F. 168.

<sup>53</sup> *Gibson v. East India Co.*, 5 Bing. (N. C.) 262 (1839); *Gidley v. Palmerston*, 3 Ba. & B. 275 (1822).

<sup>54</sup> *In re Tufnell*, 3 Ch. D. 164 (1876).

<sup>55</sup> ROBERTSON, *CIVIL PROCEEDINGS AGAINST THE CROWN*, 357.

<sup>56</sup> *Grant v. Secretary of State for India in Council*, 2 C. P. D. 445 (1877).

<sup>57</sup> 4 & 5 WILL. IV, c. 24, § 30.

<sup>58</sup> On which see *Slingsby's Case*, 3 Swanst. 178 (1680).

<sup>59</sup> *Shenton v. Smith*, [1895] A. C. 229.

<sup>60</sup> *Young v. Waller*, [1898] A. C. 661.

<sup>61</sup> *Dunn v. Regina*, 1 Q. B. 116.

<sup>62</sup> Cf. my *AUTHORITY IN THE MODERN STATE*, Chap. V.

<sup>63</sup> *LAW OF THE CONSTITUTION*, 8 ed., 189.

"every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." No one can doubt the value of this rule, for it constitutes the fundamental safeguard against the evils of bureaucracy. Nor have its results been of little value. A colonial governor<sup>64</sup> and a secretary of state<sup>65</sup> have been taught its salutary lesson; and it is, as a learned commentator has pointed out,<sup>66</sup> that which makes for the distinction between the policemen of London and the policemen of Berlin. It has the merit of enforcing a far more strict adherence to law than is possible within the limits of any other system. It restrains those notions of state prerogative which have an uncomfortable habit of making their appearance in the courts of the Continent. Nothing, at least on the surface of things, is more liable to make an official careful than the rule that he cannot make his superior liable for the act of which he has been guilty.<sup>67</sup>

Yet there are obvious difficulties about this system which must make us cautious about its too enthusiastic acceptance. Not only do immunities exist, but there is a broad field of discretion within which the courts do not venture interference. The plea of act of state is, of course, a final bar against all action; though when it operates so as to prevent government from paying to certain persons money received under treaty for that specific purpose,<sup>68</sup> it is not clear that the result is all gain. It is justifiable enough that an official should not be made liable for a contract he has made on behalf of the Crown;<sup>69</sup> nor, on a similar ground, for money erroneously paid to him as its agent.<sup>70</sup> Here the real onus of our grievance lies clearly against that principal whose *a priori* infallibility is in law assumed. The problem of irresponsibility for advice given to the Crown is more difficult;<sup>71</sup> for the actual organization of political life makes it well-nigh impossible to separate the particular facts involved from the general policy

<sup>64</sup> *Mostyn v. Fabrigas*, Cowp. 161 (1774); *Musgrave v. Pulido*, 5 A. C. 102 (1879).

<sup>65</sup> *Entick v. Carrington*, 19 St. Tr. 1030 (1765).

<sup>66</sup> 1 Hatschek, *Englische Staatsrecht*, 93.

<sup>67</sup> *Raleigh v. Goschen*, 1 Ch. 73 (1898).

<sup>68</sup> *Barclay v. Russell*, 3 Ves. 424, 431 (1797).

<sup>69</sup> See *Palmer v. Hutchinson*, 6 A. C. 619 (1881), where the cases are reviewed.

<sup>70</sup> *Whitbread v. Brooksbank*, 1 Cowp. 66 (1774); *Sadler v. Evans*, 4 Burr. 1984 (1766).

<sup>71</sup> *West v. West*, 27 T. L. R. 476 (1911).

of the government. Nor is there liability for a tort done in the exercise of a discretion conferred by law, so long as there is an absence of malice or improper motive.<sup>72</sup> The courts are unwilling, and with obvious reason, to substitute their own view of policy for that of the recognized agents of administration. So, too, protection must be afforded to the police or the proper execution of a warrant;<sup>73</sup> it would be intolerable if a mere defect of technical procedure brought with it liability to an unconscious agent who was also the humblest minister of the law.

Far more questionable is the refusal to enforce liability against an officer for the torts of his subordinate. Problems of public policy apart, the negligence of a postman ought not less to affect the Postmaster-General<sup>74</sup> than the stupidity of a teacher may affect her employers.<sup>75</sup> If there is to be equality before the law in any fundamental sense, there must be equality in the persons affected by its application; and the irresponsibility of a government official in this aspect is, at bottom, excused only by introducing exactly that notion of state which it is the purpose of the rule of law to avoid. Nor, save on similar grounds, can the Public Authorities Protection Act be defended;<sup>76</sup> for what, essentially, it does is to put certain officials on a different footing from other men. Both these categories of protection raise here the general question that is involved. The obvious aim of the system is to prevent the individual official from violating the law. It does not, as on the Continent, look to the sufferer's loss. It simply insists that if an official has made a legal mistake he must pay for it. But it is, to say the least, far from clear whether the rule results in justice. To throw upon a humble man the burden of a mistake he commits to the profit of another is surely hard measure. There will, for the most part, be no adequate opportunity for the complainant to have adequate remedy. Broadly speaking, it must be enough for him that he has vindicated a principle otherwise left empty. Nor does the protection come, damages apart, where it is most needed. For the main business of the

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<sup>72</sup> *Tozer v. Child*, 7 E. & B. 377 (1857).

<sup>73</sup> 24 GEO. II, c. 44 (1751).

<sup>74</sup> *Lane v. Cotton*, 1 Ld. Raym. 646 (1701).

<sup>75</sup> *Smith v. Martin*, [1911] 2 K. B. D. 775.

<sup>76</sup> 56 & 57 VICT. c. 61.

ordinary citizen who wreaks his vengeance upon an unconscious offender is to reach those superiors whom the law does not permit him to touch. No protection is offered against the negligence or stupidity of an official so long as he keeps within the strict letter of his statute. His order may be wanton or arbitrary, but it is law. The burden of its error will fall upon the humble official who acts rather than upon the man in office who issues a valid order. The system may, as Mr. Lowell has aptly said,<sup>77</sup> make liberty depend upon law, but it is a liberty which denies regard to that equality fundamental to its operation.

It intensifies, moreover, the tendency of the state to escape the categories of law. For, by emphasizing a remedy that is in no real sense substantial, it conceals the real defects involved in the system. It is true, of course, that the number of officials to whom the system applies is smaller than on the Continent; for the English state does not throw the cloak of its sovereignty about its local constituents. But the number of officials is growing;<sup>78</sup> and the real problem is simply the maxim of whether a principal should be responsible for the acts of his agent. In private law, that is obvious enough; yet the state, by a subterfuge, escapes its operation. The protection of individual rights is not maintained except at the expense of other individuals; where the real point at issue is to maintain them at the expense of the illegally assumed rights of the state. For, theory apart, the Crown has not less acted when a colonel mistakenly orders his men to fire upon a mob than when the King by his signature turns a bill into an Act of Parliament.

The lack, again, of any control over acts that are technically legal is thrown into clearer relief by the recent development of administrative law. Indeed, it may be here suggested that what that development essentially reveals is the limitation of the rule of law where the rule operates in the presence of an irresponsible state. If, under the Second Empire, the Napoleonic police arbitrarily suppress a newspaper,<sup>79</sup> or destroy the proof-sheets of a work by the Duc d'Aumale,<sup>80</sup> it is not difficult to perceive that the invasion of individual liberty, where no cause save the will

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<sup>77</sup> 2 LOWELL, GOVERNMENT OF ENGLAND, 503.

<sup>78</sup> Cf. WALLAS, THE GREAT SOCIETY, 7.

<sup>79</sup> DALLOZ, 1856, III, 57.      <sup>80</sup> *Ibid.*, 1867, III, 49.

of government is shown, is, in fact, most serious. A state, in brief, the officials of which can act without the proof of reasonableness inherent in the methods of their policy, has gone far to destroy the notion which lies at the basis of law.

This recent development has, indeed, a history that goes back to the tendency of the official to show deep dissatisfaction with the slow-moving methods of the law. The technicalities of the Merchant Shipping Act, for instance, actually operate, so we are told,<sup>81</sup> to make its provisions for detaining unseaworthy ships substantially null and void. Effort has in recent years been made to free the administrative process from the hampering influence of the rule of law. Where, a generation ago, Parliament laid down with strict minuteness the conditions of taxation, to-day the Board of Customs and Excise has practically legislative powers.<sup>82</sup> "Wise men," said Sir Henry Taylor in a remarkable sentence,<sup>83</sup> "have always perceived that the execution of political measures is in reality the essence of them"; and it is this which makes so urgent the rigorous regard of executive practice. In the stress of conflict, perhaps, cases like *R. v. Halliday*<sup>84</sup> may be pardoned; though it is well even there to consider whether the end the means is to serve may not be lost sight of in the means a narrow expediency seems to dictate.<sup>85</sup> But a far wider problem is set in the *Arlidge* case.<sup>86</sup> For here, in fact, not only is the court excluded from the consideration of an administrative decision, but the tests of judicial procedure which have been proved by experience are excluded without means at hand to force their entrance. What, broadly, the *Arlidge* case means is that a handful of officials will, without hindrance from the courts, decide in their own fashion what method of application an Act of Parliament is to have. And where the state that is acting through their agency is an irresponsible state, we have in fact a return to those primitive methods of justice traditionally associated with the rough efficiency of the Tudor age.<sup>87</sup>

<sup>81</sup> DICEY, *LAW OF THE CONSTITUTION*, 8 ed., 393.

<sup>82</sup> Fourth Report of the Royal Commission on the Civil Service (1914), Cd. 7338, 28.

<sup>83</sup> *THE STATESMAN*, 89.

<sup>84</sup> [1917] A. C. 260.

<sup>85</sup> Cf. Lord Shaw's dissent in *Rex v. Halliday*, *supra*.

<sup>86</sup> [1915] A. C. 120.

<sup>87</sup> Cf. Pound, Address to the New Hampshire Bar Association, June 30, 1917.

This is not to say that administrative law represents a mistaken evolution. The most striking change in the political organization of the last half century is the rapidity with which, by the sheer pressure of events, the state has been driven to assume a positive character. We talk less and less in the terms of nineteenth-century individualism. The absence of governmental restraint has ceased to seem the ultimate ideal. There is everywhere almost anxiety for the extension of governmental functions. It was inevitable that such an evolution should involve a change in the judicial process. Where, for example, great problems like those involved in government insurance are concerned, there is a great convenience in leaving their interpretation to the officials who administer the Act. They have gained in its application an expert character to which no purely judicial body can pretend; and their opinion has a weight which no community can afford to neglect. The business of the state, in fact, has here become so much like private business that, as Professor Dicey has emphasized,<sup>88</sup> its officials need "that freedom of action necessarily possessed by every private person in the management of his own personal concerns." So much is tolerably clear. But history suggests that the relation of such executive justice to the slow infiltration of a bureaucratic regime is at each stage more perilously close; and the development of administrative law needs to be closely scrutinized in the interests of public liberty. If a government department may make regulations of any kind without any judicial tests of fairness or reasonableness being involved, it is clear that a fundamental safeguard upon English liberties has disappeared. If administrative action can escape the review of the courts, there is no reality in official responsibility; and cases like *Entick v. Carrington*<sup>89</sup> become, in such a contest, of merely antiquarian interest. If the Secretary of State, under wide powers, issues a regulation prohibiting the publication of any book or pamphlet he does not like without previous submission to a censor, who may suppress it without assignment of cause, the merest and irresponsible caprice of a junior clerk may actually be the occasion for the suppression of vital knowledge;<sup>90</sup> nor will there

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<sup>88</sup> 31 L. QUART. REV. 148, 150.

<sup>89</sup> 19 ST. TR. 1030.

<sup>90</sup> Defence of the Realm Act, Order No. 51. Cf. *The London Nation*, § 8, 1917.

be the means judicially at hand for controlling the exercise of such powers. The legislative control that misuse will eventually imply is so slow in coming that it arrives almost always too late. And the cabinet system, with its collective responsibility, virtually casts its enveloping network of protection about the offender. A member of Parliament may resent the stupid imprisonment of a distinguished philosopher; but his resentment will rarely take the form of turning out the government as a protest.<sup>91</sup>

In such a situation, it is obvious that we must have safeguards. It is not adequate to give a half-protection in the form of the rule of law, and then to destroy the utility of its application. What, in fact, is implied in a state which evades responsibility is, sooner or later, the irresponsibility of officials immediately the business of the state is complex enough to make judicial control a source of administrative irritation. Administrative law, in such an aspect, implies the absence of law; for the discretion of officials sitting, as in the *Arlidge* case, in secret, cannot be called law. What is needed is rather the frank admission that special administrative courts, as on the Continent, are needed, or the requirement of a procedure in which the rights of the private citizen have their due protection.<sup>92</sup> What, in any case, is clear is the fact that the official will not, in any other way, be substantially subject to the rule of law. In the vital case the avenue of escape is sufficiently broad to make legal attack of little use. It is hardly helpful to be able to bring a policeman into court if the real offender is the Home Secretary. It is utterly useless even to make protestation if the government is, by virtue of its growing business, to take its acts from the public view. Growing functions ought rather to mean growing responsibility than less; and if that should involve a new system of rights it makes thought about its content only the greater need. The ordinary citizen of to-day is so much the mere subject of administration that we cannot afford to stifle the least opportunity of his active exertions. The very scale, in fact, of the great society is giving new substance to Aristotle's definition of citizenship.

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<sup>91</sup> On the private member's protest, *cf.* Low, *GOVERNANCE OF ENGLAND*, 5 ed., Chap. IV.

<sup>92</sup> As in the United States. *New York v. Public Service Commission*, 38 Sup. Ct. Rep. 122 (1917).

## IV

The America which a Revolution brought into being did not relinquish the rights surrendered by George III at Versailles. If the people is to be master in its own house, it will not belittle itself and cease, in consequence, to be sovereign. Rights here, as elsewhere, are to flow from the fount of sovereign power; and its irresponsibility is the natural consequence. That the state is not to be sued, in truth, is taken, even by the greatest authority, as a simple matter of logic. "A sovereign," says Mr. Justice Holmes,<sup>83</sup> "is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Nor did Mr. Justice Holmes fail to draw the inevitable conclusion from that attitude. The sovereignty of the people will mean, in actual terms of daily business, the sovereignty of its government.<sup>84</sup> "As the ground is thus logical and practical," he said, "the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that, in actual administration, originate and change at their will the law of contract and property from which persons within the jurisdiction derive their rights." Here is the Austinian theory of sovereignty in all its formidable completeness; though it is worth while noting that its complications have elsewhere driven Mr. Justice Holmes to the enunciation of a doctrine of quasi-sovereignty that the hardness of the rule might suffer mitigation.<sup>85</sup> No such certainty, indeed, existed in the early days of the Republic; and Chief Justice Jay and Mr. Justice Wilson regarded the immunity of the state from suit as the typical doctrine of autocratic government.<sup>86</sup> But, from the time of *Cohens v. Virginia*,<sup>87</sup> the doctrine of non-suability has taken firm hold; and men such as Harlan, J., have urged it with almost religious fervor.<sup>88</sup>

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<sup>83</sup> *Kawananakoa v. Polyblank*, 205 U. S. 349 (1907).

<sup>84</sup> Cf. my paper on "The Theory of Popular Sovereignty" in the *MICH. L. REV.* for January, 1919.

<sup>85</sup> *Georgia v. Tenn. Copper Co.*, 206 U. S. 230 (1907).

<sup>86</sup> *Chisholm v. Georgia*, 2 Dall. (U. S.) 419 (1793).

<sup>87</sup> 6 Wheat. (U. S.) 264, 382 (1821).

<sup>88</sup> Cf., for instance, *United States v. Texas*, 143 U. S. 621 (1892), and *Fuller, C. J.*, in *Kansas v. United States*, 204 U. S. 331 (1907).



The result is that, broadly speaking, the situation is hardly distinct in its general outlines from that of Great Britain. In eight of the states there is actual constitutional provision against suit; and in sixteen more special privileges are erected as a tribute to its sovereign character.<sup>99</sup> It is, in short, the general rule that a state will not be liable for acts which, were they not, directly or indirectly, acts of the government, would render the doer responsible before the courts.<sup>100</sup> The United States will abuse the patents of its citizens hardly less cheerfully than the British Admiralty.<sup>101</sup> State duties, like prison maintenance<sup>102</sup> and the repair of roads,<sup>103</sup> may be done without reference to the neglect of private interests. The rule goes even further and protects a charitable institution like an agricultural society from the accidents that happen in the best-regulated fairs.<sup>104</sup> If the state leases an armory for athletic purposes and has failed, through sheer negligence, to repair a defective railing,<sup>105</sup> it does not, to say the least, seem logical to refuse compensation, especially when damages may be obtained in a similar case from a municipal body.<sup>106</sup> But a sovereign is perhaps unamenable to the more obvious rules of logic.

Nor has America made substantial departure from the British practice in regard to ministerial responsibility. Only one case against the head of an executive department seems to exist, and it was decided adversely to the plaintiff.<sup>107</sup> Nor are purely ministerial officials held responsible for actions following upon instructions legal upon their face;<sup>108</sup> and that although the officer may be convinced that the instruction in fact breaks the law.<sup>109</sup> The

<sup>99</sup> BEARD, INDEX OF STATE CONSTITUTIONS, 1360.

<sup>100</sup> *Murdock Parlor Grate Co. v. Commonwealth*, 152 Mass. 28, 24 N. E. 854 (1890).

<sup>101</sup> *Belknap v. Schild*, 161 U. S. 10 (1896).

<sup>102</sup> *Moody v. State Prison*, 128 N. C. 12, 38 S. E. 131 (1901).

<sup>103</sup> *Johnson v. State*, 1 Court of Claims (Ill.), 208.

<sup>104</sup> *Berman v. State Agricultural Society of Minnesota*, 93 Minn. 125, 100 N. W. 732 (1904).

<sup>105</sup> *Riddoch v. State*, 68 Wash. 329, 123 Pac. 450 (1912).

<sup>106</sup> *Little v. Holyoke*, 177 Mass. 114, 58 N. E. 170 (1900). I owe my knowledge of this and the other state cases in America to the brilliant article of Mr. R. D. Maguire, 30 HARV. L. REV., 20 ff.

<sup>107</sup> *Stokes v. Kendall*, 3 How. (U. S.) 87 (1845).

<sup>108</sup> *Erskine v. Bohnbach*, 14 Wall. (U. S.) 613 (1871).

<sup>109</sup> *Wall v. Trumbull*, 16 Mich. 228 (1867); *Underwood v. Robinson*, 106 Mass. 296 (1871).

law, indeed, has many anomalies about it. A company which serves as a mail carrier is not responsible to the owner of a package for its loss;<sup>110</sup> it is here an agent of government, and so, as it seems, protected from the consequences of its acts. But a mail contractor will be liable for the negligence of the carrier whom he employs.<sup>111</sup> Once an official engages a private servant to perform a task, the ordinary rules of principal and agent are said to apply.<sup>112</sup> Certain mystic words are here, as elsewhere, the vital point in the evasion of law.

Such facts converge towards an argument first stated in a distinct form by Paley. "Sovereignty," he says,<sup>113</sup> "may be termed absolute, omnipotent, uncontrollable, arbitrary, despotic, and is alike so in all countries." Certainly the forms of government could in no two countries remain more substantially distinct than those of England and the United States; yet, in each, the attributes of sovereign power admit no differentiation. What mitigation there is of a rule hard alike in intent and execution is the mitigation of the sovereign's generosity; that is to say, a mitigation which stops short where the Treasury becomes concerned. For this theory of an auto-limitation of the sovereign's power has in fact nothing of value to contribute to our problems. The real need is the enforcement of responsibility, and that cannot be effected if the test is to be our success in convincing the sovereign power of its delinquencies. The fact is that here, as elsewhere, the democratic state bears upon itself the marks of its imperial origin. The essence of American sovereignty hardly differs, under this aspect, from the attributes of sovereignty as Bodin distinguished them three centuries ago.<sup>114</sup> What emerges, whether in England or in the United States, is the fact that an Austinian state is incompatible with the substance of democracy. For the latter implies responsibility by its very definition; and the Austinian system is, at bottom, simply a method by which the fallibility of men is concealed imposingly from the public view.

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<sup>110</sup> *Bankers' Mutual Casualty Co. v. Minneapolis, etc. Ry.*, 117 Fed. 434 (1902).

<sup>111</sup> *Sawyer v. Corse*, 17 Gratt. (Va.) 230 (1867).

<sup>112</sup> *Dunlop v. Munroe*, 7 Cranch (U. S.) 242 (1812).

<sup>113</sup> *MORAL AND POLITICAL PHILOSOPHY*, Bk. VI, Chap. VI. Cf. my *AUTHORITY IN THE MODERN STATE*, 29 f.

<sup>114</sup> *DE LA RÉPUBLIQUE*, I, 8, 9. Cf. *CHAUVIRÉ, BODIN*, 311 f.

## V

The Anglo-American system exists in isolation; and it is, in a sense, the only one which has remained true to the logical conditions of its origin. In France and Germany a régime exists which, while in no sense antithetic, may be usefully contrasted with the more logical effort here discussed.<sup>115</sup> No text, indeed, declares in France the responsibility of the state; such concession to the historic content of sovereign power is here, as elsewhere, deemed fundamental. But the courts have little by little been driven through circumstances to desert this rigidity, so that in the France of to-day the older notion of irresponsibility is no longer existent. The state, indeed, is in nowise liable for the consequence of its legislative acts; though the demand for compensation in cases where a state monopoly has been created are not without their interest. Nor must we miss the significance of ministerial protest against the easy thesis that the obligations of the state are liable to instant change by statute.<sup>116</sup>

What is perhaps more significant than the substance of the decisions is the manner in which this jurisprudence has been evolved. We start, as in England, with an irresponsible state. Little by little a distinction is made between the acts of the state in its sovereign capacity, where irresponsibility remains, and in its non-sovereign aspect, where liability is assumed. But it has been in the last decade seen that such distinction is in fact untenable and that the test of liability must be sought in different fashion. While, therefore, the sovereignty of the state finds its historic emphasis within the chamber,<sup>117</sup> it is less and less insistent before the Council of State. And even within the Chamber suggestions of a notable kind have been made. It was M. Clemenceau who proposed statutory compensation for unlawful arrest,<sup>118</sup> and a vote of credit for this purpose has been made in every budget since 1910.

<sup>115</sup> The literature of the responsibility of the state in France and Germany is now enormous. The two best treatises on the former country are those of Teissier and Tirard. On Germany the best general discussion is still that of OTTO MAYER, *DEUTSCHES VERWALTUNGSRECHT*, Bk. III, § 17. Cf. also LOENING, *DIE HAFTUNG DES STAATES*.

<sup>116</sup> DUGUIT, *LES TRANSFORMATIONS DU DROIT PUBLIC*, 235-39 (a translation of this work will be shortly published).

<sup>117</sup> Cf. my *AUTHORITY IN THE MODERN STATE*, Chap. V.

<sup>118</sup> DUGUIT, *op. cit.*, 252.

Here, at least, is a clear admission that the sovereign state is a fallible thing.

But a more notable change even than this may be observed. The administration has become responsible for faults in the exercise of its functions. There has been evolved, if the phrase may be permitted, a category of public torts where the state becomes liable for the acts of its agents. And this is, in fact, no more than the admission of that realism which, in the Anglo-American system, has no opportunity for expression. For every state act is, in literal truth, the act of some official; and the vital need is simply the recognition that the acts of an agent involve the responsibility of his superior. Where the service of the state, that is to say, is badly performed in the sense that its operation prejudices the interest of a private citizen more especially than the interests of the mass of men, the exchequer should lie open for his relief. Obviously enough a responsibility stated in these terms becomes no more than equitable adjustment. If the state comes down into the market-place it must, as even American courts have observed,<sup>119</sup> put off its robe of sovereignty and act like a human being.

This modern development goes back to a distinguished jurist's criticism of the *Lepreux* case in 1899.<sup>120</sup> *Lepreux* was injured by the state-guard in the performance of its duties; and his plea for damages was rejected on the ground that it was an inadmissible attack on the sovereignty of the state. M. Hauriou argued that this was the coronation of injustice. He did not deny that there are cases where public policy demands irresponsibility; but he urged, in effect, that in the general business of daily administration negligence ought, as with the relations of private citizens, to have its due consequence. The result of his argument was seen in the next few years. In the *Grecco* case, for example, though the plaintiff was unsuccessful, the ground of his failure was not the irresponsibility of the state, but the fact that he had not proved his claim of negligence.<sup>121</sup> It was thus admitted that the state was not infallible, and the way lay open to a striking devel-

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<sup>119</sup> *Charleston v. Murray*, 96 U. S. 432 (1877); *United States Bank v. Planters' Bank*, 9 Wheat. (U. S.) 904 (1824); *The Royal Acceptances*, 7 Wall. (U. S.) 666 (1868).

<sup>120</sup> *SIREY*, 1900, III, 1.

<sup>121</sup> *Ibid.*, 113.

opment. The Council of State was willing to insist upon damages for an unduly delayed appointment of a retired soldier to the civil service; it held the state responsible for the faulty construction of a canal.<sup>122</sup> Most remarkable of all was perhaps the Pluchard case in which a civilian obtained damages for a fall occasioned by an involuntary collision with a policeman in pursuit of a thief.<sup>123</sup> Nor has the evolution stopped there. It has become possible to overturn governmental ordinances — the analogue of the English provisional order; or, at least, to obtain special compensation where hardship in the application of the ordinance can be proved.<sup>124</sup> What practically has been established is governmental responsibility where the administrative act is in genuine relation to the official's duty. It is only where, as in the Morizot case,<sup>125</sup> the official goes clearly outside his functions that the state repudiates liability.

No one will claim for this French evolution that it has been the result of a conscious effort to overthrow the traditional theory of sovereignty; on the contrary, its slow and hesitating development suggests the difficulties that have been encountered.<sup>126</sup> But no French court will say again, as in the Blanco case,<sup>127</sup> that problems of state are to be ruled by special considerations alien to the categories of private law. The real advantage, indeed, of the system is its refusal to recognize, within, at least, the existing limits of this evolution, any special privilege to the state. It judges the acts of authority by the recognized rules of ordinary justice. It asks, as it is surely right to ask, the same standard of conduct from a public official as would be expected from a private citizen. The method may have its disadvantages. There is undoubtedly a real benefit in the Anglo-American method of bringing the consequences of each act rigidly to bear upon the official responsible for it. Yet, as has been shown, this theory is far different from the application of the rule in practice; it does

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<sup>122</sup> Cf. DUGUIT, *op. cit.*, 261.

<sup>123</sup> RECUEIL (1910), 1029.

<sup>124</sup> SIREY, 1908, III, 1, and see the account of the Turpin case in DUGUIT, *op. cit.*, 266, for the application of responsibility to ministerial negligence of a special kind.

<sup>125</sup> SIREY, 1908, III, 83.

<sup>126</sup> The Ambrosini case, for example, SIREY, 1912, III, 161, suggests a revulsion of sentiment.

<sup>127</sup> HAURIOU, *PRÉCIS DE DROIT ADMINISTRATIF*, 8 ed., 503, note 1.

not affect those upon whom the cloak of sovereignty is thrown; and it offers no prospect of any full relief to the person who has been prejudiced. These evils, at least, the French method avoids. It conceives of the state as ultimately no more than the greatest of public utilities, and it insists that, like a public utility in private hands, it shall act at its peril. In an age where government service has been so vastly extended, the merit of that concept is unquestionable.

It may, of course, be argued that such an attitude is only possible in the special environment of French administrative law. That system is, as Professor Dicey has taught us in his classical analysis,<sup>128</sup> essentially a system of executive justice, basically incompatible with the ideals of Anglo-American law. Yet there are many answers possible to that attitude. French administrative law may be in the hands of executive officials; but no one who has watched its administration can urge a bias towards the administration on the part of the Council of State.<sup>129</sup> Nor, if the fear remain, need we insist upon the rigid outlines of the French inheritance. The Prussian system of administrative law is administered by special courts, and it has won high praise from distinguished authority.<sup>130</sup> If it be true that the pressure of executive business makes continuous recourse to the ordinary courts impossible, the establishment of such tribunals may be the necessary and concomitant safeguard of private liberty; and Mr. Barker has pointed out that in the English umpires and referees we have the foundation upon which an adequate system can be erected.<sup>131</sup> Certain at least it is that in no other way than some such development can we prevent the annihilation of that sturdy legalism which was the real condition of Anglo-Saxon freedom.

## VI

"It is a wholesome sight," said Maitland in a famous sentence,<sup>132</sup> "to see 'the Crown' sued and answering for its torts." We per-

<sup>128</sup> LAW OF THE CONSTITUTION, 8 ed., 324-401.

<sup>129</sup> Cf. E. M. Parker, 19 HARV. L. REV. 335. Mr. Parker gives good examples of this tendency; but I do not think he has altogether realized the substantial character of Professor Dicey's strictures.

<sup>130</sup> Cf. E. Barker, 2 POLITICAL QUART. 117.

<sup>131</sup> *Ibid.*, 135 f.

<sup>132</sup> 3 COLLECTED PAPERS, 263.

haps too little realize how much of historic fiction there is in the theory of the English state. Certainly there have been moments in its early development when it almost seemed as though the great maxim *respondeat superior* would apply to official persons; for in documents no less substantial than statutes the germ of official responsibility is to be found.<sup>133</sup> But the doctrine seems to climb no higher than the sheriff or escheator, and it is in Council or Parliament that the greater men make what answer they deem fit. And, as Maitland said,<sup>134</sup> we should not expect to find the medieval King a responsible officer simply because he was every inch a man. When theory develops it was thus too late. The wholesome sight is beyond our vision. The state is still the King; and if an occasional judge, more deeply seeing or blunter than the rest, tells us that our cases in fact concern not the state or the Crown but the government, a phrase used *obiter* is not strong enough to point the obvious moral.<sup>135</sup>

Yet obvious it is; and if, for a moment, we move from law to its philosophy the groundwork of our difficulties will be clear enough. We are struggling to apply to a situation that is at each moment changing conceptions that have about them the special fragrance of the Counter-Reformation. It is then that the absolute and irresponsible state is born, and it is absolute and irresponsible from the basic necessity of safeguarding its rights against the Roman challenge.<sup>136</sup> But the attributes are convenient, especially when they are in actual fact exercised by government. For then, as now, in the normal process of daily life what we in general fail to see is that acts of state are governmental acts which command the assent of the mass of men. The classic theory of sovereignty is unfitted to such a situation. The fundamental characteristic of political evolution is the notion of responsibility. If our King fails to suit us we behead or replace him; if our ministry loses its hold, the result is registered in the ballot-boxes. But the categories of law have obstinately and needlessly resisted such transformation. The government has for the most part kept the realm of administration beclouded by high notions of prerogative.

<sup>133</sup> STATUTE OF WESTMINSTER II, 13 EDW. I, St. I, chap. 2, § 3 (1285); *ARTICULI SUPER CARTAS*, § 18.

<sup>134</sup> 3 COLLECTED PAPERS, 247.

<sup>135</sup> *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93, 111, per Blackburn, J.

<sup>136</sup> Cf. *my AUTHORITY IN THE MODERN STATE*, 22 f.

What is here argued is the simple thesis that this is legally unnecessary and morally inadequate. It is legally unnecessary because, in fact, no sovereignty, however conceived, is weakened by living the life of the law. It is morally inadequate because it exalts authority over justice.

It would not persist but for the use of antiquarian terminology. The Crown is a noble hieroglyphic; and it is not in the Law Courts that effort will be made to penetrate the meaning of its patent symbolism. Crown in fact means government, and government means those innumerable officials who collect our taxes and grant us patents and inspect our drains. They are human beings with the money-bags of the state behind them. They are fallible beings because they are human, and if they do wrong it is in truth no other derogation than the admission of their human fallibility to force responsibility upon the treasury of their principal. To avoid that issue results not merely in injustice. It makes of authority a category apart from the life that same authority insists the state itself must live. By its sanctification of authority it pays false tribute to an outworn philosophy. "Whatever the reasons for establishing government," said James Mill,<sup>137</sup> "the very same are reasons for establishing securities." It is this absence of safeguards that makes inadequate the legal theory our courts to-day apply. Nor has it even the merit of consistency; for the needs of administration have necessitated governmental division into parts that may or may not be sovereign or irresponsible without regard to logic. The cause of this moral anachronism may be imbedded in history; but we must not make the fatal error of confounding antiquity with experience. We live in a new world, and a new theory of the state is necessary to its adequate operation. The head and center of practical, as of speculative effort, must be the translation of the facts of life into the theories of law. The effort to this end is slowly coming; but we have not yet taken to heart the burden of its teaching. The ghost of old Rome, as in Hobbe's masterpiece of phrase, still sits in triumph upon ruins we might fashion anew into an empire.

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<sup>137</sup> Essays reprinted from the *Encyclopedia Britannica*, 5.



MARRIAGE BY PROXY AND THE CONFLICT  
OF LAWS

## I

THE question whether a marriage may be celebrated by proxy has been of very little practical importance in modern times. So far as England and America are concerned no mention is made of marriage by proxy in the books of the nineteenth and twentieth centuries. The only discussion of the subject in the English language that has come to the notice of the writer is found in Swinburne's "Law of Espousals" which was first published in the latter part of the seventeenth century.<sup>1</sup> The continental writers also, who are more inclined to discuss problems of a purely theoretical nature have paid little attention to the subject in recent times.<sup>2</sup> The legislation of the present war, however, has given to the subject renewed importance, for in three of the continental countries — Belgium, France, and Italy — marriage by proxy has been expressly sanctioned by law. The presence of so many American soldiers abroad naturally raises the question whether they may contract a marriage by proxy either by virtue of the American law or by virtue of the law of the country in which they may happen to be for the time being. Before an answer can be given to these questions the subject of marriage by proxy must be considered both from the standpoint of the internal law of the principal countries concerned and from the viewpoint of the American rules relating to the conflict of laws.

That marriage by proxy was allowed in the late Roman law and in the Canon Law is an established fact. Pomponius says:<sup>3</sup>

*"Mulierem absenti per litteras eius vel per nuntium posse nubere placet, si in domum eius deduceretur: eam vero quae abesset ex litteris vel nuntio*

<sup>1</sup> The first edition appeared in 1686, the second in 1711.

<sup>2</sup> 2 v. SCHERER, HANDBUCH DES KIRCHENRECHTS (page 192) gives the following bibliography: ARIENS, DE NUPTIIS, QUAE PER PROCURATOREM CONTRAHUNTUR, Traj. 1841; Kutschker, E. R. 4, 321-46; LUDEWIG, DE MATRIMONIO PRINCIPIS PER PROCURATORES, 1736; MÜLLER, DE MATRIMONIO ABSENTIUM, 1740; SANCHEZ, DE SANCTO MATRIMONII SACRAMENTO DISPUTATIONUM TOMI TRES, LII, Disp. 11; SCHÖPFER, DE MATRIMONIO PER SUBSTITUTUM CONTRACTO, 1709.

<sup>3</sup> DIGEST, XXIII, 2, 5.

*suo duci a marito non posse: deductione enim opus esse in mariti, non in uxoris domum, quasi in domicilium matrimonii."*

According to this passage a man who was away from home might marry a woman by letter or messenger, but marriage could not be contracted in this manner by a woman who was absent from the man's place of residence. The reason for this difference between the man and the woman resulted from the requirement of the Roman law that the wife be led to the husband's home (*deductio in domum mariti*). Marriage was considered in the late Roman law as based solely upon the agreement of the parties to take each other from that moment as husband and wife.<sup>4</sup> This consent might be expressed, with the reservation above made, by letter or by agent (*per nuntium vel epistulam*) as in all ordinary consensual contracts.

The Canon Law accepted as its fundamental doctrine the principle that *consensus facit nuptias*. Gratian<sup>5</sup> insisted that there was no marriage unless the agreement of the parties to take each other as husband and wife was followed by cohabitation, but this requirement did not prevail. Peter Lombard, professor at the University of Paris, and later ordained bishop, suggested a distinction in this regard between *sponsalia de praesenti* and *sponsalia per verba de futuro*, requiring cohabitation only for the validity of the latter. Through the influence of Alexander III the church accepted this distinction toward the end of the twelfth and at the beginning of the thirteenth centuries.<sup>6</sup> Parties declaring in words of the present tense that they take each other from that moment as husband and wife were regarded as legally married.<sup>7</sup> The only difference between a marriage that was consummated through cohabitation and one that was not so consummated was that the latter might be dissolved by entering religion and was subject to the papal power of dispensation.<sup>8</sup>

From the earliest times the church had insisted that the parties should exchange matrimonial consents in face of the church and should get their union blessed by the church, but a failure to observe

<sup>4</sup> *NUPTIAS ENIM NON CONCUBITUS, SED CONSENSUS FACIT*, D. 35, 1, 15; D. 50, 17, 30.

<sup>5</sup> 1 ESMEIN, *LE MARIAGE EN DROIT CANONIQUE*, 109; 1 HOWARD, *HISTORY OF MATRIMONIAL INSTITUTIONS*, 336.

<sup>6</sup> 1 ESMEIN, *supra*, 127.

<sup>7</sup> 1 HOWARD, *supra*, 337; 3 BOEHMER, *JUS ECCLESIASTICUM PROTESTANTUM*, 3 ed., Bk. 4, Tit. 1, No. 13.

<sup>8</sup> 2 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW*, 368; 1 ESMEIN, *supra*, 130.

these requirements did not render the marriage void.<sup>9</sup> At the Lateran Council of 1215 Pope Innocent III extended for the whole Western Christendom the requirement of the publication of banns. A marriage with banns had certain legal advantages over a marriage without banns; but the formless, unblessed marriage was nevertheless valid.<sup>10</sup>

Innocent III accepted the Roman view that the marriage contract, being based upon the present consent of the parties, might be entered into by messenger.<sup>11</sup> Some of the canonists, following the example of the Roman law, maintained that only the man should be permitted to marry in this manner,<sup>12</sup> but it was felt that the same rule should apply to both parties.<sup>13</sup> Others contended that a marriage contract was different from an ordinary consensual contract, the expression of consent being of such far reaching consequences that it should be expressed in person instead of by proxy. This objection was met by the technical argument that a procurator represented the person of his principal and that the latter could pronounce the words through the procurator's mouth, as it were.<sup>14</sup> This view triumphed and found expression in the following decretal of Boniface VIII:<sup>15</sup>

*"Procurator non aliter censetur idoneus ad matrimonium contrahendum, quam si ad hoc mandatum habuerit speciale. Et quamvis alias is, qui constituitur ad negotia procurator, alium dare possit: in hoc tamen casu, propter magnum quod ex facto tam arduo posset periculum imminere, non poterit deputare alium, nisi hoc eidem specialiter sit commissum. Sane si procurator, antequam contraxerit, a domino fuerit revocatus, contractum postmodum matrimonium ab eodem, licet tam ipse quam ea, cum qua contraxerit, revocationem huiusmodi penitus ignorarent, nullius momenti existit, quum illius consensus defecerit, sine quo firmitatem habere nequevit."*

<sup>9</sup> 1 ESMEIN, *supra*, 96.

<sup>10</sup> 2 POLLOCK AND MAITLAND, *supra*, 369; BROUWER, *DE JURE CONNUBIUM*, Bk. I, Chap. 24, No. 19; FRIEDBERG, *RECHT DER EHESCHLIESSUNG*, 314; RICHTER, *LEHRBUCH DES KATHOLISCHEN UND EVANGELISCHEN KIRCHENRECHTS*, 1126, 1194; 2 v. SCHERER, *HANDBUCH DES KIRCHENRECHTS*, 163-64; WALTER, *LEHRBUCH DES KIRCHENRECHTS*, 572-73.

<sup>11</sup> 1 ESMEIN, *supra*, 169-70.

<sup>12</sup> Berardus would follow the Roman law on account of the weakness of the sex.

3 BERARDUS, *COMMENTARIA IN JUS ECCLESIASTICUM UNIVERSUM*, 156.

<sup>13</sup> HOSTIENSIS, *SUMMA AUREA*, LIB. III, DE SPONS. ET MATRIMONIIS, Col. 1236, No. 7.

<sup>14</sup> 1 ESMEIN, *supra*, 171.

<sup>15</sup> SEXT. (*LIBER SEXTUS DECRETALIU*), I, 19, 9.

Since the Council of Trent (1563) matrimonial consents must be exchanged according to the Canon Law before a priest and at least two witnesses. Otherwise the marriage is invalid. There appears to have been at first considerable dispute among the canonists on the point whether this new requirement affected the rules of the Canon Law relating to marriage by proxy. Some argued that the priest and the witnesses were to identify the parties and ascertain their intention to marry and that this necessitated the presence of both parties. This contention was rejected, it being held that the main object of the provision of the Council of Trent was to give publicity to the marriage, to bring the fact of marriage to the notice of the church.<sup>16</sup> Thereupon some maintained that the power of attorney must be executed in the presence of a priest and two witnesses, but this view also did not prevail.<sup>17</sup> The result was that even in those countries in which the Council of Trent was accepted a marriage conforming to the requirements of this Council might be entered into by proxy upon the same conditions, so far as the proxy is concerned, as before.<sup>18</sup>

The decretal above quoted requires that the mandate or power of attorney be special and that it has not been revoked before the celebration of the marriage.<sup>19</sup> It mentions also the fact that in the absence of an express authorization the proxy shall have no power of substitution. No special form is prescribed for the power of attorney, so that a mere oral authorization would be sufficient.<sup>20</sup> The agent may be either a man or woman, no distinction being made between the sexes.<sup>21</sup>

The provisions of the Canon Law relating to marriage have

<sup>16</sup> 5 FERRARIS, *PROMPTA BIBLIOTHECA CANONICA, JURIDICA, ETC., MATRIMONIUM*, Articulus I, No. 34.

<sup>17</sup> SANCHEZ, *DE SANCTO MATRIMONII SACRAMENTO DISPUTATIONUM TOMI TRES*, DISPUTATIO, II, No. 23.

<sup>18</sup> CARRIÈRE, *DE MATRIMONIO*, § 4. See also FRIEDBERG, *LEHRBUCH DES KIRCHENRECHTS*, 490; RICHTER, 1133; 2 v. SCHERER, *supra*, 192; v. SCHULTE, *LEHRBUCH DES KATHOLISCHEN UND EVANGELISCHEN KIRCHENRECHTS*, § 159; VAN ESPEN, *JUS ECCLESIASTICUM UNIVERSUM*, Pt. 2, § 1, Tit. 12, No. 10.

The canonists advise parties marrying by proxy to exchange matrimonial consents in person later. SANCHEZ, *supra*, No. 31, note.

<sup>19</sup> As regards ordinary contracts the continental rule of agency allows the agent to bind the principal notwithstanding a revocation of the agent's authority if the contract was entered into before the agent knew of the revocation.

<sup>20</sup> 2 v. SCHERER, *supra*, 192.

<sup>21</sup> SANCHEZ, *supra*, No. 15.

generally been superseded on the continent to-day by civil marriage acts whose object it is, as their name indicates, to make marriage a purely civil institution. These acts aim to give due publicity to the proposed marriage and to make certain, so far as possible, that the marriage is the voluntary and deliberative act of the parties. Marriage by proxy obviously violates the objects of these acts, for there can be no certainty at the time of the marriage that the power of attorney was not given under circumstances constituting fraud, mistake or duress, or that it was not revoked prior to the celebration of the marriage.

The Code Napoléon does not prohibit marriage by proxy in express terms. Article 75 of the Code requires the officer of the civil status, however, to read to the parties the different documents required by law respecting their civil status and the Code provisions dealing with the mutual rights and duties of husband and wife. This requirement would be purposeless if the parties were not present in person. The framers of the Code<sup>22</sup> without doubt intended to prohibit marriage by proxy and the provisions of the Code are so understood to-day.<sup>23</sup> The French writers maintain that in the absence of an express provision in the Code declaring a marriage by proxy void a marriage so celebrated before an officer of the civil status must be deemed valid.<sup>24</sup> The Court of Bastia has taken the contrary view.<sup>25</sup>

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<sup>22</sup> At a meeting of the Council of State the first consul stated without being contradicted by any one "*le mariage n' a plus lieu qu' entre personnes présentes.*" 2 LOCRE, *LÉGISLATION CIVILE, COMMERCIALE ET CRIMINELLE*, 365.

The ancient law of France allowed marriage by proxy. This was still the law at the time of Pothier. 6 POTHIER, *OEUVRES*, 3 ed., No. 367.

<sup>23</sup> 7 AUBRY & RAU, *COURS DE DROIT CIVIL FRANÇAIS*, 5 ed., § 466; 2 BAUDRY LACANTINERIE & HOUQUES-FOURCADE, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL. DES PERSONNES*, Vol. 2, No. 1597; 1 BEUDANT, *COURS DE DROIT CIVIL FRANÇAIS*, No. 222; 1 DEMANTE, *COURS ANALYTIQUE DE CODE CIVIL*, 3 ed., 357; 3 DEMOLOMBE, *COURS DE CODE NAPOLÉON*, No. 210; 1 DURANTON, *COURS DE DROIT FRANÇAIS SUIVANT LE CODE CIVIL*, No. 287; FUZIER-HERMAN, *CODES ANNOTÉS, CODE CIVIL*, Art. 36, Nos. 2 *et seq.*; Art. 75, No. 5; GLASSON, *DU CONSENTEMENT DES EPOUX AU MARIAGE*, No. 108; 1 HUC, *COMMENTAIRE THÉORIQUE ET PRATIQUE DU CODE CIVIL*, No. 345; 2 LAURENT, *PRINCIPES DE DROIT CIVIL FRANÇAIS*, No. 427; 1 MARCADÉ, *EXPLICATION THÉORIQUE ET PRATIQUE DU CODE NAPOLÉON*, No. 231. *Contra*, MERLIN, *RÉPERTOIRE, MARIAGE*, Sec. 4, § 1, Art. 1, QUEST. 4; 1 TOULLIER, *DROIT CIVIL FRANÇAIS*, No. 574.

<sup>24</sup> 7 AUBRY & RAU, *supra*, § 467; 3 DEMOLOMBE, *supra*, No. 210; GLASSON, *supra*, No. 109; 2 LAURENT, *supra*, No. 485.

<sup>25</sup> BASTIA, April 2, 1849, D. 49, 2, 80; S. 49, 2, 338.

In Belgium the Code Napoléon is law, so that the situation is the same as in France. The Belgian writers agree with the French that a marriage celebrated contrary to the implied prohibition of the Code would be valid.<sup>26</sup>

Under the modern law of Italy marriage by proxy is prohibited except with respect to the King and members of the royal family.<sup>27</sup>

A marriage cannot be celebrated in Germany by proxy since the law of February 6, 1875, section 52 of that law requiring the personal presence of both parties.<sup>28</sup> A reservation is made in favor of the ruling families and the princely House of Hohenzollern.<sup>29</sup> The present Civil Code made no change in the law.<sup>30</sup>

In Austria the parties may marry by proxy with the consent of the government.<sup>31</sup> The person with whom the marriage is to take place must be mentioned in the power of attorney. A marriage celebrated without "such special power of attorney" is void. Some of the Austrian writers maintain that the word "such" does not refer to the governmental consent and that the absence of such consent does not render the marriage invalid.<sup>32</sup> Whether the power of attorney must be in writing is doubtful.<sup>33</sup>

<sup>26</sup> *ENCYCLOPÉDIE DE DROIT CIVIL BELGE*, 1 *CODE CIVIL*, Art. 36, No. 1, Art. 75, No. 6; 2 LAURENT, *supra*, No. 427; 1 THIRY, *COURS DE DROIT CIVIL*, No. 265.

<sup>27</sup> See FOSCHINI, *I MOTIVI DEL CODICE CIVILE DEL REGNO D'ITALIA*, 171; 1 BORSARI, *COMMENTARIO DE CODICE CIVILE ITALIANO*, § 254; 1 CATTANEO, *IL CODICE CIVILE ITALIANO ANNOTATO*, 82.

<sup>28</sup> *REICHSGESETZBLATT*, 1875, 23. So formerly in Prussia, A. L. R. Pt. 2, Tit. 1, § 167; 3 DERNBURG, *PREUSSISCHES PRIVATRECHT*, 4 ed., 37.

<sup>29</sup> § 72 of above law. The same reservation is contained in Arts. 32, 46, *INTRODUCTORY LAW, CIVIL CODE*.

<sup>30</sup> A motion made before the second Code Commission to allow marriage by proxy when the bridegroom was in a non-European state was rejected. The need of such an exception did not appear sufficiently great, especially in view of the fact that since the law of May 4, 1870, Germans may marry abroad before a diplomatic or consular officer. 5 *PROTOKOLLE*, 51 *et seq.*; 2 ENDEMANN, *LEHRBUCH DES BÜRGERLICHEN RECHTS*, 8 and 9 ed., Pt. 2, 83; 4 PLANCK, *BÜRGERLICHES GESETZBUCH*, 3 ed., 4; 4 STAUDINGER, *KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH*, 7 and 8 ed., 66.

<sup>31</sup> Article 76, Civil Code. The consent will be given only if sufficient reasons appear. 1 NIPPEL, *ERLÄUTERUNG DES ALLGEMEINEN BÜRGERLICHEN GESETZBUCHS DER OESTERREICHISCHEN MONARCHIE*, 336.

<sup>32</sup> 1 DOLLNER, *HANDBUCH DES IN OESTERREICH GELTENDEN EHRECHTS*, 308, 311-12; 5 STÄLIN, *ZEITSCHRIFT FÜR KIRCHENRECHT*, 158; 1 STUBENRAUCH, *COMMENTAR ZUM OESTERREICHISCHEN ALLGEMEINEN BÜRGERLICHEN GESETZBUCH*, 7 ed., 178. *Contra*, v. KIRCHSTETTER, *COMMENTAR ZUM OESTERREICHISCHEN ALLGEMEINEN BÜRGERLICHEN GESETZBUCH*, 5 ed., 88.

<sup>33</sup> 1 STUBENRAUCH, *supra*, 77.

Belgium, France, and Italy have authorized marriage by proxy again during the present war. The Belgian law of May 30, 1916, provides that "during the duration of the war either or both of the parties may appear before the officer of the civil status either in person or by a special and authentic power of attorney."<sup>34</sup> According to Masson,<sup>35</sup> the law was passed for the benefit of Belgian soldiers residing abroad. The wording of the law gives it a general application.

The French law of April 4, 1915,<sup>36</sup> authorized soldiers and sailors with the colors to marry for grave reasons by proxy with the permission of the minister of justice and of the minister of war or the minister of the navy. A circular of the minister of justice of April 8, 1915, defines more fully the object of the law and the particular steps to be followed.<sup>37</sup>

Soldiers and sailors, employees of the Army and Navy, and persons in the service of the Army and Navy, were authorized in Italy to marry by proxy by a decree of June 24, 1915.<sup>38</sup>

<sup>34</sup> MASSON, *LA LÉGISLATION DE GUERRE*, London, 1917, 146.

<sup>35</sup> *Ibid.*, 145.

<sup>36</sup> DUVERGIER, *LA LÉGISLATION COMPLÈTE DES LOIS, ETC.*, 1915, 113.

The law of August 19, 1915, has extended the benefit of the law of April 4 to French prisoners of war in Germany. CLUNET, 1916, 864.

<sup>37</sup> DUVERGIER, *supra*, 1915, 119, 120.

As grave reasons the following are specified: (1) the existence of illegitimate children; (2) pregnancy; (3) imminent death of either party; (4) promise to marry before mobilization and service in a place dangerous to life.

The proxy must be at least twenty-one years of age and be of the male sex. He must not be a relative within the prohibited degrees of relationship, nor have been convicted of crime.

The power of attorney must be executed in accordance with the law of June 8, 1893, relating to acts of persons in the army.

For a criticism of the above provisions see Albert Wahl, "*Mariage par Procuration*," *REVUE TRIMESTRIELLE DE DROIT CIVIL*, 1915, 5.

<sup>38</sup> 67 LA LEGGE (*Supplemento Legislativo*), Col. 511; CLUNET, 1917, 1172.

The power of attorney must be special and under penalty of nullity must indicate (1) the first and last name of the person giving the proxy; (2) the age and the place of birth of himself and of the person with whom he contemplates matrimony; (3) if he is a soldier, his rank and the regiment to which he belongs. The power of attorney must be executed in the presence of two witnesses, in conformity with article 2 of the decree of May 23, 1915. The marriage is valid notwithstanding a defect in the power of attorney at the expiration of six months after the husband has left the military service.

67 LA LEGGE (*Supplemento Legislativo*), Col. 511; CLUNET, 1917, 1172.

An agreement was entered into between the French and Italian governments according to which Italian soldiers may get married by proxy in France under the conditions prescribed by the Italian decree of June 24, 1915, and by way of reciprocity

As for England, marriage by proxy is incompatible with the modern marriage acts.<sup>39</sup> The marriage act of 1898 prescribes that the parties must say in the presence of the registrar or authorized person and of the witnesses, "I call upon these persons here present to witness that I, AB, do take thee, CD, to be my lawful wedded wife [or husband]," or in lieu thereof the following words: "I, AB, do take thee, CD, to be my wedded wife [or husband]." These provisions evidently contemplate the personal presence of the parties and thus preclude the possibility of marrying by proxy.

With respect to this country the matter is not free from difficulty. In some of the states, in which the common-law marriage is no longer recognized, the statutes manifestly require the personal presence of the parties. In other states the statutes are not so clear. In the great majority of states the common-law marriage is still valid, notwithstanding modern statutes relating to the solemnization of marriage.<sup>40</sup> Is not marriage by proxy valid in these states? The answer will depend in the first place upon the question whether marriage by proxy was recognized by the English law at the time our colonies were settled. On this point there can be little doubt. We need not inquire here whether the general Canon Law had force in England *proprio vigore* before the time of the Reformation or whether it required acceptance by the King's Ecclesiastical Law.<sup>41</sup> As regards marriage by proxy we have the clearest proof that the Canon Law was so accepted in England, for we find in Lyndwood's *Provinciale*, written in 1430, which contains the accepted constitutions of the Church of England the following:<sup>42</sup>

*"Contractibus matrimonialibus qui non solum possunt fieri utraque parte præsente, sed altera absente ut videlicet contrahatur matrimonium per procuratorem, sicut legitur et notatur de procuracione c. ulti. li. vi et in hoc casu requiritur mandatum speciale ut ibi dicitur: nec potest talis procurator alium substituere, ut ibi dicitur. Absque speciali mandato et si revocetur mandatum talis procuratoris etiam ipso ignorante re integra non tenebit*

French soldiers may be married by proxy before the proper Italian officer of the civil status upon compliance with the provisions of the French law of April 4, 1915. See note of Minister of Justice, CLUNET, 1917, 1171.

<sup>39</sup> MARRIAGE ACT, 1836, 6 & 7 WILL. IV, c. 85, § 20; MARRIAGE ACT, 1898, 61 & 62 VICT., c. 58, § 6.

<sup>40</sup> The states are enumerated in L. R. A. 1915E, 19-20; ANN. CAS. 1912D, 598 ff.

<sup>41</sup> In regard to this question see Maitland, "Canon Law in England," 11 ENG. HIST. REV., 446; OGLE, THE CANON LAW IN MEDIEVAL ENGLAND, London, 1912.

<sup>42</sup> Bretton-Hopyl edition, 1505. Fol. CXLVIII.



*contractus ut ibi dicitur. Ratio est quia deficit consensus mandantis et sic videtur quod ubicunque actus gesti per procuratorem debet adesse verus consensus Domini pro substantia actus non est necesse quod revocatio transeat in notitiam procuratoris."*

The English law thus adopted the provisions of the Canon Law relative to marriage by proxy. No change was made in this respect by the Reformation. In the reign of Henry VIII the clergy was prohibited from enacting constitutions and ordinances without the King's consent, but the existing Canon Law was continued in force.<sup>43</sup> A revision of the Canon Law by a commission of thirty-two members was contemplated by that statute but this revision was never consummated. Mary the Catholic<sup>44</sup> repealed the above law but it was reënacted under Elizabeth.<sup>45</sup> The statute of Henry VIII has remained the basis of English ecclesiastical law except in so far as the latter may have been changed by special legislation.

That marriage by proxy was a part of the English law until the eighteenth century would appear from Swinburne's treatise on Espousals in which he says:<sup>46</sup>

"Not only such Persons as be present, but those Persons also which are absent may contract Spousals or Matrimony together. So did *Isaac* and *Rebecca*, as it appears in the Sacred Scriptures. Betwixt them that be absent, Spousals or Matrimony may be contracted three manner of ways; that is to say, by *Mediation* of their Proctors, or of *Messengers*, or of *Letters*; provided nevertheless in every of those Cases, that the Parties have some notice or intelligence the one of the other, at hand by *Fame* or *Report*; for unto those who be utterly *unknown* to us, we cannot yield our Consent, (without the which it is impossible to contract Matrimony or Spousals) no more than it is possible for us to love them, of whom we have never heard."

Swinburne thereupon enters upon a lengthy explanation of the subject, as regards the sufficiency of the power of attorney, the words to be used by the proxy, *et cetera*.

<sup>43</sup> 25 HEN. VIII, c. 19. The statute contains the following provision: "That such canons, constitutions, ordinances, and synodals provincial being already made, which be not contrariant or repugnant to the laws, statutes and customs of this realm, nor to the damage or hurt of the King's prerogative royal, shall now still be used and executed, as they were afore the making of this act, till such time as they be viewed, searched, or otherwise ordered or determined by the said two and thirty persons, or the more part of them, according to the tenor, form and effect of this present act."

<sup>44</sup> 1 & 2 PH. & M., c. 8.

<sup>45</sup> 1 ELIZ., c. 1.

<sup>46</sup> SWINBURNE, ESPOUSALS, 2 ed., 162.

Did marriage by proxy become a part of the common law of this country? In the absence of decisions on the point no absolutely certain answer can be given to this question. In favor of the validity of marriage by proxy the following may be said. The American colonies are deemed to have brought with them the English law of marriage, so far as it was adapted to their environment. They accepted the then prevailing view that a marriage *de praesenti* without a religious ceremony constituted a perfect marriage, although the English House of Lords has since declared in the famous case of *Regina v. Millis*<sup>47</sup> that this has never been the English law. That such consent might be expressed by an agent was admitted by the Roman law, by the Canon Law, and, according to Swinburne, by the English law as late as the eighteenth century. If marriage by proxy did not become law in this country it must have been because it did not suit our conditions. A comparison of the conditions in England and in the American colonies would lead to the conclusion, however, that during our colonial days there existed stronger reasons for the recognition of marriage by proxy in this country than ever existed in England. Many a colonist must have left his sweetheart behind when he first ventured over seas. Others, without being engaged, must have desired, after becoming established in this country, to marry someone whom they had known in their native land. A trip to the old country for that purpose was long and costly. Unless marriage could be celebrated abroad by proxy the woman would be compelled to go to the man in a strange land and cross the seas unmarried. Marriage by proxy would enable the woman to become the man's wife before leaving her home.

Marriages by proxy have doubtless taken place in this country, but no record thereof can be found in the decisions of the courts.<sup>48</sup> That there are serious objections to marriage by proxy is apparent. The uncertainty in regard to the legal existence of such a

<sup>47</sup> 10 CL. & F., 534 (1844). That the decision of the House of Lords is historically unsound, see 2 POLLOCK AND MAITLAND, *supra*, 367 *et seq.*; BISHOP, MARRIAGE AND DIVORCE, 5 ed., § 276 *et seq.*; FRIEDBERG, *LEHRBUCH DES KIRCHENRECHTS*, 309 *et seq.*; HOWARD, *supra*, 316.

Marriage based upon mere present consent came historically to an end in England through Lord Hardwick's Act of 1753, 26 GEO. II, c. 33. HAMMICK, *THE MARRIAGE LAW OF ENGLAND*, 2 ed., 13.

<sup>48</sup> According to a newspaper report a man in Chicago married recently a woman in Egypt by proxy.

marriage arising from the fact that the power of attorney is revocable and may have been revoked without knowledge of the other party or the proxy prior to the celebration of the marriage would suggest of itself the expediency of prohibiting such a marriage. In view of the fact, however, that marriage by proxy was permissible in England until the eighteenth century and has been recognized in all countries so long as marriage rested upon mere consent, it must be regarded as valid in those states in which the common-law marriage still exists. Should this view be taken by the courts it would follow logically that marriage might be contracted in such a state by proxy, although neither of the parties was present when the consents were exchanged by the proxies.

## II

Turning from the internal law of marriage to marriage by proxy in its international aspects, it is apparent that the question relates to the formalities or to the mode in which the marriage must be celebrated. According to the generally accepted view a marriage is valid as regards the mode of celebration if it conforms to the law of the place of celebration.<sup>49</sup> In nearly all of the countries, including the United States, the rule *lex loci celebrationis* has a mandatory character, so that a marriage not celebrated in accordance with its provisions is void.<sup>50</sup> In Italy the marriage is valid if it satisfies as regards form either the law of the place of celebration or the national law of the parties.<sup>51</sup> Germany recognizes the same principle except that marriages celebrated in Germany must con-

<sup>49</sup> *Belgium*: Brussels, May 29, 1852, Pas. 52, 2, 237. *England*: *Kent v. Burgess*, 11 Sim. 361 (1840); *Butler v. Freeman*, Ambl. 303 (1756); DICEY, *CONFLICT OF LAWS*, 2 ed., rule 172; WESTLAKE, *PRIVATE INTERNATIONAL LAW*, 5 ed., 60. *France*: App. Paris, Dec. 18, 1837, S. 38, 2, 113; Trib. Civ. Seine, July 27, 1897, CLUNET, 1897, 1029. *United States*: See note 57 L. R. A., 155-59; STORY, *CONFLICT OF LAWS*, 8 ed., 216; 1 WHARTON, *CONFLICT OF LAWS*, 3 ed., 366 *et seq.*

The rule is applied in England and in this country although there has been an evasion of the local law. *Compton v. Bearcroft*, cited in *Middleton v. Janverin*, 2 Hagg. C. R. 444, note; *Simonin v. Mallac*, Sw. & Tr. 67 (1860). See also *Medway v. Needham*, 16 Mass. 157 (1819); *Sturgis v. Sturgis*, 51 Ore. 10, 93 Pac. 696 (1908); *State v. Hand*, 87 Neb. 189, 126 N. W. 1002 (1910); *Leefield v. Leefield*, 85 Ore. 287, 166 Pac. 953 (1917). *Contra*, *Cunningham v. Cunningham*, 206 N. Y. 341, 99 N. E. 845 (1912).

<sup>50</sup> BUZZATI, *L'AUTORITÀ DELLE LEGGI STRANIERE RELATIVE ALLA FORMA DEGLI ATTI CIVILI*, 187 *et seq.*

<sup>51</sup> Article 9, Preliminary Dispositions, CIVIL CODE.

form in respect of the mode of celebration to the German law of marriage.<sup>52</sup>

From the standpoint of the conflict of laws of the United States the law of the place of celebration will decide, therefore, whether a marriage by proxy is valid. If the *lex loci celebrationis* allows this mode of celebration it will determine not only all the special questions relating to the power of attorney but also the formalities applicable to marriage in general. This law would decide, for example, whether the power of attorney must be in writing, whether the government consent to such marriage is necessary, and the effect of a failure to obtain such consent. It will control the question whether a mere consent to take each other from the present moment as husband and wife is sufficient to constitute the parties husband and wife, or whether they must be joined in marriage by some official before witnesses and after the publication of banns, etc.

Marriage by proxy is possible under certain conditions in Austria, Belgium, France, and Italy, but it is evident that the legislation relating to marriage by proxy operates only as a waiver of the requirement of personal presence. In all other respects the local provisions relating to the celebration of marriage must be observed. These provisions are far more stringent than those prescribed by the statutes governing the marriage ceremony in this country. The ceremony itself can be performed only by an officer of the civil status, and one of the parties must be domiciled in the place where the marriage is to be celebrated or have lived there for a specified period of time.<sup>53</sup> The parties must also submit various certificates relating to birth, parental consent, publication of banns, etc., before the marriage can be performed.<sup>54</sup> For an American it is very difficult, if not impossible, to satisfy these requirements. We have no registers of the civil status in this country; hence no official birth certificates as required by the foreign law can be obtained. Where no birth certificates can be presented the foreign law, it is true, provides a method for proving the time of birth, but such

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<sup>52</sup> Article 13, Introductory Law, CIVIL CODE; 5 PLANCK, BÜRGERLICHES GESETZ-  
BUCH, 3 ed., 50.

<sup>53</sup> Belgium, CIVIL CODE, Art. 74; France, Art. 4 of Law of June 21, 1907, repealing  
Art. 74, CIVIL CODE, DUVERGIER, 1907, 287; Italy, Art. 93, CIVIL CODE.

<sup>54</sup> Belgium, CIVIL CODE, Arts. 63 *et seq.*, and Law of December 26, 1891. France,  
CIVIL CODE, Arts. 63 *et seq.*, and Law of June 21, 1907; DUVERGIER, 1907, 287;  
Italy, CIVIL CODE, Art. 79.

method is frequently of no avail to Americans. For example, Article 70 of the French Civil Code authorizes an *acte de notoriété* as a substitute for a birth certificate, but this involves a proceeding before a French court in which the facts relating to birth and parentage must be proved by seven witnesses.<sup>55</sup> In Italy the parties must be competent to marry each other not only under the national law but also according to the Italian law.<sup>56</sup> The capacity to marry according to the foreign law must be proved by an official certificate. As there is no American official who is authorized by law to execute such a certificate<sup>57</sup> an American can

<sup>55</sup> The practical impossibility of satisfying these requirements has led in France to an arrangement between the Department of Justice and the American Embassy under which courts will accept a certificate based upon affidavits by an American attorney whose competency is certified by the American Embassy, setting forth the circumstances of birth. See KELLY, *THE FRENCH LAW OF MARRIAGE, MARRIAGE CONTRACTS AND DIVORCE*, 2 ed., 63.

<sup>56</sup> Article 102, Civil Code; App. Ancona, March 12, 1884, *Foro Italiano*, 1884, 1, 574.

Article 102 of the Civil Code reads as follows: "A foreigner's capacity to contract matrimony is governed by the law of the country to which he belongs.

"The foreigner is also subject to the impediments mentioned in Sec. 2, Chap. I, of the present title (Arts. 55 *et seq.*)."

Among the text-writers there is the greatest dispute concerning the meaning of Article 102. Most of them maintain that the foreigner must comply with the law of his own country and that of Italy. Emilio Bianchi, "*Studi di Diritto Internazionale Privato*," 10 *ARCHIVIO GIURIDICO*, 433; 9 DE FILIPPIS, *CORSO COMPLETO DI DIRITTO CIVILE ITALIANO COMPARATO*, 185-86; 1 LOMONACO, *ISTITUZIONI DI DIRITTO CIVILE ITALIANO*, 316; 7 PACIFICI-MAZZONI, *ISTITUZIONI DI DIRITTO CIVILE ITALIANO*, 3 ed., 83; 1 RICCI, *CORSO DI DIRITTO CIVILE*, 2 ed., No. 260. But see 5 BIANCHI, *CORSO DI CODICE CIVILE ITALIANO*, 828; 1 BORSARI, *COMMENTARIO DEL CODICE CIVILE ITALIANO*, 382; ESPERSON, *IL PRINCIPIO DI NAZIONALITÀ APPLICATO ALLE RELAZIONI CIVILI INTERNAZIONALI*, 77-78.

According to some writers there is no general test, but each provision must be examined with a view of ascertaining whether it affects the public policy of Italy or only the private interests of the contracting parties. 2 FIORI, *DIRITTO INTERNAZIONALE PRIVATO*, 3 ed., Nos. 533-34; 2 GALDI, *COMMENTARIO DI CODICE CIVILE*, 597.

<sup>57</sup> A marriage by an American was annulled in Italy a few years ago on the ground that the American consular agent who had executed such a certificate was not authorized by American law to do so. TRIB. CIV. DE ROME, June 19, 1911, *REVUE DE DROIT INTERNATIONAL PRIVÉ*, 1912, 493.

Continental countries regard the parental consent as relating to capacity and not to the formalities of marriage. App. Besançon, January 4, 1888, D. 89, 2, 69; App. Florence, August 7, 1907, *LA LEGGE*, 1907, 2230; A. G. Celle, January 15, 1870, 24 SEUFFERT'S *ARCHIV*, 1. The consent of parents was formerly regarded in France as relating to the formalities of the marriage. See decision of Parliament of Paris of June 26, 1634, given by 1 BOUHIER, *OBSERVATIONS SUR LA COUTUME DU DUCHÉ DE BOURGOGNE*, Chap. 28, 774.

marry in Italy only if his capacity has been established in an Italian court.<sup>58</sup>

An American, whether he be a soldier or a civilian, who can meet the above requirements will generally be able to be married in person, so that the foreign legislation on the subject of marriage by proxy is not likely to have great practical importance so far as the United States are concerned.

It is possible, of course, that an American soldier, while he was a prisoner in Germany or Austria, may have desired to marry by proxy a young lady to whom he had become engaged in Belgium, France, or Italy. Such a marriage could not take place in Germany because the German law does not recognize marriage by proxy. If the American were a prisoner in Austria the marriage could be celebrated there only with the permission of the government, and it is most improbable that such a consent could be obtained. Could the marriage be performed at the place of the residence of the fiancée in Belgium, France, or Italy? As the Belgian law of May 30, 1916, appears to have a general application it would seem as if such a marriage could be celebrated in Belgium. In regard to France and Italy there is doubt. The legislation of these countries applies to persons connected with the Army or Navy, and the question is whether it refers exclusively to the national Army and Navy. In the opinion of Professor Wahl<sup>59</sup> the French legislation applies also to the Army and Navy of the Allies. If this view is correct the

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<sup>58</sup> Article 75, CIVIL CODE; 5 BIANCHI, *supra*, 833; 1 LOMONACO, *DIRITTO CIVILE ITALIANO*, 319.

Such a proceeding may be instituted upon a declaration from an American consul that the American authorities do not execute such certificates of capacity. BUZZATI, *LE DROIT INTERNATIONAL PRIVÉ D'APRÈS LES CONVENTIONS DE LA HAYE I, LE MARIAGE*, 279.

A certificate of capacity according to the national law was formerly required in France by a circular of the Minister of Justice of March 14, 1831 (see S. 36, 2, 342) but this requirement is no longer in force. According to a note of the Minister of Justice of August 1, 1911, the French officer of the civil status can no longer require of foreigners proof of their capacity to marry according to their national law. SURVILLE & ARTHUYS, *DROIT INTERNATIONAL PRIVÉ*, 6 ed., 373. Under the former requirement it had become the settled practice in France to accept as a substitute for such certificate the opinion of an American attorney whose competency was certified by the American Embassy, that according to the law of the state to which the party belonged parental consent and the publication of banns were not required. KELLY, *supra*, 57-63.

<sup>59</sup> Wahl, "*Mariage par Procuration*," *REVUE TRIMESTRIELLE DE DROIT CIVIL*, 1915, 15.

American prisoner in Germany could marry his fiancée in France, provided the French legislation is applicable to American soldiers and sailors who are prisoners in foreign countries.<sup>60</sup>

Marriage by proxy, so far as American soldiers are concerned, would have a more practical bearing as regards marriages celebrated in this country. Many American soldiers must have been ordered abroad on such short notice that they were unable to get married before leaving. Suppose that one of these soldiers, feeling that the war might continue several years, should have asked a friend to act as his proxy in this country and that the marriage consents had been exchanged in his behalf with his fiancée in the state in which she lived. If the common-law marriage still existed in that state such marriage would probably be valid, as has been shown above. If the common-law marriage is not authorized in the state of her residence she might go to a neighboring state where it still exists and exchange marriage consents there with her fiancé's proxy. Such a marriage, if valid where celebrated, would be recognized by the other states of this country under the ordinary rules governing the conflict of laws. Even the courts of the home state whose law has been evaded would probably recognize the validity of the marriage. American courts have gone to the very extreme in sustaining marriages on grounds of policy, notwithstanding an evasion of the domestic law. As regards legal prohibitions to marry there is a conflict of view on the question, but there appear to be no modern cases in England or the United States which have refused to recognize, on the ground that there has been an evasion of the domestic law, a marriage validly celebrated in accordance with the law of the state where the marriage took place, where the difference in the law concerned merely matters of form. Inasmuch as the question whether a marriage may be entered into by proxy relates clearly to the formalities, a marriage so celebrated in conformity with the local law will be recognized, notwithstanding any evasion of the law of the state in which the parties were domiciled.<sup>61</sup> A logical

<sup>60</sup> The provisions of the law of April 4, 1915, were extended, with respect to French prisoners in Germany, by the Law of August 19, 1915. CLUNET, 1916, 864.

<sup>61</sup> Upon the reasoning of the court in *Freeman's Appeal*, 68 Conn. 533, 37 Atl. 420 (1897), it might be argued that inasmuch as marriage by proxy is prohibited in the state in which the power of attorney was given the power of attorney itself is void, so that no marriage can be entered into anywhere by virtue of that power of attorney. The conclusion of the court in the above case as regards the validity of the power of

application of the principle would enable the parties to get married in a state authorizing marriage by proxy without going there themselves, both parties being represented by proxies.<sup>62</sup>

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attorney is, however, obviously erroneous, and there is no likelihood that any court would follow it with respect to marriage by proxy.

<sup>62</sup> As this article was going through the press, the Judge Advocate General rendered an opinion in which he held that soldiers abroad might marry their sweethearts in the United States through interchanging a marriage contract by mail, provided that such marriage does not contravene state statutes, and that this method might properly be facilitated by the military authorities in France.



## UPSET PRICES IN CORPORATE REORGANIZATION

THE uncertainties, delay, and heavy expense involved in corporate reorganization, particularly where dissension arises among the security holders, would seem to indicate a defect in our law of corporations. The right of the majority of the stockholders of a corporation to control the corporate policy is, obviously, one of the salient reasons for the wide adoption of the corporate form in business; yet, conveniences of financing have brought about a change in the organization of corporations to which the law has not yet adjusted itself. The theory of the law is that the ownership of a corporation is vested in its stockholders; the truth is that to-day the substantial ownership of most large corporations, particularly public, service corporations, because of the lower cost of financing through the sale of bonds, is held not by the stockholders but by the bondholders. Most public utility bonds, as well as the secured obligations of many private corporations, are issued without any intent of being repaid; the money obtained therefrom is considered part of the capital invested.<sup>1</sup> Bondholders, unlike stockholders, stand in the position of tenants in common; in theory the consent of all the bondholders, not merely of a majority, is required before any action can be taken. So, whenever a corporation encounters difficulties, and the control of the corporation passes out of the hands of the stockholders, whose equity in the property has faded away, into the hands of the owners of the property, the bondholders, there is no convenient or facile procedure — no means of majority control — whereby the interests of the bondholders, or of other creditors, can be adjusted. Hence the confusion and litigation which accompanies a hostile reorganization.

Indeed, a corporate reorganization is looked upon commonly as a catastrophe; few recognize it as a natural phase of corporate growth. It has been estimated that fifty per cent of our American corporations have passed through some form of reorganization

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<sup>1</sup> See *Wilds v. St. Louis, etc. R.*, 7 N. E. 290, 293, 102 N. Y. 410 (1886).

in the last twenty years.<sup>2</sup> Corporate reorganizations, of course, are usually caused by insolvency; but not infrequently a sound enterprise, earning an adequate return, will be hampered by an unsound financial structure involving excessive fixed charges, such as bond interest; or again, the difficulty of refunding a matured bonded indebtedness during a time of financial stringency, or the urgent need of additional capital for improvements, or the weight of an unfunded debt, will make a reorganization necessary. Reorganization, in brief, must be viewed as a normal phase of corporate life; the frequency of reorganizations makes it necessary for the law to provide a facile procedure; and the basis of such procedure must be fair majority control. It is the purpose of the writer to indicate how this right of the majority to control during corporate reorganizations, under the guidance of the court, can be conveniently secured without the violation of any constitutional rights, thus removing many of the present uncertainties, and much of the delay and cost of corporate reorganizations; and also to show how the authorities, throughout the various phases of corporate reorganization, are slowly recognizing this right of fair majority control.

## I

The English procedure of "Arrangements" — such is the apt term used — approaches closely the desired procedure. The control of the majority over the minority, during the reorganization of public service corporations, is fully established by Act of Parliament. Formerly an Act was passed for each reorganization, and that is the practice in Canada to-day;<sup>3</sup> a general statute in England,<sup>4</sup> however, provides for all such situations, leaving it to the courts to pass upon the fairness of the reorganization plan instead of Parliament itself. Lord Cairns has tersely described the purpose of this act as follows:

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<sup>2</sup> United States District Judge Hough, of the Southern District of New York, as quoted by Paul D. Cravath in "Reorganization of Corporations," STETSON, LYNDE, *et al.*, *SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION*, 154.

<sup>3</sup> *Canada Southern Ry. v. Gebhard*, 109 U. S. 527, 534 (1883). See *Jones v. Canada, etc. Ry.*, 46 U. C. Q. B. 250, 261 (1881), where Osler, J., said, in discussing such statutes, " . . . Legislation of this kind, of which, be it said, our books are full." See also, JONES, *CORPORATE BONDS AND MORTGAGES*, 3 ed., § 617.

<sup>4</sup> *Railway Companies Act*, 1867, 30 & 31 Vict. c. 127.

"Hitherto such companies, if they desired to raise further capital to meet their engagements, have been forced to go to Parliament for a special Act, enabling them to offer such advantages by way of preference or priority to persons furnishing new capital as would lead to its being obtained. And Parliament, in dealing with such applications, has been in the habit of considering how far the arrangements proposed as to such new capital were assented to or dissented from by those who might be considered as the proprietors of the existing capital of the company, either as shareholders or bondholders. The object of the present Act . . . appears to be to dispense with a special application to Parliament of the kind I have described, and to give a Parliamentary sanction to a scheme filed in the Court of Chancery, and confirmed by that Court, and assented to by certain majorities of shareholders and of holders of debentures and securities *ejusdem generis*." <sup>5</sup>

Under the English Act, the directors of a corporation in difficulty file a scheme of arrangement with the Chancery Division of the High Court. The filing of the scheme gives the court jurisdiction to enjoin actions against the Company. The assent in writing of three-fourths in value of any class of security holders, other than common stockholders, binds the minority members of each class; in the case of common stockholders the assent of the corporation at a special meeting is sufficient. The court ascertains whether a majority in each class has assented, and whether the scheme is fair and just to all concerned; if the court approves, the scheme is enrolled and becomes effective as an Act of Parliament.<sup>6</sup> After enrollment no appeal is possible, although the court may in its discretion delay enrollment to allow an appeal.<sup>7</sup> Similar procedure is provided for in the case of most private corporations under the Companies Acts.<sup>8</sup>

An English debenture upon a railroad's properties, or upon the property of any public utility, differs, it is true, from the ordinary American bond issue in that the rights of the security holders are limited solely to the returns <sup>9</sup> from the property after the fashion

<sup>5</sup> Cambrian Railways Company's Scheme, L. R. 3 Ch. App. 278, 294 (1868).

<sup>6</sup> Railway Companies Act, 1867, 30 & 31, Vict. c. 127, §§ 6-22. See also 2 LINDLEY ON COMPANIES, 6 ed., 1261; HAMILTON'S COMPANY LAW, 3 ed., 525.

<sup>7</sup> Devon & Somerset Ry. Co., L. R. 6 Eq. Cas. 615 (1868).

<sup>8</sup> Companies Act, § 120, 8 Edw. 7, c. 69. See also HAMILTON'S COMPANY LAW, 3 ed., 527.

<sup>9</sup> Bowen v. Brecon, etc. Ry., L. R. 3 Eq. Cas. 541, 547 (1867).

of a "Welsh Mortgage" or the "*vivium vadium*" of Lord Coke;<sup>10</sup> but that does not affect a comparison with the English procedure of "arrangements." The public utility, under a debenture, to use the often-quoted phrase of the English courts, is viewed "as a fruit-bearing tree, the produce of which is the fund dedicated by the contract to secure and pay the debt;"<sup>11</sup> or, as the English courts also state it, the "living and going concern thus created by the Legislature must not, under a contract pledging it, as security, be destroyed, broken up, or annihilated."<sup>12</sup> In brief, a debenture holder cannot destroy the usefulness of the property to the public in order to get payment of his obligation. This same rule applies in America. A public utility is charged with an obligation to the public; its property is dedicated to the public use, and the owner thereof, or the holder of any lien thereon, cannot so change the nature or condition of the property as to interfere with the public's rights.<sup>13</sup> Thus in substance there is no difference between an American bond or an English debenture, and the situation in each case during reorganization is comparable.

The method of "Arrangements" in force in England, thus recognizes the two fundamental necessities of all reorganizations: first, a means of forcing the minority to abide by a plan of reorganization acceptable to the majority; second, a method of de-

<sup>10</sup> See 4 KENT. COM., 6 ed., 137.

<sup>11</sup> Lord Cairns in *Gardner v. London, Chatham & Dover Ry. Co.*, L. R. 2 Ch. App. Cas. 201, 217 (1867). See also *Marshall v. South Staffordshire, etc. Co.*, [1895] L. R. 2 Ch. D. 36.

<sup>12</sup> *Gardner v. London, Chatham & Dover Ry. Co.*, *supra*.

<sup>13</sup> *Munn v. Illinois*, 94 U. S. 113, p. 126 (1876). The question as to whether or not one voluntarily engaging in a public service can voluntarily withdraw on due notice to the public is not entirely settled in America. In *Munn v. Illinois* at page 126 this right to withdraw was recognized; see also *Weems Steamboat Co. v. Peoples Co.*, 214 U. S. 345, 356 (1909). Yet, as a practical question, a utility, needed by the public will not be allowed to cease serving the public, and this rule now insisted upon by State Regulatory Bodies probably will be finally accepted by the courts. Moreover, a utility must give adequate service; a partial withdrawal resulting in inadequate service or a temporary cessation of service will not be allowed. *San Antonio St. Ry. Co. v. Texas*, 90 Tex. 520, 39 S. W. 926 (1897). The public has an established right in every reorganization, *Central Trust Co. v. Missouri K. & T. Ry. Co.*, 246 Fed. 154, 156 (1917); and, even assuming that the bondholders could acquire the ownership of a property and completely terminate its continuance in the public service, yet they could not by reason of their position as creditors or owners, impair its usefulness so long as it continued in the public service. Thus the powers and security of holders of American public utility bonds is actually no greater than that of holders of English debentures despite frequent assertions to the contrary.

termining, preferably by the decree of the Chancellor, that the plan is not fraudulent or unduly oppressive as to minority interests. In America, although such procedure would not be a violation of the due process clause of the Federal Constitution, as to the rights of the minority, since it can be viewed as a form of bankruptcy or insolvency procedure, nevertheless, the contract rights of the minority would be impaired. The Supreme Court of the United States has so viewed the English procedure:

"Unless, as is the case in the States of the United States, the passage of laws impairing the obligation of contracts is forbidden, we see no good reason why such provision may not be made in respect to existing as well as prospective obligations. The nature of securities of this class is such that the right of legislative supervision for the good of all, unless restrained by some constitutional prohibition, seems almost necessarily to form one of their ingredients, and when insolvency is threatened, and the interests of the public as well as creditors, are imperilled by the financial embarrassments of the corporation, a reasonable 'scheme or arrangement' may, in our opinion, as well be legalized as an ordinary 'composition in bankruptcy.'" <sup>14</sup>

Because of this constitutional difficulty, reorganizations in America require a foreclosure sale under the mortgage or trust deed securing the bonds. Thus the procedure adopted unfortunately is that of the winding up of a business, or a complete change of ownership — a flat contradiction of the real purpose of a reorganization, which is simply an "arrangement" whereby a new financial structure can be established.<sup>15</sup> Such a foreclosure sale, in short, is a device rather than a fact. A new purchaser with sufficient means to buy the property outright and pay off the bondholders practically never appears; the old security holders must be the purchasers under the foreclosure sale.<sup>16</sup> Consent decrees are entered by the court if all the bondholders reach an agreement; and, as will be pointed out later, the courts, recognizing such consent decrees of sale to be merely devices to facilitate reorganization, rather than the adjudication of rights, do not hesitate to set aside such decrees, often with startling results. For convenience, outstanding bonds may be paid to the master under the foreclosure

<sup>14</sup> *Canada Southern Ry. Co. v. Gebhard*, 109 U. S. 527, 535 (1883).

<sup>15</sup> *Canada Southern Ry. Co. v. Gebhard*, *supra*. See 4 COOK ON CORPORATIONS, 7 ed., § 889, pp. 3496, 3498.

<sup>16</sup> *Investment Registry Limited v. Chicago & M. E. R. Co.*, 212 Fed. 594, 609 (1913).

sale as part of the purchase price. "It is not deemed proper and necessary to require purchasers to put up cash with one hand to take it down with the other,"<sup>17</sup> as one court has said. And in such sales, the vital and controlling feature, although this has not yet been recognized to be the fact, is the tendency of the courts to fix an upset price as a minimum at which the property can be bought in by the majority bondholders so that the minority may not receive a sum less than the value of their bonds.<sup>18</sup> Our courts, particularly the lower federal courts, have adopted this procedure because they felt that the theory of a public sale under foreclosure was unsound, and that there would be no competitive bidding. Therefore they desired to protect the minority from being despoiled by the majority who could "chill the sale,"<sup>19</sup> *i. e.* bid the property in for a pittance and give the minority bondholders nothing.

But the American courts have gone much too far in this solicitude for the interests of the minority. The fixing of an upset price to protect minority bondholders means the intervention of the court at the controlling moment of a reorganization with the purpose, or result, of defeating the control of the majority. If the plan of reorganization is approved by the majority of the securityholders of all classes; if it appears fair and just to the court after full hearing of the contentions of the minority; and if the plan be open to the dissenting bondholders on an equality with the majority, the court should refuse to fix an upset price, or should fix a purely nominal price, disregarding the value of the property, and solely in order to take care of the mechanics of determining the value of the bonds of the majority turned in to the master as payment for the property. Thus the majority could force the minority to accept their plan of reorganization by buying the property up for an insignificant sum, and offering the minority the alternative of taking virtually nothing in cash, or of taking new securi-

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<sup>17</sup> *Schuler v. Hassinger*, 177 Fed. 119, 126 (1910). See also *Easton v. German-American Bank*, 127 U. S. 532, 539 (1888); *Duncan v. Mobile, etc. R. R.*, 3 Woods (U. S.) 597; 8 Fed. Cas. 25, 27 (1879); *Rumsey v. People's Ry.*, 154 Mo. 215, 55 S. W. 615, 626 (1899).

<sup>18</sup> See, as to the practical phases of the upset price, James Byrne, "Foreclosure of Railroad Mortgages in the United States Courts," in STETSON, LYNDE, *et al.*, *SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION*, 141.

<sup>19</sup> See JONES, *CORPORATE BONDS AND MORTGAGES*, 3 ed., § 618.

ties on an equality with the majority under the reorganization plan. The recognition of this right in the majority, and the refusal to fix an upset price, will make possible the same facile and expeditious procedure as is found under English "Arrangements," without unwise imitation of English methods and consequent violence to our American procedure, and also without the denial of any constitutional rights.

## II

The Supreme Court of the United States<sup>20</sup> has recognized the validity of a reorganization effected under this precise plan. Indeed, Chief Justice Waite, who wrote the opinion in the *Shaw* case, as appears from his opinion in the *Canada* case, was an admirer of the English method of "Arrangements" and recognized fully the necessity of majority control in corporate reorganization. In this case the railroad company had issued two series of bonds; one for \$3,500,000 secured by a mortgage on the uncompleted railroad; a second issue of \$5,000,000 secured by a mortgage of its federal land grants. Upon the insolvency of the railroad company the trustees brought foreclosure proceedings; a committee representing the holders of \$6,097,000 of the bonds bought in the property at the foreclosure sale for the nominal sum of \$50,000 and incorporated in the decree confirming the sale a stipulation allowing all bondholders to participate on an equality in the reorganization by receiving stock in the new company. After confirmation of the sale, minority bondholders sought to set it aside; this the Supreme Court refused to do, saying by Chief Justice Waite:

"To allow a small minority of bondholders representing a comparatively insignificant amount of the mortgage debt, in the absence of any pretence even of fraud or unfairness, to defeat the wishes of such an overwhelming majority of those associated with them in the benefits of their common security, would be to ignore entirely the relation which bondholders, secured by a railroad mortgage, bear to each other. Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and in executing his trust may exercise his own discretion within the scope of his powers. If there are differences of opinion among

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<sup>20</sup> *Shaw v. Railroad Co.*, 100 U. S. 605, 611 (1879).

the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority, acting in good faith and without collusion, if what they ask is not inconsistent with the provisions of his trust."<sup>21</sup>

The same court<sup>22</sup> considered a somewhat similar question some seven years later, and took an even more advanced view. Here the trustees under two mortgages on the same railroad property were following the desires of the majority of the bondholders under each mortgage in bringing about an immediate sale of the property so as to enable a reorganization to be carried out, and were seeking to have disputes, as to the priority of liens, postponed until after the foreclosure, and determined upon distribution of the proceeds of the sale.

Chief Justice Waite said, in delivering the opinion of the court upholding the acts of the trustees:

"As a rule the trustee of a railroad mortgage represents the bondholders in all legal proceedings carried on by him affecting his trust to which they are not actually parties. There is here no evidence to show fraud or unfairness on the part of the trustees. The company is satisfied with what they are doing, and so are all the bondholders under the Rawle mortgage and a majority of those under that to Devereux. As was said in *Shaw v. Railroad Company*, 100 U. S. 605, 612: 'Railroad mortgages are a peculiar class of securities . . .' Here the majority want an immediate sale. In this the trustees both agree, as does the railroad company itself. There is no evidence whatever of a want of good faith in any one. The court below, having the practical workings of the receivership under its own eye, did not hesitate to say that 'it is now entirely clear that the best interests of all parties concerned will be promoted by a speedy sale,' and we see nothing to the contrary."

The Supreme Court of Errors of Connecticut<sup>23</sup> has followed these decisions of the Supreme Court. A minority bondholder sought to enjoin a foreclosure sale and reorganization from being carried out without his consent. The court trenchantly said of the plaintiff's rights as a minority bondholder to insist upon the necessity of unanimous consent:

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<sup>21</sup> *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 532 (1883).

<sup>22</sup> *First National Bank v. Shedd*, 121 U. S. 74, 86 (1886).

<sup>23</sup> *Gates v. Boston & N. Y. Air-Line R. Co.*, 53 Conn. 333, 342, 345, 5 Atl. 695, 698, 701 (1885).



"In making this claim the plaintiff ignores, or subordinates to his own claim, both the private rights of his co-bondholders and public rights vested in trust in the state, while upon every true theory and exposition of his contract the rights of the public are superior to his private rights, and the rights and interests of his co-bondholders are, equally with his own to be protected by the law. The plaintiff's argument treats this matter as one of strict legal private right of an individual creditor against or to private property of an individual debtor, instead of a claim of exceptional character upon property of peculiar nature, in which private rights of others and the right of the public exist, which must be regarded and protected. . . . So, too, in relation to the other bondholders, it is manifest that each bondholder enters into contract relation with each and all of his co-bondholders. His right to appropriate the security in satisfaction of his bond in such lawful manner as he may choose, is modified by the same existent right in every other holder. His absolute right of control is limited, not only by the express provisions of the bond and mortgage, but also, in great measure, by the peculiar nature and character of the security."

It is to be noted that all of these cases involved railroad companies, and that the public interest in an expeditious and sound reorganization was a moving cause with the court in recognizing the right of the majority to control. Indeed the courts have gone far in dealing with private contract rights where public utilities are concerned. The familiar doctrine of *Fosdick v. Schall*<sup>24</sup> that the public interest requires the court to displace the prior lien of bondholders and give a preference to unsecured creditors who hold claims for "the current debts of a railroad company contracted in the ordinary course of its business, . . . to keep the railroad itself in condition to be used with reasonable safety for the transportation of persons and property"<sup>25</sup> needs no elaboration. Again,

<sup>24</sup> 99 U. S. 235, 249 (1878). It is interesting to note that the rather startling though sound doctrine of *Fosdick v. Schall*, with its seeming denial of bond-holders' constitutional rights was established by Chief Justice Waite, who had so clear an insight into the realities of corporate reorganizations. In reaching the conclusion he did in *Fosdick v. Schall* he laid stress upon the fact that the legal rights of bond-holders among themselves had to be modified as appears from the following language:

"It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation."

<sup>25</sup> Justice Harlan, in delivering the opinion of the court, in *Southern Ry. Co. v. Carnegie Steel Co.*, 176 U. S. 257, 285 (1900).

the courts have held that the public interest involved in a railroad was such that the holders of conflicting liens arising from separate mortgages would not be allowed to tear the property apart so as to have separate sales of the constituent parts as they were strictly entitled to do.<sup>26</sup> This consideration of the public interest likewise demands a facile and direct method of reorganization by majority control. The public is concerned in not having a utility hobbled by a long receivership, and starved because of indiscriminate litigation between the owners, while a tremendous load of receiver's certificates accumulates, destroying, in substance, the bondholders' priorities; such conditions, obviously prevent the utility from giving efficient service. As Judge Hook said recently:

"Moreover, the public, though not a party to the record, has an interest in every railroad reorganization, accomplished by foreclosure, of which the court should take notice."<sup>27</sup>

And if majority control should be observed in the reorganization of public utilities, because it is facile and time-saving, and avoids the wasting of property, it should be adopted for the same reasons in the case of the reorganization of private corporations. The interests of bondholders in private corporations — indeed of investors in corporate securities generally — would be furthered by a certain and trustworthy procedure of corporate reorganization; such an improvement in the law would enhance the value of their securities.

To be sure, the court should not draw a plan of reorganization for the parties; nor should it force bondholders to accept a plan which has not already been approved by a large majority. It should limit its activity primarily to protecting the majority in their right to control, and in ascertaining whether or not a proposed plan is fair to all concerned, and, in case of public utilities, to the public as well as to the majority and to the minority. Public interest, powerful though it is, cannot induce a court of equity to carry out a reorganization and consolidation itself by the issuance of receiver's certificates although such a plan would greatly benefit

<sup>26</sup> *Farmers' Loan & Trust Co. v. Cape Fear Ry. Co.*, 82 Fed. 344, 347 (1897), and on appeal to the Circuit Court of Appeals for the Fourth Circuit, 87 Fed. 392, 400 (1898). *Chicago D. & V. Ry. Co. v. Loewenthal*, 93 Ill. 433, 450 (1879); *Gibert v. Washington City etc. Ry. Co.*, 33 Gratt. (Va.) 586, 609 (1880).

<sup>27</sup> *Central Trust Co. v. Missouri K. & T. Ry. Co.*, 246 Fed. 154, 156 (1917).

the public.<sup>28</sup> In brief, the court during a reorganization must insure a convenient procedure to enforce contract-rights but should not make new contracts for the parties.

The decisions of the Supreme Court in the Shaw case<sup>29</sup> and the Shedd case<sup>30</sup> have not been followed by the lower federal courts, especially so far as the theory of these cases is concerned.<sup>31</sup> Indeed, the doctrine of the necessity of fixing an upset price in reorganizations by way of foreclosure, is a doctrine built up solely by the lower federal courts; it has arisen out of an overwhelming solicitude for minority rights and a confusion as to the duties of the chancellor under a foreclosure sale. The reasons impelling this fixing of an upset price because of the court's fear that the sale will be "chilled," are aptly stated in a decision by the Circuit Court of Appeals for the Seventh Circuit;

"At execution sales and at foreclosure sales of ordinary farms or town lots, the general public may in fact be interested as intending bidders because of their separate financial ability to purchase. It was in the consideration of such sales that the ancient and familiar rule arose. But in modern times, when vast railroad and industrial enterprises are financed by selling millions of bonds payable to bearer through the world's exchanges, a different class of sales has appeared. Courts have had to recognize that separate individual ability is not equal to the purchase and rehabilitation of a broken-down railroad. 'Reorganization' has become familiar. This means, usually, that the equity of the stockholders, if any ever existed in actual value, has vanished; that the property virtually belongs in equity to the bondholders; and that, if the bondholders will combine for the mutual protection of their equal interest, they will have a practical monopoly of the bidding. This last is so because, if all the bondholders are in the combination, it is utterly immaterial to them whether they bid the full amount of the decree or a sum that will pay only one cent on the dollar of their bonds; and therefore, by creating that masterful situation, they can force any outside combination to offer the full amount of the decree without danger or expense to themselves. Most commonly the controversy over the sale

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<sup>28</sup> *Merchants' Loan & Trust Co. v. Chicago Rys.*, 158 Fed. 927 (1907); *Kneeland v. American Loan Co.*, 136 U. S. 89, 97; *Lake St. El. Ry. Co. v. Ziegler*, 99 Fed. 114, 129 (1900).

<sup>29</sup> *Shaw v. Railroad Co.*, *supra*.

<sup>30</sup> *First Nat. Bank v. Shedd*, *supra*.

<sup>31</sup> But see decision by Justice Bradley as Circuit Justice in *Duncan v. Mobile & O. Ry. Co.*, 3 Woods (U. S.) 597, 8 Fed. Cas. 25, 26 (1879).

arises when there are nonassenting bondholders. When such a controversy is on, the chancellor in our opinion not only has the right but owes the duty of being vigilant to see, on the one hand, that a dissenter be not permitted to create a maneuvering value in his bonds by opposing confirmation, and, on the other, that the majority does not use its power, unique in sales of this class, to oppress a helpless minority. Mr. Justice Brewer in *Ballentyne v. Smith*, 205 U. S. 285, 27 Sup. Ct. 527, 51 L. Ed. 803, said:

"That a court of equity owes a duty to the creditors seeking its assistance in subjecting property to the payment of debts, to see that the property brings something like its true value in order that to the extent of that value the debts secured upon the property may be paid; that it owes to them something more than to merely take care that the forms of law are complied with, and that the purchaser is guilty of no fraudulent act.'"<sup>32</sup>

It is to be noted that the language from *Ballentyne v. Smith*<sup>33</sup> quoted above, so often used by the lower federal courts to bolster up the doctrine of an upset price, is not in point. In that case there was no reorganization involved. A small electric railway issued bonds to the amount of \$50,000 secured by a deed of trust; the property cost and was worth about \$78,000. On the foreclosure it was bought for \$1,000; the master and the lower court advised against the confirmation of the sale and the Supreme Court of the United States confirmed this finding. In such cases, where the wronged party who seeks the chancellor's aid is either the mortgagor, who complains that he will be despoiled of his equity in the property, and subjected in addition, to an unjust deficiency judgment, or the holder of an inferior lien, or an unsecured judgment creditor, who will be deprived of property rights thereby, the chancellor can well intervene.<sup>34</sup> But the situation is entirely

<sup>32</sup> *Investment Registry, Limited v. Chicago & M. E. Ry. Co.*, 212 Fed. 594, 609 (1913).

<sup>33</sup> 205 U. S. 285, 289 (1907).

<sup>34</sup> In a case, where first mortgage bondholders are seeking to buy in the property under a foreclosure sale and to exclude junior bondholders who claim that the value of the property is such that they have a substantial equity, theoretically there would be a need of fixing a value for the properties or determining an upset price. But this situation is purely theoretical, and seems never to have arisen in the books. Since the first mortgage bondholders would not impair their rights by giving junior lien-holders "residuary claims to the property," *i. e.*, third mortgage bonds, or common stock in the new corporation, they are almost always willing to do so to avoid litigation. Yet, if senior bondholders seek to exclude junior bondholders who have some equity in

different in the case of the usual foreclosure sale in aid of a reorganization; there the mortgage debtor or holders of inferior liens, as a class, are not seeking the protection of the court. It is a confusion of ideas to assert that such a foreclosure sale, because of the lack of public bidding, requires the chancellor to become a party and safeguard the minority; a foreclosure sale is not a foreclosure sale at all but merely a left-handed device to effect a reorganization.

"For it rarely happens in the United States that foreclosures of railway mortgages are anything else than the machinery by which arrangements between the creditors and other parties in interest are carried into effect, and a reorganization of the affairs of the corporation under a new name brought about."<sup>85</sup>

Hence so long as the reorganization plan is fair and open to all parties, and the majority approves, the court should refuse to act.

The vice of fixing an upset price is the power it gives the minority to harass the majority, to delay proceedings, and to attempt to set aside a sale after it has been held. It is this fear of an attack upon a sale that causes counsel for a reorganization committee often to request the fixing of an upset price. So soon as it is clear that the courts will not fix upset prices, or set aside sales, or enjoin reorganization committees, or allow indiscriminate interventions, minority bondholders during a reorganization will demean themselves like minority stockholders. Only fraud or oppression — and concrete allegations and proofs not generalities ought to be required — should cause the chancellor to give heed to the minority. Indeed, the lower federal courts, instead of firmly establishing or denying the rights of a minority to have an upset price fixed, have hesitated and equivocated; the authorities are unsatisfactory;<sup>86</sup>

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the property, the plan of reorganization would not be a fair one and would lack the consent of a majority of all classes of bondholders; the court could well refuse to accept such a plan, and could threaten to fix an upset price. This threat and the cost of the litigation involved, as a practical matter, would force the senior lien-holders to reach an understanding with the junior lien-holders and thus the unsatisfactory guessing at a value on the property would be avoided. See *COOK ON CORPORATIONS*, 7 ed., note 1, § 886, pp. 3465-66.

<sup>85</sup> Chief Justice Waite in *Canada Southern Ry. Co. v. Gebhard*, 109 U. S. 527, 539 (1883).

<sup>86</sup> In the following cases an upset price has been fixed, or the right to have an upset price fixed, recognized. *Blair v. St. Louis H. & K. Ry. Co.*, 25 Fed. 232, 233 (1885); *Central Trust Co. of New York v. Washington County R. Co.*, 124 Fed. 813, 818 (1903); *Investment Registry Limited v. Chicago & M. E. R. Co.*, 212 Fed. 594, 609 (1913);

there is needed an appreciation by the courts that foreclosure sales are merely arrangements which can be effected only by majority control under the guidance of the courts, and that the chancellor should not think primarily of minority rights and sorrows. And what is needed more than anything else is a vigorous hand by the courts in carrying out this policy.

Indefensible as the fixing of an upset price is in principle, the practical difficulties involved constitute a greater objection. By what rule should this upset price be determined? The cases where an upset price has been fixed are few in number and in hopeless confusion. In one case the court capitalized the net earnings at four per cent;<sup>37</sup> this would result in an unusually high upset price. In another case the court fixed the upset price at the amount of the costs of litigation and outstanding receiver's certificates;<sup>38</sup> this result, of course, was of no protection to the minority bondholders. In another case a compromise figure was adopted, based upon the net earnings and the future bonding value of the properties.<sup>39</sup> Indeed, when one considers the confusion in the law of

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*Equitable Trust Co. v. Western Pac. Ry. Co.*, 233 Fed. 335, 336 (1916); *Rospigliosi v. New Orleans M. & C. R. Co.*, 237 Fed. 341, 344 (1916); *Simon v. New Orleans T. & M. R. Co.*, 242 Fed. 62, 63 (1917). See also dissenting opinion of Justice Lurton in *Northern Pac. Ry. Co. v. Boyd*, 228 U. S. 482, 513 (1913); *COOK, CORPORATIONS*, 7 ed., § 849, note 2; *SHORT, RAILWAY BONDS & MORTGAGES* (1897), § 792; *JONES, CORPORATE BONDS AND MORTGAGES*, 3 ed., § 422. In none of these cases has the theory or necessity of fixing an upset price been considered without confusion with the case of a fraudulent sale where the mortgagors or unsecured creditors complain because the price is too low. For a good example of this confusion see the discussion in *SHORT, RAILWAY BONDS, supra*. In some of the cases the courts have felt the need of majority control, but were not called upon or were unwilling to enforce the rights of the majority in a practical way. See *Simon v. New Orleans T. & M. R. Co.*, *supra*; *Investment Registry v. Chicago & M. E. R. Co.*, *supra*, etc. In *Fearon v. Bankers Trust Co.*, 238 Fed. 83, 88 (1916), the Circuit Court of Appeals for the Third Circuit in refusing to set aside a sale said, "In view of these considerations — that the great majority of the bond-holders favor this sale; that all the bond-holders, whether in favor of the sale or objecting to it, will have an opportunity of sharing on equal terms in the reorganization — we are of the opinion that the court below committed no error." In *Lake St. El. R. Co. v. Ziegler*, 99 Fed. 114, 129 (1900), the court held that it would "lend all proper aid to a plan of reorganization which is fair and just"; in *Conley v. International Pump Co.*, 237 Fed. 286, 287 (1915), the court denied the right of the minority to oppose a foreclosure in vigorous terms. For language somewhat *contra*, see *Holister v. Stewart*, 111 N. Y. 644, 19 N. E. 782, 790 (1889).

<sup>37</sup> *Central Trust Co. v. Washington R. R.*, 124 Fed. 813, 818 (1903).

<sup>38</sup> *Blair v. St. Louis H. & K. R. Co.*, 25 Fed. 232, 233 (1885).

<sup>39</sup> *Equitable Trust Co. v. Western Pac. Ry.*, 233 Fed. 335, 336 (1916).

public utility valuation in rate and eminent domain cases, the costly and voluminous engineering appraisals necessary to ascertain the fair value of a plant, the extremely lengthy and technical hearings, the chances of fixing a fair upset price seem negligible. Even the earnings of the property are no guide. Aside from the fact that to capitalize the earnings in the case of a public utility is generally to argue in a circle, the earnings of an insolvent corporation, without adequate capital, are usually modified by so many circumstances — unusual expenses of receivership, temporary difficulties and adversities, need of further expenditures to preserve the property — as to be of little aid. Again, it is not the fair value of the property that the court should seek; it is the fair value at a forced sale, for the bondholders as a class have brought about a foreclosure and the minority cannot in fairness force the majority to consider the sale other than a forced one. In short, the confusion of theories, the anomalous conditions, the heavy expense and costly litigation involved in valuation proceedings, show clearly the reasons why the courts in attempting to fix an upset value have simply guessed wildly and reached some figure.

Some minority bondholders of course seek to obstruct until they acquire a nuisance value and are bought out; others act in good faith and assert their right not to be forced to go into a reorganization of which they disapprove. They desire to get some of their money back and seek to place upon the majority bondholders the obligation to repay them. Obviously this is unfair; if the minority desire cash they can receive their securities under the reorganization and sell them on the market. But they have no right to insist that the majority should buy them out, directly or indirectly; or to obstruct the majority in conserving and protecting the common security.

### III

The advantages of enforcing majority control by refusing to fix an upset price, are even more apparent in the case of a reorganization — indeed the usual reorganization — where there are conflicts between the liens of different classes of bonds. Frequently two or more public utility corporations, each of which has a mortgage outstanding on its separate property, is consolidated into a new company, upon the assets of which a new mortgage, and often

a third, is placed. The deeds of trust securing the underlying bond issues usually contain the conventional clause, mortgaging all the property thereafter acquired by the mortgaging corporations as additional security for the bonds issued. The new corporation, from the proceeds of the new bonds issued by it, makes extensive replacements and improvements, and adds new lands or equipment to the plant or system. The underlying bondholders claim a first lien upon all of the property of the new corporation, including this after-acquired property, and often quarrel among themselves as to their priorities thereto; the overlying bondholders assert that they hold a first lien upon all the after-acquired property. Thus a vexed legal and engineering question offers a high-road to fruitless litigation and delay.

For, although the effect of a clause mortgaging after-acquired property is in its nature clear, the precise property covered thereby is often open to doubt. Where a mortgagor agrees to mortgage any property he may acquire after the date of the mortgage, a court of equity will specifically enforce this contract to mortgage, and will therefore, without any formal performance of the agreement to mortgage, create an equitable lien which attaches to the after-acquired property so soon as it comes into existence.<sup>40</sup> But will equity enforce this agreement against the bondholders of the successor of the mortgaging corporation as to property acquired by this new corporation? At first glance, such a result would seem illogical; but the courts have gone to considerable lengths in holding that this equitable lien attaches to property acquired by a succeeding corporation. The Supreme Court of the United States<sup>41</sup> for example, has held that where the "A" railroad corporation surveyed the route for a railroad from Springfield, Illinois, to Chicago, constructing through the "X" construction company, a very small part of the road, and issued bonds, secured by a deed of trust containing an after-acquired clause, the lien of these bonds would attach to parts of the contemplated road built by the "B" corporation, the successor of "A" and also to other parts of the contemplated road built by the "C" corporation, successor of "B." The decision is somewhat confused by mesne conveyances

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<sup>40</sup> See WILLISTON, SALES (1909), 168, also Samuel Williston, "Transfers of After-acquired Personal Property," 19 HARV. L. REV. 557.

<sup>41</sup> *Wade v. Chicago, Springfield & St. Louis R. R. Co.*, 149 U. S. 327, 341 (1893).



through the "X" construction corporation, but the result and the reasoning give an unexpected scope to an after-acquired clause. So, too, the Supreme Court of Maine<sup>42</sup> has held that bonds issued by the "A" railroad corporation, secured by a deed of trust containing an after-acquired clause, will prevail over the bond issue of the succeeding "B" corporation which built part of the road, and over the bond issue of the "C" corporation, which succeeded the "A" and "B" corporations, even as to broad-gauge rolling stock purchased by the "C" corporation to be used after the narrow gauge "A" roadway had been replaced by a broad gauge line.<sup>43</sup>

The problems arising from an after-acquired clause are often rendered well nigh insoluble when there is doubt if additions to and extensions of, the original property, are integral parts of the property as described in the underlying mortgage, or entirely new properties not within the contemplation of the after-acquired clause of the first mortgage. The decisive factor in such a situation, in the case of a public utility, would seem to be the extent of the franchise of the original company. The intent of the parties to the mortgage as to the precise property to be covered by the after-acquired clause would, it seems, be determined by the obligation of the mortgagor to extend its service under its franchise. The Supreme Court of the United States has been called upon to define the extent of a gas company's franchise with considerable nicety.<sup>44</sup> Unless this guide of the profession of service by the corporation is accepted, it would seem difficult to ascertain just what property, other than replacements, the parties to the mortgage intended to include in the effect of the after-acquired clause; in the case of a private corporation, obviously, this guide is lacking. Again, the doctrine of accession, where one company adds pipes or rails to the existing system of the old company, or the questions resulting from the erection of buildings or structures by the consolidated

<sup>42</sup> *Hamlin v. Jerrard*, 72 Me. 62, 68 (1881).

<sup>43</sup> This same rule was adopted in *Nat. Bank of Wilmington & Brandywine v. Wilmington Ry. Co.*, 81 Atl. 70, 73 (Delaware, 1911). See language apparently *contra*, *Hinchman v. Point Defiance Ry. Co.*, 14 Wash. 171, 44 Pac. 867, 872 (1896). See also *Pullman's Palace Car Co. v. Mo. Pac. Ry. Co.*, 115 U. S. 587, 594 (1885); *Diggs v. Fidelity & Deposit Co.*, 112 Md. 50, 75 Atl. 517, 524 (1910); *New York Security & Trust Co. v. Louisville Eastern & St. Louis Consol. R. Co.*, 102 Fed. 382, 393 (1900); *Harris v. Youngstown Bridge Co.*, 90 Fed. 322, 332 (1898).

<sup>44</sup> *Russell v. Sebastian*, 233 U. S. 195, 208 (1914).

company on land or under franchises originally held by the mortgaging company,<sup>45</sup> further complicate the situation. The uncertainty of the scope of an after-acquired clause, when the mortgaging company has transferred its assets, therefore, is the greatest limitation upon its effectiveness; yet, in the cases discussed before, the courts seem to have ignored that difficulty.

The engineering problems involved in segregating a unified property so as to ascertain the extent of the conflicting liens, and the difficulty of tearing the property apart in order to give each class of lien-holders their strict rights — if equity will so do — can scarcely be exaggerated. The necessity of this has been recognized by the Supreme Court of the United States<sup>46</sup> where the court held that this controversy as to priority of liens should be transferred from the property to the equitable fund received from the sale of the properties. Yet a new company, as a banking problem, cannot be organized effectively if its ownership is to be the subject of litigation. Such a question as this offers minority bondholders a chance to keep the property in litigation for years. The technical legal rights of dissenting overlying bondholders, if carefully examined, appear well-nigh unassailable. A reorganization plan, establishing a compromise delimitation of the extent of each mortgage lien, approved by the majority of the bondholders of each class, could always be forced upon the minority if the court refused to fix an upset price. A minority bondholder would not be inclined to litigate over the apportionment of an equitable fund if that fund be so small as to make his share insignificant. He would prefer to abide by the reorganization plan. And since it is difficult to conceive of any constitutional right in a minority bondholder to have an upset price fixed, and since he can share with the majority on an equal footing, such procedure would be a happy means of preventing litigation, and thereby facilitating a reorganization. Otherwise, if a minority bondholder has a right to have an adequate upset price fixed, he can insist upon having the property for which the price is to be fixed ascertained, and that means a heyday of litigation.

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<sup>45</sup> See *Toledo, Delphos & Burlington R. R. Co. v. Hamilton*, 134 U. S. 296, 297 (1890).

<sup>46</sup> *First National Bank of Cleveland v. Shedd*, 121 U. S. 74, 85 (1887).

## IV

In what is perhaps the most vexed and unsatisfactory phase of corporate reorganization — the participation of stockholders of the insolvent corporation in the reorganization — the theory of majority control seems to offer the only solution. The most pressing problem confronting a reorganization committee is, usually, that of new funds to meet current expenses, and to provide for necessary improvements and replacements. The conventional way of raising new money, as approved by the Supreme Court of the United States,<sup>47</sup> is to make the old bondholders stockholders in the new corporation and to issue new first mortgage bonds. Often, such a plan cannot be forced upon the old bondholders, or will not produce enough money. The source of hope, then, is usually the old stockholders. Stockholders generally show a startling sporting propensity, and are willing to stand an assessment, and advance new funds, rather than lose forever what slender hopes they may have. Yet, the Supreme Court of the United States has placed such indistinct limitations upon the participation of stockholders in a reorganization that it is difficult to tell from the authorities what may or may not be done.

In the *Monon* case<sup>48</sup> the Supreme Court of the United States first considered the "novel and important"<sup>49</sup> question of the participation of a stockholder in a reorganization. Here a general creditor sought to set aside a decree of foreclosure and sale on the ground that the bondholders and stockholders of the railroad had consummated a scheme wherein they colluded to defeat all general creditors by foreclosing the mortgage of the bondholders; in other words, the scheme of reorganization, under the foreclosure, provided no place at all for the unsecured creditors, but did allow the stockholders to participate. The court held that the property was a trust fund for the benefit of all creditors, and that a scheme whereby one class of creditors was allowed nothing, and the stockholders still retained an interest in the property, could not be tolerated.

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<sup>47</sup> *Shaw v. Railroad Co.*, 100 U. S. 605, 612 (1879). See also *Ginty v. Ocean Shore R. R. Co.*, 172 Cal. 31, 155 Pac. 77, 79 (1916).

<sup>48</sup> *Louisville Trust Co. v. Louisville, etc. Ry. Co.*, 174 U. S. 674, 681 (1899).

<sup>49</sup> See opinion Justice Brewer in the *Monon* case, *supra*.

The Monon case was followed by the famous Boyd case<sup>50</sup> which offers a still more serious and perplexing menace to most reorganization plans. The most striking danger in the doctrine of this case arises not merely from the uncertainty it left as to the right of stockholders to participate in a reorganization, but rather from the fact that the court held that, although Boyd, an unsecured creditor, brought his suit to upset the foreclosure sale, and the reorganization thereunder, by subjecting the property of the railroad company to a lien for his claim, nine years after the foreclosure sale had been confirmed by the court, nevertheless he could prevail. To be sure, the long litigation in a collateral suit that Boyd had been forced to undergo in order to establish his claim probably meant that the statute of limitations had not run, or that he was not barred by laches; nevertheless the case holds that so long as a reorganization contains a flaw it can never be considered the basis of fixed rights, regardless of foreclosures or confirmations of sales by solemnly entered decrees of the court.<sup>51</sup> Surely such is a deplorable rule; it arises from the fact that the courts view foreclosure sales as devices and will not be bound by them. The court said in the Boyd case:<sup>52</sup>

"But, of course, such a transfer by stockholders from themselves to themselves cannot defeat the claim of a non-assenting creditor. As against him the sale is void in equity, regardless of the motive with which it was made. For if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt the subordinate interest of the old stockholders would still be subject to his claim in the hands of the reorganized company. Cf. *San Francisco, & N. P. R. R. v. Bee*, 48 Calif. 398; *Grenell v. Detroit Gas Co.*, 112 Mich. 70. There is no difference in principle if the contract of reorganization, instead of being effectuated by private sale, is consummated by a master's deed under a consent decree."

The plan involved in the Boyd case, whereby the Northern Pacific Railway Company was reorganized, proceeded upon the theory that the bondholders owned the property and could do as they chose with it. Thus no provision was made for a large float-

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<sup>50</sup> *Northern Pac. Ry. v. Boyd*, 228 U. S. 482, 498 (1913).

<sup>51</sup> See COOK, ON CORPORATIONS, 7 ed., § 849.

<sup>52</sup> *Northern Pac. Ry. v. Boyd*, 228 U. S. 482, 502 (1913).

ing debt; but the stockholders, both common and preferred, were given stock in the new company, upon condition that they paid a heavy assessment. Some eleven million dollars were raised in this way, and it was admitted that this money was essential and served as the basis of the prosperity of the new company. The unsecured creditors sought to defeat the foreclosure plan because they were excluded and the stockholders were not, but the Circuit Court held, in a decision from which no appeal was taken, that, since the assets were insufficient to pay the mortgage debt, the unsecured creditors had no claim to the property, and that, in as much as the bondholders, in reality owned the property, they could donate an interest to whomsoever they chose, including the stockholders.<sup>53</sup> The Supreme Court held however, years later, in the *Boyd* case, four judges dissenting, that it was illegal to allow the stockholders to participate when an unsecured creditor like *Boyd* had received nothing, and that *Boyd's* claim was a lien upon the property purchased "subject, however, to the mortgages placed thereon." This decision in the *Boyd* case was recently followed by the court in an unsatisfactory opinion written by Mr. Justice Holmes, who had dissented from the *Boyd* case.<sup>54</sup>

Certain conclusions can be drawn from the doctrine of the *Boyd* case, aside from the menace of allowing the court to set aside consent foreclosure decrees at any time, which will aid one in ascertaining the real problem involved. It must be admitted, first, that it is unfortunate and undesirable rigorously to prevent bondholders from allowing stockholders to participate in a reorganization where all the creditors cannot be paid in full, thus making it impossible to get money from the stockholders. Secondly, it would seem clear that the basis of the decision in the *Boyd* case that the court cannot tolerate the participation of stockholders in a plan of reorganization where a class of creditors are coldly and completely barred is just. The fundamental rule that debtors, *i. e.*

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<sup>53</sup> *Paton v. Northern Pac. Ry. Co.*, 85 Fed. 838, 839 (1896).

<sup>54</sup> *Kansas City, So. Ry. Co. v. Guardian Trust Co.*, 240 U. S. 166, 174 (1916). The decisions of the lower Federal Courts following the *Boyd* case cast little light upon the problem. See *Mechanics & Metals Nat. Bank v. Howell*, 207 Fed. 973, 983 (1913); *Central Improvement Co. v. Cambria Steel Co.*, 210 Fed. 696, 708 (1913); *Equitable Trust Co. v. United Box Board & Paper Co.*, 220 Fed. 714, 719 (1915); *Western Union Tel. Co. v. United States & Mexican Trust Co.*, 221 Fed. 545, 550 (1915).

stockholders, must not defeat the just claims of their creditors, directly or indirectly, cannot be violated. To the argument that the bondholders own the property and can donate it to whom they choose, the answer is clear. Whether or not the bondholders own the property depends upon the valuation fixed upon the property by the court, an unsatisfactory guess upon which no rule should be based. In other words, here again arises the question of the upset price, the folly of a court attempting to put a special price upon a special kind of property, for which there is no market value, where no opportunity is afforded even to ascertain the facts of value involved. This truth involving a rejection of the value of an upset price, was cogently stated by Mr. Justice Lamar who delivered the opinion of the court:<sup>66</sup>

"The invalidity of the sale flowed from the character of the reorganization agreement regardless of the value of the property, for in cases like this, the question must be decided according to a fixed principle, not leaving the rights of the creditors to depend upon the balancing of evidence as to whether, on the day of sale the property was insufficient to pay prior encumbrances. The facts in the present case illustrate the necessity of adhering to the rule. The railroad cost \$241,000,000. The lien debts were \$157,000,000. The road sold for \$61,000,000, and the purchaser at once issued \$190,000,000 of bonds and \$155,000,000 of stock on property which a month before, had been bought for \$61,000,000."

Some equitable middle ground should be found reconciling, or at least delimiting, these two elements. In the *Guardian Trust Company* case<sup>67</sup> the court indicated its desire to reach some fair result in solving this problem, Mr. Justice Holmes saying:<sup>67</sup>

"In short while it is true that reorganization plans often would fail if the old stockholders could not be induced to come in and to contribute some fresh money, and that the necessity of such arrangements should lead Courts to avoid artificial scruples, still we are not prepared to say

<sup>66</sup> *Northern Pac. Ry. v. Boyd*, 228 U. S. 482, 507 (1913).

<sup>67</sup> In *Kansas City So. R. Co. v. Guardian Trust Co.*, 240 U. S. 166, 176 (1916), Mr. Justice Holmes uses the following language: "It is essential to inquire whether the appellant (*i. e.* the reorganized corporation), received any such property, that is, whether it got by the foreclosure more than enough to satisfy the mortgage, which was a paramount lien." This might indicate that the court was inclined to regard the fixing of an upset price as the solution of the difficulty. See Paul D. Cravath, "Reorganization of Corporations," in STETSON, LYNDE, *et al.*, *SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION*, 198.

<sup>67</sup> 240 U. S. 166, 178 (1916).

that the Court of Appeals was wrong in finding that there had been a transgression of the well settled rule of equity in this case, or that it went further than to see that substantial justice should be done."

And in the *Boyd* case the court suggests the proper course to be followed.<sup>58</sup>

"This conclusion does not, as claimed, require the impossible and make it necessary to pay an unsecured creditor in cash as a condition of stockholders retaining an interest in the reorganized company. His interest can be preserved by the issuance, on equitable bonds, of income bonds or preferred stock. If he declines a fair offer he is left to protect himself as any other creditor of a judgment debtor, and, having refused to come into a just reorganization, could not thereafter be heard in a court of equity to attack it. If, however, no such tender was made and kept good he retains the right to subject the interest of the old stockholders in the property to the payment of his debt. If their interest is valueless, he gets nothing. If it be valuable, he merely subjects that which the law had originally and continuously made liable for the payment of corporate liabilities."

In brief, if the plan of organization provides a place for unsecured creditors whereby such creditors are partly or slightly paid, in cash or bonds, or allowed stock, even inferior to that of the old stockholders who advance money to the new company and can be given a priority because of that reason, and if a majority of the unsecured creditors accept this offer, and the dissenting unsecured creditors are given an equal opportunity to participate, can the minority object? Such a plan, it would seem, would contain the "fair offer" in a "just reorganization" of which the court speaks in the *Boyd* case. It would be fair to all because all classes of creditors would be provided for; it would allow stockholders to participate; and thus the conditions of the decision in the *Boyd* case would be met, and conveniences of financing not precluded. In other words, if the majority of the class excluded, or relegated to a position inferior to the participating stockholders, consent and the plan is not oppressive or unfair, can the minority of this class object? And must not the reorganization committee provide in some way for these creditors as a class?

If the majority of creditors should demand full payment of their claims, and should refuse to accept a plan of reorganization

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<sup>58</sup> *Northern Pac. Ry. v. Boyd*, 228 U. S. 482, 508 (1913).

which provides for part payment of unsecured creditors, and also allows stockholders to participate, the court must, it seems,<sup>59</sup> refuse to allow stockholders to participate, unless the class of creditors is unusually small and is acting with bad faith in reliance upon their nuisance value. Then equity should, on elementary principles, refuse relief, exclude the class, and refuse to fix an upset price. The majority of any class of security holders almost always will act reasonably in order to preserve the property; the danger arises from an unreasonable minority. Such is the theory upon which the English Acts providing for arrangements are based; the soundness of this theory is shown in actual reorganization experience.

In the Boyd case the reorganization committee did acquire \$14,000,000 of the unsecured claims; at what discount it does not appear. In the Guardian Trust case, a fund has been provided to buy in unsecured claims and many had been acquired. These facts indicate sharply the necessity of the rule of fair majority control urged herein. Obviously for a reorganization committee to arrogate to itself the right of paying off some unsecured creditors in part or whole, — or even the majority of the unsecured creditors, — and to ignore the rest, as was done in the Boyd case, for ignored and dissatisfied creditors brought the suit in the Paton case,<sup>60</sup> is an act of oppression. Merely to provide a fund, which can be withdrawn, for the purpose of buying in unsecured claims, is not enough; all classes must be given definite legal rights. The majority should control only where the plan is a fair one; and even then the majority of all classes of bondholders and unsecured creditors must consent and the plan be open to all on an equality.

Again, the court was right in holding as it did in the Boyd case that the fact that Boyd did not appear at the time of the foreclosure sale did not mean that the decree foreclosed his rights as would be true in the case of an ordinary foreclosure sale where all

<sup>59</sup> For, unless the rule that debtors shall not prevail over creditors is to be regarded lightly, stockholders, where creditors are not paid in full and a majority of these creditors fairly refuse to accept a plan for the participation of stockholders, cannot participate. The only alternative is to allow an additional privilege to the reorganizers and to extend them, in case they cannot get the consent of a majority of the unsecured creditors, the right to prove that the objecting creditors are unfair because of the value of the property regardless of their motives. This theory, of course, depends upon an upset price and seems too uncertain to be adopted.

<sup>60</sup> *Paton v. Northern Pac. R. R.*, 85 Fed. 838, 839 (1896).



creditors are forever barred by the sale. Foreclosure sales as such in aid of reorganization are merely devices. They should be considered a final adjustment of all rights, as is done in England, only if they result in a complete and just financial structure erected under the supervision of the chancellor. Non-appearing security holders of all classes must be provided for. Their securities in the new company must be kept ready for them for a reasonable time. No reorganization committee fails to provide for a bondholder whose whereabouts is unknown; the same rule should be observed in the case of unsecured creditors. To be sure there is no certain means of ascertaining the amount of unsecured claims; hence a contingent fund must be set aside to pay, or provide securities for, these claims as they appear. There might be a theoretical difficulty in getting the consent of the majority of a class the extent of which is unknown; yet those creditors who fail to use due diligence in appearing, after reasonable notice by publication, can well be ignored so far as voting is concerned. If this method of majority control under a plan, providing for all parties, and approved by the court, is followed, then a foreclosure in aid of reorganization can well be considered final by the courts; the menace of the Boyd case in holding that a foreclosure decree can be opened at any time, is therefore avoided.

In short, majority control of all security holders under a fair plan of reorganization providing for, and open to all security holders, appears to offer a sound solution of the difficulties arising from the doctrine of the Boyd case.

## V

How can majority control under a fair plan be provided for, assuming that the courts will not readily establish such a doctrine in its full scope? Provisions in the deed of trust are usually relied on. Deeds of trust, as now drawn up, are voluminous and wonderful documents; yet the conventional provisions as to majority control found therein are open to grave criticism and seem futile and useless. In the first place, unless the courts favor majority control they will not be bound by any covenants in the mortgage which seem to them oppressive, any more than they will in the case of oppressive covenants in an ordinary mortgage. Again,

general grants of power to the majority will be construed closely, because of uncertainty and because of the nature of the relationship involved. No careful lawyer drawing a deposit agreement, whereby securities are to be deposited with a committee effecting a reorganization, fails to insert an express and concrete power to do everything possible;<sup>61</sup> yet general clauses in the case of deeds of trust giving the majority general powers are usually relied upon.

Thus, the conventional provision providing for a meeting of the bondholders, or their consent thereto in writing, and binding the minority absent or present, to do anything the majority decide upon, so far as reorganizations are concerned, appears to miss the mark. An effort has been made to show that majority control is not the sole essential of a reorganization; the plan provided must be a fair one, and a means must be afforded of determining that the plan is fair.<sup>62</sup> Surely the majority cannot draw up the plan, accept it, and also determine that it is fair. Reorganizations, since they involve large property rights, absent parties, and also represent a fundamental change in the nature of the corporation, and since the public interests are often concerned, should be carried out publicly under the protection and guidance of a court as is done in England. And it seems clear that the courts will not allow general provisions in a deed of trust to deprive them of this duty. Definite provisions can well be inserted in a deed of trust providing that, upon default of the mortgagor corporation, the trustee must propose, or accept at the request of two thirds of the security holders of all classes, a fair plan of reorganization providing for and open to all classes of security holders; that upon the written consent of a majority of each class, and determination of the court before whom the foreclosure is pending that the plan is fair to all security holders,<sup>63</sup> each and every bondholder surrenders all rights to have an upset price fixed, and agrees to accept securities under the reorganization, similar to those

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<sup>61</sup> See, as to the dangers of general provisions. *United Water Works, Limited v. Omaha Water Co.*, 164 N. Y. 41, 58 N. E. 58, 59 (1900); *SHORT, RAILWAY BONDS & MORTGAGES* (1897), § 28.

<sup>62</sup> See *COOK ON CORPORATIONS*, 7 ed., § 833.

<sup>63</sup> Possibly it is difficult to confer jurisdiction upon a court to determine a condition precedent — the fairness of the plan. Yet the court should void the surrender of the right to fix an upset price if the plan is fraudulent or oppressive. Thus the result is the same.

accepted by the majority creditors, in satisfaction of all rights. In short the vital and determining feature of a reorganization is the fixing of an upset price; definite provisions should be made for the surrender of that right where the plan is fair to all concerned. Such a provision is essential; the failure of deeds of trust to provide for the relinquishment of this right to have an upset price fixed is indeed startling.

This phase of corporation law, however, should not be left to the parties to agree upon and codify as part of their contract. Like other phases of corporation law, where certainty and definiteness of rights are vital, the subject is peculiarly one requiring codification by statute.<sup>64</sup> A short section added to the corporation laws of the various states, and especially to the Federal Judicial Code, would complete our statutory corporation law and do much to establish the value and safety of corporate securities.<sup>65</sup> Possibly arguments for such an improvement in the law are visionary; yet the codification of other branches of corporation law, and the improvements by statute in England, afford ground for hope.

*Samuel Spring.*

BOSTON, MASS.

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<sup>64</sup> Kentucky has a statute in force enacted in 1896, which follows the English procedure and requires the minority to assent without the intervention of a foreclosure. To avoid constitutional difficulties, the act provides that contract rights arising before the passage of the act are not to be affected thereby. (KENTUCKY STATUTES, CARROL, 1915, § 771.) No other state, evidently, has passed such a statute. See, generally, SHORT, RAILWAY BONDS & MORTGAGES (1897), § 878, note 1.

<sup>65</sup> In 1896, Mr. Moorfield Story, in his address as President of the American Bar Association, discussed the Kentucky statute, *supra*, and suggested that other states adopt it. Mr. Story trenchantly pointed out the defects in our law governing reorganization, describing the "existing practice, of which the country has had a bitter experience within the last few years and of which the railroad cases furnish the most conspicuous examples." "Reorganization of Railway and Other Corporations," REPORT OF AMERICAN BAR ASSOCIATION (1896), Vol. XIX, page 240. His comments are equally true to-day, twenty-two years later.

## VALUE OF THE SERVICE AS A FACTOR IN RATE MAKING\*

THE reasonableness of the schedule as a whole depends as has been seen, upon whether it yields a fair return to the carrier;<sup>1</sup> yet "the requirement that no person may be charged more than a reasonable rate may be insisted upon although the result is that the company does not get a fair return from its schedule as a whole."<sup>2</sup> Rates may be so high as to be "unreasonable in themselves," although the company is "earning no more than a fair return";<sup>3</sup> yet "the rule that a carrier should not charge more than the traffic can bear . . . does not impose upon a carrier any duty to carry traffic at a loss."<sup>4</sup>

These antitheses are from one work on rate regulation. It contains more statements that the cost of a service outweighs its value in determining rates than statements that value outweighs cost;<sup>5</sup> at one point the author casts doubt, in terms, upon the value test which he repeatedly lays down;<sup>6</sup> in the preface he expresses his "preference for cost";<sup>7</sup> and he tells us that "more and more, the [Interstate Commerce] Commission has been laying

<sup>1</sup> BRUCE WYMAN, 2 ed., BEALE AND WYMAN, RAILROAD RATE REGULATION (1915), § 220.

<sup>2</sup> *Ibid.*, § 225.

<sup>3</sup> *Ibid.*, § 445.

<sup>4</sup> *Ibid.*, § 434.

<sup>5</sup> Cf. "It is certain upon fundamental principles that the company cannot justify exorbitant profits by urging that the rates are reasonable in themselves." *Ibid.*, § 226.

"Nothing is better established than that the Commission may not make the needs of the shipper the basis of reasonable rates." *Ibid.*, § 434.

"A railway may not impose an unreasonable rate merely because the business of the shipper is so profitable that he can pay it." *Ibid.*, § 439.

<sup>6</sup> The statement (*Ibid.*, § 435) that "the value of the service to the shipper should be considered, which includes a consideration of the profit that the shipper can make," carries this comment: "The correctness of this view may be doubted: at all events, the Commission has rejected any theory to the effect that rates may be increased by successive advances, so long as traffic moves freely. But, on the other hand, the Commission has said repeatedly that consideration must be given to the value of the service in determining reasonableness of rates."

<sup>7</sup> *Ibid.*, vi, vii.

\* I am much indebted to the critical suggestions of my friend Professor Charles K. Burdick, who kindly read the manuscript and proof.

emphasis upon the cost of the service, as the element to be given precedence in the determining of a rate.”<sup>8</sup> If the book conveys any net impression on the subject, it is that, while the criterion of cost is gaining ground as against the criterion of value, and should for some reason be preferred to it, value is none the less a criterion substantially coördinate with cost, and there is no knowing what will be done in a particular case when the two conflict.

Is value of the service, or reasonableness to the consumer, or reasonableness to the public — anything other than cost of the service (and discrimination) — a factor in public-service rate regulation? If so, in what relation does this factor, whatever it is, stand to the factor of cost? Commissions and courts have said things as inconclusive and contradictory as Mr. Wyman. The courts have long laid it down that a public utility is entitled to “a fair return upon the value of that which it employs for the public convenience”;<sup>9</sup> that is, rates are to be determined by the cost of the service, taking cost to include not only current out-go and depreciation but a reasonable return upon the value of the property employed. But a great deal is said about value of the service, reasonableness to the consumer, and the like, which, taken at its face, conflicts with this. Many *dicta* set up value as a criterion apparently coördinate with cost, and leave us to worry over the inevitable conflict. Thus the Interstate Commerce Commission said in 1912:

“Cost is generally an important element in arriving at a judgment with respect to a rate. What weight shall be given to that element as compared with all the other elements entering into a particular rate, such as the value of the service, with its bundle of constituents, and the various conditions surrounding the particular traffic, is a matter to be decided in each individual case. . . . Both cost and value must be considered as well as all other elements entering into a rate.”<sup>10</sup>

The same opinion speaks of “the two cardinal principles of rate making — the cost of the service and the value of the service.” Again in 1916 the commission said, “The law contemplates that

<sup>8</sup> BRUCE WYMAN, 2 ed., BEALE AND WYMAN, RAILROAD RATE REGULATION (1915), § 385. He adds: “. . . Certainly, the adequacy of the revenue for the service performed by the carriers must take precedence over market conditions in determining the reasonableness of a rate.”

<sup>9</sup> *Smyth v. Ames*, 169 U. S. 466, 547 (1898).

<sup>10</sup> Per Meyer, Commr., in *Boileau v. P. & L. E. R. R. Co.*, 22 I. C. C. 640, 652 (1912).

the rates shall be just and reasonable to shipper and carrier alike."<sup>11</sup> Language of the same sort has long been used by the Supreme Court of the United States. In *Smyth v. Ames*, Mr. Justice Harlan said:

"What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."<sup>12</sup>

Speaking for the court in 1915, Mr. Justice Hughes said: "There are many factors to be considered, — differences in the articles transported, the care required, the risk assumed, the value of the service . . ." <sup>13</sup> Again in 1917 the Supreme Court repeated that "the nature and value of the service rendered by the company to the public are matters to be considered."<sup>14</sup>

Another group of *dicta* go further, and make of value of the service, or reasonableness to the public, a criterion not merely coördinate with, but superior to, cost of service. "Reasonableness relates to both the company and the customer. Rates must be reasonable to both, and, if they cannot be to both, they must be to the customer."<sup>15</sup> "The rates must be reasonable to the company, but they must, in any event, be reasonable to the public."<sup>16</sup> Mr. Robert H. Whitten, in an article on "Fair Value for Rate Purposes," uses closely similar language — "Reasonable compensation . . . must be just to the public and should be just to the company; but if it cannot be just to both it must in any event be just to the public."<sup>17</sup>

Logically, there are two halves to the proposition that cost must give way to value: rates must sometimes be fixed below cost, and they must sometimes be fixed above it. They must be fixed below cost when the value of the service to the public is less than

<sup>11</sup> *New England Plaster*, 41 I. C. C. 687, 704 (1916).

<sup>12</sup> 169 U. S. 466, 547 (1898).

<sup>13</sup> *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 599 (1915).

<sup>14</sup> *Darnell v. Edwards*, 244 U. S. 564, 570 (1917).

<sup>15</sup> *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371, 380, 59 Atl. 537, 540 (1904).

<sup>16</sup> *Southern Pacific Co. v. Bartine*, 170 Fed. 725, 767 (1909).

<sup>17</sup> 27 HARV. L. REV. 421. Cf. *Puget Sound Electric Railway v. R. R. Commission*, 65 Wash. 75, 117 Pac. 739 (1911).

the service costs (whatever that may mean), and they must, similarly, be fixed above cost when the value of the service exceeds its cost. And even from the milder view that value is a rate-making factor coördinate with cost, it would follow that, in cases of conflict, rates must sometimes be fixed below, and sometimes above, the point of cost; for if, when two requirements conflict, one of them is always to yield to the other, the relation of the first to the second is not of equality but of subordination. To say that there can be no conflict between the two criteria, because that which is reasonable to the producer is always reasonable to the consumer also, is to abandon the proposition that reasonableness to the consumer counts. If value, or reasonableness to the consumer, means anything (*i. e.*, anything independent of cost, or reasonableness to the producer), by hypothesis it must, whatever it means, occasionally conflict with reasonableness to the producer. To say that cost is not conclusive, because value also must be given weight, but that value is always equal to cost, is evidently to insist upon two names for the same thing, to no other purpose than confusion.<sup>18</sup>

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<sup>18</sup> Yet there are advocates of a value-of-the-service standard who say that there is commonly complete identity between value of the service and cost of the service: between what is reasonable to the public and what is reasonable to the utility. Thus Mr. Robert H. Whitten, in the article just quoted, says: "Normally there is no conflict, for a rate that is just to the company is also just to the public. . . . For the normal successful public utility enterprise the reasonable rate of charge is the rate that affords the company a reasonable, and no more than reasonable, compensation for its entire service to the public." 27 HARV. L. REV. 421. So, a federal court has said: "Generally, that which is just, but no more than just, to the owner, ought to be the equivalent of that which is just, but no more than just, to the consumer." *Spring Valley Water Co. v. City & County of San Francisco*, 165 Fed. 667, 679 (1908). The Wisconsin Railroad Commission agrees: "Ordinarily the rate of return or the rates for services that are reasonable to the utility are also reasonable to the consumers." 4 Wis. R. R. Com. 625.

Both the Wisconsin Railroad Commission and Mr. Whitten speak of an exception to their rule of identity. The Commission refers to the case of "utilities which are operating under such conditions that no rates that can be collected from the consumers would be sufficient to meet" expenses, including a fair return. But this is no exception to the rule that cost alone governs, since, in this situation, rates are kept below the point of cost not by considerations of the value of the service but because it is (by hypothesis) impossible to collect cost: not by a rule of law but by a state of fact.

Mr. Whitten says: "It is for the most part only in cases where there has been poor judgment in the establishment of an enterprise, or changed conditions have rendered it inappropriate, that a rate which offers only a fair compensation to the company is

The questions then arise: Is it true that rates may sometimes be fixed by the state so low as not to cover the cost of the service (including a reasonable profit), although a rate which covers cost is possible? Is it true that they may sometimes be fixed by the utility so high that they more than cover the cost of the service including a reasonable profit? In dealing with these questions, we are not concerned, evidently, with the meaning of such phrases as value of the service, reasonableness to the consumer, and reasonableness to the public. If the answer to either question is yes, something other than cost must exist as a criterion superior to, or coördinate with, cost, and it will remain to inquire what that criterion is — whether value of the service (or reasonableness to the public) or something else. If the answer to both questions is no, no such superior or coördinate criterion exists.

It is assumed that the company is passably performing its duty to serve. If it is not, there is some suggestion that it should be encouraged to do so by denying it an adequate return in the meantime.<sup>19</sup>

Some cases which have been treated as holding that a rate need not cover cost are to be explained by the doctrine of the fair value of the property employed. "The basis of all calculations as to the reasonableness of rates to be charged . . . must be the fair value of the property."<sup>20</sup> Although the sense in which the courts use the phrase "fair value" is less definite than it should be,<sup>21</sup> it seems clear that the term does not cover money stupidly, extravagantly, or corruptly spent. If a utility has been seriously over-

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unjust to the public." 27 HARV. L. REV. 421. This also is no true exception to the rule that cost alone governs: since, in this situation, rates either (1) are kept below the point of cost by a state of facts instead of a rule of law, or (2) are not kept below the point of cost (*i. e.*, reasonable return on the fair value of the property employed) at all, but only below the point of return on a higher, inflated value. The Northern Pacific case (note 55, *infra*) makes it clear that, if there is some rate which will bring in reasonable cost, a utility's right to charge that rate is qualified by no considerations of reasonableness to the public.

<sup>19</sup> *Re Union Traction Co.*, P. U. R. 1918 B, 663 (Ind. Pub. Serv. Com.); *Thorn v. Montgomery Light & Water Improvement Co.*, P. U. R. 1916 C, 406 (W. Va. Pub. Serv. Com.); *In re Riverview Telephone Co.*, P. U. R. 1916 B, 442 (Wis. R. R. Com.).

<sup>20</sup> *Smyth v. Ames*, 169 U. S. 466, 546 (1898).

<sup>21</sup> Cf. Robert H. Whitten, "Fair Value for Rate Purposes," 27 HARV L. REV. 419; Robert L. Hale, "The Supreme Court's Ambiguous Use of 'Value' in Rate Cases," 18 COL. L. REV. 208.



built, or its promoters have been seriously overpaid, the law does not intend that its customers shall be saddled with the payment of interest on the money thrown away. In *San Diego Land and Town Co. v. National City*,<sup>22</sup> the Supreme Court held that the amount which a plant had actually cost its owners was not conclusive of the amount on which the public must pay a return — the fair value of the plant. The company having complained that the proposed rates would not permit a reasonable return on the cost of the plant, the court said:

"What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the company and to the public."<sup>23</sup>

*San Diego Land and Town Co. v. Jasper*<sup>24</sup> lays down the similar proposition that the "cost to another company which sold out on foreclosure to the appellant," when "seemingly inflated by improper charges . . . and by injudicious expenditures," is a different thing from the fair value of the property. In *Stanislaus County v. San Joaquin Canal Co.*,<sup>25</sup> it appeared that expensive mistakes had been made in organizing the company, and the Supreme Court took this into consideration in holding that a return need not be paid upon the cost of the property; that it was enough that a return was allowed upon its value. In the recent case of *Darnell v. Edwards*,<sup>26</sup> the court said by way of *dictum*: "The circumstance that a road may have been unwisely built, in a locality where

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<sup>22</sup> 174 U. S. 739, 757, 758 (1899).

<sup>23</sup> The court observed that the cost-of-the-property basis was "defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration." *Ibid.*, 757. But the reference to the value of the services, so far as it suggests that rates might on occasion be fixed at such a point that they would not pay a return on the fair value of the property, was pure *dictum*, as the court was engaged precisely in pointing out that, in the case before it, there was no evidence that a reasonable return on the fair value of the property would not be furnished by the rates complained of.

<sup>24</sup> 189 U. S. 439, 442 (1903).

<sup>25</sup> 192 U. S. 201, 214 (1904).

<sup>26</sup> 244 U. S. 564, 570 (1917).

there is not sufficient business to sustain it, may be taken into account."

This fair-value doctrine explains the Arkansas case of *Missouri Pacific Railway v. Smith*, which Mr. Wyman<sup>27</sup> relies on for the proposition that "a reasonable rate" (*i. e.*, evidently, a rate reasonable to the public), "may be insisted upon although the result is that the company does not get a fair return from its schedule as a whole." The case contains no suggestion that the company concerned was in danger of being deprived of a fair return from its schedule as a whole. The court simply held that the sum on which the company was entitled to a reasonable return was the fair value, and not an improperly inflated value, of its property. It held that the railroad's mere inability, under the legislative rates, to "pay the interest upon its just debts and the cost of maintaining and operating its railroad," was not fatal to the rates, because, for all that appeared, the debts might have been unreasonably and extravagantly contracted, and debts so contracted would not constitute value upon which the public could be required to pay a return.

"Rates of transportation sufficient to enable the road to realize a sum large enough to defray current repairs and expenses and pay a profit on the reasonable cost of building the road and equipping it ought to be reasonable. The earnings of a road might be sufficient for this purpose, and yet not large enough to pay expenses and interest on its debts."<sup>28</sup>

That a company cannot always claim a return on the value of property held for future use<sup>29</sup> is simply another illustration of the principle that the basis on which reasonable returns are calculated is the fair value of what the company is using for the public service, at the time when it is using it.

Clearly, cases holding that the fair value of the property employed is or may be something less than the property cost do not thereby hold that rates need not provide a reasonable return on

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<sup>27</sup> BRUCE WYMAN, 2 ed., *BEALE AND WYMAN, RAILROAD RATE REGULATION* (1915), § 225.

<sup>28</sup> 60 Ark. 221, 242-44, 29 S. W. 752 (1895).

The case also involves the theory, now discredited, that a utility is not entitled to a reasonable return on every branch of its business, but only on its business as a whole.

<sup>29</sup> *Capital City Gaslight Co. v. Des Moines*, 72 Fed. 829, 845 (1896); *Southern Pacific Co. v. Bartine*, 170 Fed. 725 (1909).

the fair value of the property. To the particular element of extravagant construction it would be possible to give effect in either of two ways: by writing down the value of the property or by disallowing a reasonable rate of return. So far as this particular element is concerned, therefore, it may not greatly matter that what is actually done is to write down the value of the property. But in many connections the distinction between the two processes is important. Suppose all the elements which can be thought to affect the fair value of the property have been considered, and it has been determined that its fair value is  $n$ . If it were taken to be the law that rates need not provide a reasonable return, it would follow that a reasonable return on  $n$  need not necessarily be provided; while if the law requires a reasonable return on the fair value of the property employed in every case, then by hypothesis the company is entitled to a return on  $n$  regardless of all other considerations.

Unreasonable operating expenses, like unreasonable capital charges, are not part of what is meant by the cost of the service. The cost of the service as a rate-making criterion means its reasonable cost. The Supreme Court has said, in sustaining legislative railroad rates against the allegation (which was not fully established) that they did not cover operating expenses:

"Of what do these operating expenses consist? Are they made up partially of extravagant salaries; fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing . . . rates for railroad companies to be unconstitutional . . . they should be fully advised as to what is done with the receipts and earnings of the company; for if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends. . . . It has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.'" <sup>30</sup>

This point — that utilities are not entitled to charge to the public, as a part of cost, the burden of their own extrav-

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<sup>30</sup> *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U. S. 339, 345, 346 (1892).

agance or inefficiency — has repeatedly been made by state commissions.<sup>21</sup>

One class of cases which seem or purport to lay down as a rule of law that rates need not always provide a reasonable return involve merely an encounter with the fact that rates cannot always produce such a return. An increase of rates will not always increase profits; if it would, there would presumably be no failures in business. It may and does occur that while a given rate will not produce a reasonable return, a higher rate, by cutting off custom, would produce a net return as small or even smaller. No rate, high or low, will earn some companies a fair return, for the simple reason that there is not a demand for their product in paying quantities and at a paying price. Where this condition exists, the enforcement of rates which produce an inadequate return involves no theory that the company is not entitled to an adequate return, whether because of a conflicting right in the public to a reasonable rate or for any other reason; it involves merely a recognition of the fact that to charge the consumer more in order that the company may earn less would benefit nobody. As the Wisconsin Railroad Commission has said: "If the rates are placed at too high a figure, consumption will fall off and the gain from the high rate charges" is "likely to be more than offset by losses in the number of takers."<sup>22</sup> In another case the Wisconsin commission was obliged to fix rates at an unremunerative point for the reason that there was no remunerative point. Because of the ease with which water could be got in its locality, the business of a water company was competitive, and customers simply would not pay a rate high enough to give the company a profit. The commission said:

"The fact that consumers will not pay a rate which will enable the utility to earn what would ordinarily constitute a reasonable rate of return upon its property, may not affect the justice of such a charge or the legal right of the utility to charge such rates, but the fact that the utility has a legal right to a reasonable return upon its property will

<sup>21</sup> *Re Atlantic County Electric Co.*, P. U. R. 1918 B, 589, 591 (N. J. Board of Pub. Util. Comms.); *Re Charles Town Water Co.*, P. U. R. 1916 D, 725, 733 (W. Va. Pub. Serv. Com.). Cf. *Salisbury v. Salisbury Lt., Ht. & Pwr. Co.*, P. U. R. 1918 E, 331, 335 (Md. Pub. Serv. Com.); *San Diego Water Co. v. San Diego*, 118 Cal. 556, 572, 50 Pac. 633 (1897), and note, 52 L. R. A. (N. S.) 51.

<sup>22</sup> *In re Manitowoc Gas Co.*, 3 Wis. R. R. Com. 163, 177 (1908).

not prove of much value if it loses a large part of its business because of the presence of competition or the inability of consumers to pay enough to ensure the company such a return."<sup>33</sup>

A case before the Colorado Public Utilities Commission in 1916 illustrates the same point. The commission declined to permit as large an increase in gas rates as the company asked for, although it expressly found that, at the rates which were adopted, the company would "not earn a fair rate of return on the present fair value of the gas properties."<sup>34</sup> The commission made use of the argument that the schedule the company proposed would "result in rates and charges exceeding the value of the service rendered";<sup>35</sup> but no such argument was necessary or pertinent. For the commission anticipated that, at the rates it prescribed, the company's income would increase, while it found that

"in the event permission should be given . . . to make a schedule of rates and charges which would" (theoretically) "bring about a fair rate of return upon the present fair value of the gas properties, such schedule would result in a charge exceeding the value of the service rendered *and would result in decreased revenues through consequent loss of patronage.*"<sup>36</sup>

A case decided in 1916 in the United States District Court for the district of Nevada involved a similar situation. At the rates which a water company was charging, many consumers bought their water from wagons instead of patronizing the company. The court sustained a reduction of rates, although the company did not appear to be making a large return. It cited some of the *dicta* to the effect that rates must not exceed the value of the service, and undoubtedly relied partly on the idea that the water was not worth what was being charged for it. But nothing turned on that theory; for the court did not anticipate that the reduction in rates would reduce the company's earnings. It said, "the pre-

<sup>33</sup> *In re Oconto City Water Supply Co.*, 7 Wis. R. R. Com. 497, 556, 557 (1911).

Mr. Robert L. Hale, in an article on "The Supreme Court's Ambiguous Use of 'Value' in Rate Cases," 18 COL. L. REV. 208, 210, cites these Wisconsin cases and observes: "The 'value of the services' concept was not needed to justify the commission in the situation described, as it must be quite clear that the company is deprived of nothing at all when its rates are kept down to the point where they yield the utmost net earnings commercially possible."

<sup>34</sup> *Re Colorado Springs Light, Heat, & Power Co.*, P. U. R. 1916 E, 650, 658.

<sup>35</sup> *Ibid.*, 657.

<sup>36</sup> *Ibid.*, 659.

vailing rates exceed the reasonable worth of the services rendered *and unduly discourage consumption of water.*" "Lower rates should at least be fairly tested."<sup>37</sup> In each of these cases the tribunal treated with respect, and believed that it applied, the theory that rates must not exceed the value of the service, but in neither was that theory at all necessary to the result.

There remain an abundance of *dicta* that rates may sometimes be fixed below cost. These examples from the United States Supreme Court are much quoted:

"We do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. . . . There may be circumstances which would justify such a tariff."<sup>38</sup> "The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends."<sup>39</sup> "It would not . . . be claimed that the railroads could in all cases be allowed to charge grossly exorbitant rates as compared with rates paid upon other roads in order to pay dividends to stockholders. . . . The rule stated in *Smyth v. Ames* . . . that the railways are entitled to a fair return upon the capital invested . . . might not justify them in charging an exorbitant mileage in order to pay operating expenses, if the conditions of the country did not permit it."<sup>40</sup>

These sayings are all frankly *dicta*. In *San Diego Land and Town Co. v. National City*,<sup>41</sup> the court in sustaining rates of which the company complained spoke of the original-cost basis for computing proper returns as "defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration"; but, as there is nothing in the case to suggest that the rates of which the court approved would yield less than a reasonable return on the fair value of the property, the intimation that rates must in any event be kept down to the "fair value in themselves of the services rendered" is another *dictum*.

<sup>37</sup> *Goldfield Consolidated Water Co. v. Pub. Serv. Com. of Nevada*, 236 Fed. 979, 986 (1916).

<sup>38</sup> *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, 412 (1894).

<sup>39</sup> *Covington & Lexington Turnpike Co. v. Sandford*, 164 U. S. 578, 596 (1896).

<sup>40</sup> *Minneapolis & St. Louis Railroad Co. v. Minnesota*, 186 U. S. 257, 268 (1902).

<sup>41</sup> 174 U. S. 739, 757 (1899).

*Cary v. Eureka Springs Railway Co.*,<sup>42</sup> decided by the Interstate Commerce Commission in 1897, is relied on by Mr. Wyman<sup>43</sup> for the proposition that rates may be so high as to be "unreasonable in themselves," although the company is "earning no more than a fair return." In that case two roads were involved. The Eureka Springs Railway Company had for many years earned an average profit far in excess of six per cent on its investment, besides accumulating a large surplus. Its earnings during the two years preceding the suit did not exceed six per cent; but the commission considered that the falling off in those years (1895 and 1896) could "only be deemed casual and temporary," as it was due to "temporary financial contingencies arising from exceptional causes," and that the "additional earnings" of previous years were "amply sufficient" to meet such contingencies. The commission further found that the "decrease in the earnings . . . was largely in the passenger traffic" (the rates charged for which the commission did not reduce), and that "more moderate rates will hardly fail to induce travel and increase the volume of freight as well as passenger business." In other words, it was found not merely that the existing freight rates — which the commission lowered — were high as compared with rates elsewhere, but also that, taking one year with another, the existing rates were giving the company an excessive return, and that the prescribed reduction would not reduce the company's returns below a reasonable point. The rates were also found to be discriminatory as between localities, and this was an additional ground for lowering them. Of the other railroad involved, the commission said:

"Nor is there anything in the facts ascertained, to justify the belief that under ordinary industrial conditions, the net earnings of this company are not, and with the moderate reduction proposed will not be, sufficiently and amply remunerative."

The case, then, fixed no rates which were not expected to produce a reasonable return on the value of the property involved. It therefore completely fails to support the theory that unremunerative rates may be fixed in order that the value of the service may not be exceeded.

<sup>42</sup> 7 I. C. C. 286, 316-18 (1897).

<sup>43</sup> BRUCE WYMAN, 2 ed., BEALE AND WYMAN, RAILROAD RATE REGULATION, § 445.

In 1916 the California Railroad Commission, in allowing a water company a much smaller increase in water rates than it asked for, declared that it applied

"the well-established rule in public utility regulation, that while rates must be reasonable to the utility, they must, in any event, be reasonable to the public. The cases clearly establish the principle that the rates charged by a public utility must in no event be higher than the service is reasonably worth to the consumer." <sup>44</sup>

But it is doubtful whether the case actually allowed the company less than a reasonable return. For the rates prescribed were expected to yield a net return, which, though small, may have amounted to 4.25 <sup>45</sup> per cent on the value of the property, even including a considerable amount of property which was not used or useful; and a comparatively small return would be reasonable in view of the fact that consumers had bought their land from a company closely affiliated with the petitioner, and their water rights from the petitioner as part of the same transaction.

The *obiter* character of what is said in the Oklahoma case of *Oklahoma Gin Co. v. State*,<sup>46</sup> seems quite as clear. A commission's order fixing the rate for cotton ginning in a city at fifty cents per bale was sustained, in spite of the commission's admission that "the price of fifty cents per bale is not sufficient to pay the operating expenses and keep all the gins . . . in operation during the ginning season." The Oklahoma court declared that it was quite immaterial whether the gins did business at a loss or not; in other words, it adopted an extreme value-of-the-service standpoint. But it had no need, in order to sustain the commission's order, to adopt anything of the sort, or to ignore the requirement of a reasonable return to the producer; for it had not been admitted or shown that there were no gins, or an insufficient number of gins to handle the business, which could make a profit at the fifty-cent rate; or that, if the number of gins were reduced to correspond with the needs of the community, that rate would not give a profit to all.

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<sup>44</sup> *Re Lake Hemet Water Co.*, P. U. R. 1917 A, 458, 483.

<sup>45</sup> It may also have amounted to less. This figure is obtained by selecting from the various alternative estimates which the case contains, of cost, depreciation, operating expenses, etc., those least favorable to the company's demand; the commission itself makes no selection.

<sup>46</sup> (Okla.), 158 Pac. 629 (1916), P. U. R. 1916 C, 22.



One case, decided in 1888 by the Interstate Commerce Commission,<sup>47</sup> may have fixed rates too low to produce a reasonable return to the carrier; but this is not clear. The earnings of the New Orleans and North Eastern, while they were "above operating expenses," were not and never had been "sufficient for the payment of operating expenses and interest or fixed charges"; yet the commission found, on grounds of reasonableness to the public, that a rate of this road should be lowered to one less excessive as compared with other ton-mile rates in the same region. But "interest or fixed charges" do not necessarily coincide with a return on the value of the road, and a return on that value may possibly have been earned both before and after the reduction.

The law, in any case, is clear enough. In *Atlantic Coast Line v. North Carolina Corporation Commission*,<sup>48</sup> the United States Supreme Court said by way of *dictum*:

"In a case involving the validity of an order enforcing a scheme of maximum rates of course the finding that the enforcement of such scheme will not produce an adequate return for the operation of the railroad, in and of itself demonstrates the unreasonableness of the order."

In other words, all the talk of courts—including the Supreme Court itself—commissions and text-writers to the effect that rates may be fixed so low that they will not produce a reasonable return to the company, if that is necessary in order that they may not exceed the value of the service to the public, is baseless. The law to-day is clearly in accordance with this *dictum*.

The doctrine that the producer is always entitled to a reasonable return, whatever the needs of the consumer or the value of the service to him may be, has several times been applied by the Interstate Commerce Commission. *Re Alleged Excessive Freight Rates and Charges on Food Products*<sup>49</sup> was the commission's report to the Senate on an investigation made at its direction. The commission refused to find certain rates unreasonable, although people were unable, at those rates, to market food products which they had long been accustomed to market.

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<sup>47</sup> *New Orleans Cotton Exchange v. Cincinnati, New Orleans, & T. P. Ry.*, 2 I. C. C. 375 (1888).

<sup>48</sup> 206 U. S. 1, 24, 25 (1906).

<sup>49</sup> 4 I. C. C. 48, 66, 67.

"There is an excellent clay in Nebraska for making bricks, a useful and creditable industry. Bricks are much needed in New York. The people of Nebraska have a right to make them as well as a right to have them shipped to New York at reasonable rates. But it might be that when such reasonable rates were deducted from the price received the remainder would be less than the 'actual cost of production.' That would not necessarily make the rates unreasonable. Unfortunate it may be, but still, of necessity, the claims of the shipper must wait upon the rights of those whose services he employs and whose property he uses. The employees who run the train may have neither brick, corn, nor railroad investment, but they must be paid for their services. The road must be repaired and bridges mended. Actual and honest investment must receive fair reward. All this must be paid before the profits or actual cost of producers are paid unless the services and property of others are to be appropriated to the use of those who for the time may be engaged in an unprofitable business or disadvantageously located industry."

Similarly, the commission in 1910 refused to lower rates on pine-apples to or near a point at which producers could market them profitably.

"The position of the growers is that such rates should be established as will permit them to market their product at a reasonable profit. No such test of the justness of a transportation charge can be admitted."<sup>60</sup>

The point that the utility must always be allowed a reasonable return, regardless of the value of the service, is not fully established by *Reagan v. Farmers' Loan and Trust Co.*<sup>61</sup> and *Covington and Lexington Turnpike Co. v. Sandford*,<sup>62</sup> which held that rates which produced no return on the investment were invalid; for both these cases intimated that the right to some return was not absolute, and would or might in some cases have to give way to the right of the public to pay no more than a reasonable price. But the matter is concluded by *Northern Pacific Railway v. North Dakota*,<sup>63</sup> decided by the Supreme Court in 1915.

It would be possible, evidently, to admit the necessity of a

<sup>60</sup> *Florida Fruit & Vegetable Shippers' Assn. v. A. C. L. R. R.*, 17 I. C. C. 552, 560 (1910).

*Cf. In re San Diego & Southeastern Ry. Co.*, P. U. R. 1916 C, 1 (Cal. R. R. Com.). The commission refused to lower rates, in spite of the allegations of shippers that they could make no profit under existing rates.

<sup>61</sup> 154 U. S. 362 (1894).

<sup>62</sup> 164 U. S. 578 (1896).

<sup>63</sup> 236 U. S. 585 (1915).

reasonable return on the entire business of a public utility and yet to deny the necessity of such a return on each kind of service which it performed. But it is not possible to admit the necessity in the case of each particular service and deny it in the case of the business as a whole. If a company is to make a profit on each service it performs, it must inevitably make a profit on its entire business; if, therefore, it is entitled to make a profit on each service, regardless of the value of the service and the needs of the consumer, it follows that it is entitled, equally regardless, to make a profit on its whole business.

Is a utility entitled to make a profit on each service? In the Arkansas case of *Missouri Pacific Railway Co. v. Smith*,<sup>54</sup> it was held that a railroad might be required to carry passengers at a loss, so long as it was allowed to earn a profit on its aggregate business, passenger and freight. The Northern Pacific case<sup>55</sup> in the Supreme Court settled the law to the contrary. It decided that rates on a particular commodity (coal) which did not yield a return large enough to cover the overhead charges attributable to coal could not be enforced, regardless of whether the company was earning a fair return on its whole business, and regardless also of the effect which increased rates would have upon the public.

"Where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service after taking into account the entire traffic to which the rate applies, it must be concluded that the State has exceeded its authority."

"As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. . . . It would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain. . . . It is urged by the State that the commodity in question is one of the lowest classes of freight. This may be assumed, and it may be a good reason for a lower rate than that charged for carrying articles of a different sort, but the mere grade of a commodity cannot be regarded as furnishing a sufficient ground for compelling the carrier to transport it for less than cost or without substantial reward.

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<sup>54</sup> 60 Ark. 221, 244, 29 S. W. 752 (1895).

<sup>55</sup> 236 U. S. 585, 595-98, 604 (1915).

"The State insists that the enactment of the statute may be justified as 'a declaration of public policy.' In substance, the argument is that the rate was imposed to aid in the development of a local industry and thus to confer a benefit upon the people of the State. The importance to the community of its deposits of lignite coal, the infancy of the industry, and the advantages to be gained by increasing the consumption of this coal and making the community less dependent upon fuel supplies imported into the State, are emphasized. But, while local interests serve as a motive for enforcing reasonable rates, it would be a very different matter to say that the State may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally well be asserted—to carry gratuitously, in order to build up a local enterprise."

In the next case in the same volume,<sup>56</sup> the Supreme Court applied to passenger rates the principle that it had just applied to rates on coal; *i. e.*, it held that passenger rates must yield the company a profit, irrespective of the profitableness of the company's entire business.

"It would not be contended that the State might require passengers to be carried for nothing, or that it could justify such action by placing upon the shippers of goods the burden of excessive charges in order to supply an adequate return for the carrier's entire service. And, on the same principle, it would also appear to be outside the field of reasonable adjustment that the State should demand the carriage of passengers at a rate so low that it would not defray the cost of their transportation, when the entire traffic under the rate was considered, or would provide only a nominal reward in addition to cost."<sup>57</sup>

The rule, which these cases so clearly establish, that each service must pay its own costs, should be understood in this sense:

<sup>56</sup> *Norfolk & Western Ry. Co. v. Conley*, 236 U. S. 605, 609 (1915).

<sup>57</sup> In each of these cases the Supreme Court added a curious *caveat*. In the *Northern Pacific* case it said: "If in such a case there exists any practice, or what may be taken to be (broadly speaking) a standard of rates with respect to that traffic, in the light of which it is insisted that the rate should still be regarded as reasonable, that should be made to appear." 236 U. S. 585, 599 (1915). In the *Norfolk and Western* case it said: "If in any case it could be said that there existed other criteria by reference to which the rate could still be supported as a reasonable one for the transportation in question, it would be necessary to cause this to appear." 236 U. S. 605, 609 (1915). But the court does not appear to have had in mind any "practice," "standard," or "criteria" by reference to which it might be proper, on occasion, to violate the requirement of a reasonable return, and the implied *dicta* that such conditions might conceivably be discovered detract little from the force of the decisions.

that each service *which can conveniently be treated as distinct* must pay its own costs. Almost any service which is treated for rate-making purposes as a single division of a utility company's business might conceivably be subdivided into different services differing more or less in the cost of performing them. For example, it costs more to carry a passenger who weighs 180 pounds than one who weighs 130 pounds, yet both pay the same fare. In the interest of simplicity and practicability, the subdivision of services must, as it does, stop somewhere; and its stopping somewhere hardly derogates from the principle that each service must pay its own costs. This would seem to be the true explanation of the cases in which the Supreme Court has held that carriage over a section of road where costs are high, because of expensive construction<sup>58</sup> or light traffic,<sup>59</sup> entitles the carrier to no extra compensation, but only to the normal rate which when applied to its whole road gives a fair return. It seems also measurably to reconcile the case of *Atlantic Coast Line v. North Carolina Corporation Commission*,<sup>60</sup> in which the court held that a railroad might be compelled to operate a particular connecting train on which it lost money.

Since a utility company is entitled wherever possible, and re-

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<sup>58</sup> *St. Louis & San Francisco Ry. Co. v. Gill*, 156 U. S. 649, 665 (1895).

<sup>59</sup> *Puget Sound Traction Co. v. Reynolds*, 244 U. S. 574 (1917).

*Cf. State ex rel. Missouri Pacific Ry. Co. v. Atkinson*, 269 Mo. 634, 192 S. W. 86 (1917).

<sup>60</sup> 206 U. S. 1 (1907). The Supreme Court (White, J.) in this case adopts, and in *Northern Pacific Railway v. North Dakota*, 236 U. S. 585 (1915), repeats a distinction which is far from convincing; *viz.*, that to run a train is "to furnish a facility which it is a part of" the railroad's "general duty to furnish for the public convenience. The distinction between an order relating to such a subject and an order fixing rates" is that "as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result." 206 U. S. 26.

Doubtless one primal duty of a carrier is to furnish adequate facilities to the public; but the duty of actually carrying passengers and commodities would seem to be quite as primal as the duty of furnishing adequate facilities for their carriage. If a road may be compelled to furnish means at a loss, why may it not be compelled to permit their use at a loss? Of course the court would not require a road to furnish passenger facilities in general at a loss; in *Norfolk & Western Railway Co. v. Conley*, 236 U. S. 605 (1915), it held, what comes to the same thing, that a road could not be compelled to carry at a loss its passenger traffic as a whole. But the carriage of passengers on the less patronized and on the more patronized trains may well be lumped together and treated as a single service.

*Cf. Jones v. K. C., C. C., etc. Ry. Co.*, P. U. R. 1918 D, 586 (Mo. Pub. Serv. Com.).

ardless of all other considerations, to charge for every service it performs what that service costs, it is clear that there is no criterion, whether of the value of the service or anything else, which can compete with the criterion of cost as against the company. The proposition is a constitutional one. Both the Northern Pacific case and its fellow<sup>61</sup> involved state action, which the United States Supreme Court (in 1915) held unconstitutional, and the cases of course establish the law for every tribunal in the country. Yet the old idea that a utility's right to charge what its service costs is conditioned on the service being worth so much is currently set forth as a truism in the *dicta* of commissions.<sup>62</sup>

The constitutional proposition of the Northern Pacific case disposes at the same time of a common-law question which might otherwise arise. Public utilities (if not all businesses) have a common-law duty to serve at reasonable rates. Whether the discharge of this duty might sometimes involve their serving at less than cost, might be a fair common-law question, were it not foreclosed by the Supreme Court's determination that service at less than cost cannot constitutionally be required of them.

Rates may never be fixed, by the state, below the cost of the service. May they sometimes be fixed, by the utility, above the cost of the service? Is there some criterion, whether of value of the service or something else, which can compete with cost in favor of the company? This also involves a common-law and a constitutional question: the common-law question whether a utility sometimes may, consistently with its duty of serving at reasonable rates, charge rates which exceed cost, and the constitutional question whether the state may, consistently with due process of law and other constitutional restrictions, reduce to cost all rates which exceed it.<sup>63</sup> If there be a rule of constitutional law

<sup>61</sup> Notes 55 and 56, *supra*.

<sup>62</sup> *E. g.*, *Re Heisen*, P. U. R. 1917 B, 644 (Ill. Pub. Util. Com.); *Re Colorado Springs Lt. Ht. & Pwr. Co.*, P. U. R. 1916 C, 464, 482 (Colo. Pub. Util. Com.); *Salisbury v. Salisbury Lt. Ht. & Pwr. Co.*, P. U. R. 1918 E, 331, 334 (Maryland Pub. Serv. Com.); *Re New Jersey Gas Co.*, P. U. R. 1918 B, 438, 441 (N. J. Board of Pub. Util. Comms.); *Re Portland Railway Lt. & Pwr. Co.*, P. U. R. 1918 B, 266, 274 (Pub. Serv. Com. of Ore.).

<sup>63</sup> Conceivably the charging of rates which exceed cost involves another constitutional question. It has been suggested that the consumer is unconstitutionally deprived of his property if the utility is permitted to charge more than a reasonable rate; *So. Ind. Ry. Co. v. R. R. Com.*, 172 Ind. 113, 87 N. E. 966 (1909); *Civic League of St. Louis v. St. Louis Water Dept.*, P. U. R. 1917 B, 576 (Missouri Pub. Serv. Com.);

that, under some circumstances, the state may not reduce rates to cost, this is to say that utilities are at liberty under those circumstances to fix rates above cost; and again there is an end of the common-law question. But if, on the other hand, the rule of constitutional law be that the state may reduce rates to cost under all circumstances, what follows is simply that utilities may not effectively fix them higher if the state objects. There is no compulsion on the state to object, and whether it does so is for its courts, subject to free correction by its legislature, to determine. The common-law question, in other words, is in this case an independent one. And it is in this second direction that the constitutional question is decided.

It was pointed out above that the valuation of public-service property on another basis than that of cost must result, when the valuation is less than the cost, in the fixing of rates which, while they yield a reasonable return on the fair value of the property, do not yield such a return on its cost. This is a matter of valuation, of the basis on which returns are computed, with which this discussion of rates of return has nothing directly to do. In just the same way, it has nothing directly to do with the valuation of property above its original cost. The Supreme Court is probably prepared to value property above its original cost in some cases.<sup>64</sup> It would follow that rates, to be constitutional, must in such cases be high enough to produce a reasonable return on something more than cost; in other words, to produce more than a reasonable return on cost. It does not follow that rates must ever be high enough to produce more than a reasonable return on fair value. And if a rate produces no more than a reasonable return on the fair value of the property employed, by hypothesis it does not exceed the cost of the service; since the cost of the service, by definition, includes a reasonable return on the fair value of the property.

Similarly, there is some suggestion that the cost of operation of a particularly efficient and economical company should be reckoned at something more than its actual current expenditures; in

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*contra*, *Brooklyn Union Gas Co. v. New York*, 50 N. Y. Misc. 450, 100 N. Y. Supp. 570 (1906), pointing out that the law does not require the consumer to take the service.

<sup>64</sup> Cf. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 52 (1902); *Minnesota Rate Cases*, 230 U. S. 352, 454 (1913); *San Joaquin Co. v. Stanislaus County*, 233 U. S. 454 (1914); Robert L. Hale, "The Supreme Court's Ambiguous Use of 'Value' in Rate Cases," 18 COL. L. REV. 208.

order that the company may profit somewhat from its efficiency and economy.<sup>65</sup> This is a matter of defining cost, or reasonable cost; not of permitting rates to exceed cost.

A United States Circuit Court has delivered a *dictum* to the effect that the state may not constitutionally reduce rates to the cost of the service when the existing rates are no greater than the service is "worth."<sup>66</sup> This *dictum* is perhaps unique. The Supreme Court case of *Cotting v. Kansas City Stock Yards Co.*<sup>67</sup> has been thought to hold that rates may not constitutionally be forced down to the point where they yield only a reasonable return to the company, if some higher rate is reasonable to the consumer. The case has some appearance of laying down such a rule, chiefly because the only elaborate opinion it contains takes that view. But this opinion, while it reaches the result which the court reached, was concurred in by only a minority. No such view is involved either in the opinion of the majority or in the decision of the court. The Kansas legislature had passed an act which classified as "public stock yards" all yards which handled a certain amount of live stock per day. Various regulations were imposed upon "public stock yards"; among other things, the rates which they might charge were fixed and lowered. The Kansas City Stock Yards Company was the only concern the business of which was large enough to bring it within the act. The Supreme Court enjoined the enforcement of the statute, but not at all on the ground that it would be unconstitutional to limit profits to a reasonable return on the fair value of the property employed. The majority — six judges — rested the unconstitutionality of the statute solely on the ground that it deprived the company of the equal protection of the laws. That is, they decided nothing more than that mere volume of business — the basis of classification in the act — was not a reasonable basis of classification; that a company might not legally be selected for subjection to regulation of various sorts, while all others were left unregulated, on the sole ground that its volume of business was large. It was not decided that large profits, as distinguished from a large volume of business, would be an improper basis of

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<sup>65</sup> L. R. A. 1915 A, 43, note, and cases cited.

<sup>66</sup> Central of Georgia Railway v. R. R. Commission (Ala.) 161 Fed. 925, 994 (1908).

<sup>67</sup> 183 U. S. 79 (1901).



classification, though the long minority opinion of Mr. Justice Brewer contains abundant *dicta* to that effect. The court had no opportunity, if it had the inclination, to decide such a thing, and the majority did not intimate that it had any such inclination.

On the other hand, two decisions of the United States Supreme Court involve, though they do not express, both the constitutional proposition that the state may reduce to cost rates which exceed it, even if the value of the service be higher, and the common-law proposition that rates which exceed cost are unreasonable and should be reduced, even if the value of the service be higher. In *Central Yellow Pine Association v. Illinois Central Railroad*,<sup>68</sup> and *Tift v. Southern Railway*,<sup>69</sup> the Interstate Commerce Commission held that the increased prosperity of the lumber business did not justify increases in rates which were already remunerative, and ordered the carriers to reduce their rates. In the Tift case, the commission said:

"It is clear that, if a rate on an article of traffic is already remunerative, the increased prosperity of the business of manufacturing that article is no ground for an advance of the rate. The claim to the contrary on the part of the carriers is based upon the erroneous assumption, so prevalent among traffic managers, that a rate may be made as high as 'the traffic will bear' . . . 'The test of the reasonableness of a rate is not the amount of the profit in the business of a shipper or manufacturer, but whether the rate yields a reasonable compensation for the services rendered. If the prosperity of the manufacturer is to have a controlling influence, this would justify a higher rate on the traffic of the prosperous manufacturer than on that of one less prosperous. The right to participate in the prosperity of a shipper by *raising rates* is simply a license to the carrier to appropriate that prosperity, or in other words, to transfer the shipper's legitimate profit in his business from the shipper to the carrier.'" <sup>70</sup>

Both of these cases were followed by proceedings in the United States courts, and ultimately in the Supreme Court, in which the commission's orders were sustained and the roads were required to obey them. In the Tift case,<sup>71</sup> the Circuit Court pointed out that the antecedent rates were conceded to be remunerative, and that the roads were prosperous, and declared that the roads had

<sup>68</sup> 10 I. C. C. 505 (1905).

<sup>69</sup> *Ibid.*, 548.

<sup>70</sup> *Ibid.*, 548, 582.

<sup>71</sup> *Tift v. Southern Railway*, 138 Fed. 753, 763 (1905).

no "right, by arbitrarily increasing freight rates, to divert at any time to their own treasuries a share of the profits of successful industries or occupations." The Supreme Court<sup>72</sup> did not discuss or formulate the rules that, even when the consumer is particularly prosperous and the service particularly advantageous to him, rates may not reasonably be fixed by the utility above the cost of the service, and that, if so fixed, they may constitutionally be reduced to cost by the state. No attack on the commission's action on constitutional grounds seems to have been made. But both rules are involved in the court's action in sustaining the commission's rates and affirming the decrees against the companies. For the commission and the lower courts had acted on both rules, and an opposite rule on either point would have led to an opposite conclusion and a reversal. It must be supposed that, if the Constitution were violated by forcing rates down to the cost of the service regardless of its value, the Supreme Court would have taken judicial notice of the fact and refrained from doing so. In the Illinois Central case, it said:

"The question submitted to the Commission . . . was one which turned on matters of fact. In that question, of course, there were elements of law, but we cannot see that any one of these or any circumstance probative of the conclusion was overlooked or disregarded."<sup>73</sup>

These decisions are reënforced by the analogy of the rule, which the Supreme Court has not only applied but plainly expressed that rates may not be fixed below cost by the state:<sup>74</sup> and there is nothing from that court to set against them except broad *dicta* to the general effect that value is as important as cost. There is, in fact, little disposition in any quarter to give the general proposition that value of service is as important as cost any specific application to the situation in which value is thought to exceed cost. It is hardly disputed (otherwise than by the assertion of the general proposition in question) that rates which exceed cost constitutionally may, and legally should, be reduced to cost, whatever the value of the service. Every American decision or statement

<sup>72</sup> *Illinois Central Railroad v. Interstate Commerce Commission*, 206 U. S. 441 (1907); *Southern Railway v. Tift*, 206 U. S. 428 (1907).

<sup>73</sup> *Illinois Central Railroad v. Interstate Commerce Commission*, 206 U. S. 441, 466 (1907).

<sup>74</sup> Notes 55 and 56, *supra*.

that they should is of course in effect, however implicitly and unconsciously, an expression of the tribunal's opinion that they may. There are an abundance of *dicta*<sup>76</sup> and decisions<sup>76</sup> that rates must not exceed cost (including a fair return), in which nothing is said of value. This is of course tacitly to treat value as immaterial when cost is known. In *Stanislaus County v. San Joaquin Canal Co.*,<sup>77</sup> for example, the Supreme Court, without discussing the value of the service, sustained a reduction in rates on the basis of the profits the company was making, and said:

"It is not confiscation nor a taking of property without due process of law, nor a denial of the equal protection of the laws, to fix water rates so as to give an income of six per cent upon the then value of the property actually used . . . even though the company had prior thereto been allowed to fix rates that would secure to it one and a half per cent a month income upon the capital actually invested in the undertaking. If not hampered by an unalterable contract . . . a law which reduces the compensation theretofore allowed to six per cent upon the present value of the property used for the public is not unconstitutional. There is nothing in the nature of confiscation about it."

There are also some decisions (besides those already discussed) confining rates to cost, in which the contention that the value of the service concerned exceeds its cost is expressly dealt with and declared to be irrelevant. In *Oregon & Washington Lumber Manufacturers' Association v. Union Pacific Railroad*,<sup>78</sup> in disapproving certain advances in rates on lumber, the Interstate Commerce Commission said: "If the old rates were just and reasonable, the defendants cannot justify the advance on the ground of the prosperity of the lumber business. . . ." And in *Commercial Club of*

<sup>76</sup> *Turner v. Connecticut Co.*, 91 Conn. 692, 101 Atl. 88 (1917); *Hartford v. Connecticut Co.*, P. U. R. 1918 C, 611, 627; (Conn. Pub. Util. Com.); *Salisbury v. Salisbury Lt., Ht. & Pwr. Co.*, P. U. R. 1918 E, 331 (Md. Pub. Serv. Com.); *Re Farmers and Merchants Telephone Co.*, P. U. R. 1918 F, 283, 289 (Neb. Ry. Com.); *Re Bronx Gas and Electric Co.*, P. U. R. 1918 D, 300, 329 (N. Y. Pub. Serv. Com., First Dist.).

<sup>77</sup> *Stanislaus County v. San Joaquin Canal Co.*, 192 U. S. 201, 213 (1904); *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234, 91 N. W. 1081 (1902); *Home Telephone Co. v. Carthage*, 235 Mo. 644, 139 S. W. 547 (1911); *Garwood v. Colo. Southern Ry. Co.*, P. U. R. 1916 A, 911 (Colo. Dist. Ct., Div. 2); *In re Colo. Springs Lt., Ht. & Pwr. Co.*, P. U. R. 1916 A, 872, 887 (Colo. Pub. Util. Com.). *The Railroad Passenger Rate Case*, P. U. R. 1915 B, 362, 368, 369 (Mass. Pub. Serv. Com.; perhaps *dictum*).

<sup>77</sup> 192 U. S. 201, 213 (1904).

<sup>78</sup> 14 I. C. C. 1, 15 (1908).

*Omaha v. Anderson & Saline River Railway Co.*,<sup>79</sup> in holding another lumber rate too high, the commission said:

"Defendants contend that the rate of 26½ cents to Omaha is shown to be reasonable by the facts that the traffic moves freely and that the lumber business in Omaha has greatly increased. . . . We are not, as at present advised, ready to accept the theory that rates may lawfully and reasonably be increased by progressive advances as long as the traffic moves freely. . . . Some traffic must move, and reasonably freely, up to the point where the rate becomes prohibitive."

A logical modern case, decided by the Supreme Court of Wisconsin, is *Duluth Street Railway Co. v. Railroad Commission of Wisconsin*.<sup>80</sup> The commission had reduced street-car fares, on the ground that the existing ones yielded the company a net return of 7½ per cent on the fair value of its property. The court sustained the action of the commission, against the company's contention that the reasonableness of rates depended not upon the company's profit but upon what the service was "worth to the public." The court observed that the value of a service rendered by a monopoly is a vague idea, and continued:

"The cost of the service is the most definite and tangible guide there is to tie to in making rates, if, indeed, it is not the only one. Where rates are so adjusted as to yield a fair return on the value of the property over and above expenses and depreciation, they are reasonable. Where they are so fixed as to materially exceed this sum, they are not."

The House of Lords,<sup>81</sup> and in one case, curiously enough, the Interstate Commerce Commission,<sup>82</sup> seem to have taken the

<sup>79</sup> 18 I. C. C. 532, 536 (1910).

<sup>80</sup> 161 Wis. 245, 152 N. W. 887 (1915); P. U. R. 1915 D, 192.

<sup>81</sup> *Canada Southern Railway v. International Bridge Co.*, 8 A. C. 723 (1883); contains at least a vigorous *dictum* to the effect that the value of the service to the consumer is practically the only thing that counts in determining how much he may reasonably be charged; that the producer's profit, unless it is "enormously disproportionate to the money laid out," has nothing to do with it. Of course no constitutional question was involved in the case. Moreover, it is not at all clear (as a lower court had pointed out and as the House of Lords implied) that the rates which were approved as reasonable, in the absence of legislative restriction, involved any excessive return to the company; for the return was alleged to amount "at the utmost to 15 per cent," and the physical risk of loss to which the company's bridge was exposed was enormous.

<sup>82</sup> *Railroad Comms. of Iowa v. Illinois Central R. R.*, 20 I. C. C. 181 (1911). The complaint before the Commission asked for a reduction of the railroad passenger fares on a bridge across the Mississippi River. The income which the Illinois Central got from

opposite view of the question whether rates may exceed cost and still be reasonable. But the American law is clearly that rates above cost are unreasonable; that there is no constitutional obstacle to reducing them to cost; and that they should be reduced accordingly, whatever the value of the service may be.

It is clear that there can be no sense of the phrase value of the service, or reasonableness to the consumer, in which it is a criterion superior to, or coördinate with, cost of the service. If there were such a sense, it would follow, whatever the sense were, that the cost criterion would occasionally give way to it; and the cost criterion gives way to nothing. Rates may neither be fixed below cost when the value of the service is low, nor above cost when the value is high.

Is this as it should be? This raises the question, what is meant by value of the service, or reasonableness to the consumer? The phrases are much used and little defined. The word value, since it is spoken of in this connection as a measure of what purchasers should pay, is evidently not used in its ordinary sense: for we ordinarily mean by the value of a thing not a theory but a condition — the amount which people will and do pay for it. Neither, evidently, is value here used in the sense of cost: since it is offered precisely as a criterion distinct from cost. Neither does it mean the rate which will bring the producer the greatest aggregate profit (what the traffic will bear), nor the highest rate which some proportion or other of consumers will pay. There is little serious contention at present that rates should be kept up to such a point, and comparatively little need of a rule of law, or any other motive

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the bridge was a complicated bookkeeping question which the Commission did not answer categorically. After stating that "the net earnings of the bridge company are said to amount to about 20 per cent on the original cost of the structure," it intimated some doubt of the accounting processes by which that result was reached; but it did not in terms dispute it, nor fix on any lower percentage as more accurate. And it did distinctly hold that the "generous returns" did not constitute a reason for lowering the rate. This conclusion rested partly on the consideration that "bridges are and have been regarded as precarious properties" — a matter which goes to the cost of the service, and indicates that the real rate of return is less than the apparent one. But it also rested in part, expressly, on notions of reasonableness to the consumer, including the proposition that "testing the charge of 25 cents for passage over this bridge with the tolls exacted for passage over other bridges we find it not unreasonable." The bare cost basis would hardly have led the Commission to sustain the rate.

than self-interest, to keep them down to it. One critic has been led to the conclusion that "to say that the rate must not exceed what the service is reasonably worth . . . means nothing."<sup>85</sup> More exactly, perhaps, to say that the rate must not exceed what the service is reasonably worth, in any normal sense of worth, means nothing. Though the proposition means nothing if the words are taken in their ordinary sense, and nothing true in whatever sense they are taken, it may in some special sense of the words mean something false.

The sense which is given to the value of the service is not only special but various. The Interstate Commerce Commission has spoken of "value of the service, with its bundle of constituents,"<sup>86</sup> without further definition; and again has used the phrase in the sense of the rates that "commodities and the industries that use them can well stand."<sup>87</sup> In another case, the thing the commission had chiefly in mind seems to have been the rates commonly charged for similar services.<sup>88</sup> In *Silk Association of America v. Pennsylvania Railroad Co.*,<sup>87</sup> the commission said, "Illustrative of the value of service is the percentage that the rate paid bears to the value of the article." A federal court has spoken of "the value of the service to the shipper" as "including the value of the goods and the profit he could make out of them by shipment."<sup>88</sup>

These various matters have one broad feature in common: they all go to public policy. That is, they affect the question what it is or may be thought desirable to charge for a service, as distinguished from the question what the service costs. No list can be drawn of all the considerations which may affect a tribunal's view of public policy in its bearing on rates. When value of service is spoken of, as it usually is, without attempt at definition,

<sup>85</sup> Robert L. Hale, "The Supreme Court's Ambiguous Use of 'Value' in Rate Cases," 18 COL. L. REV. 208, 210.

<sup>86</sup> *Boileau v. P. & L. E. R. R.*, 22 I. C. C. 640, 652 (1912).

<sup>87</sup> *Coke Producers' Assn. v. B. and O. R. R.*, 27 I. C. C. 125, 132 (1913).

<sup>88</sup> *Railroad Comms. of Iowa v. Illinois Central R. R.*, 20 I. C. C. 181, 186, and 189 (1911). Cf. *Re Kent Water & Light Co.*, P. U. R. 1917 D, 394, 397, where the Ohio Public Utilities Commission said: "The value of the service . . . is reflected more or less by what such service is usually furnished for by other companies to other consumers under similar circumstances."

<sup>87</sup> 44 I. C. C. 578, 580 (1917).

<sup>88</sup> *Interstate Commerce Com. v. Chicago Great Western Ry.*, 141 Fed. 1003, 1015 (1905).

there is no knowing whether the intended meaning is one or more of these enumerated considerations of policy, or other comparable ones, or all of them together; but something that may be classified as an idea of policy is probably always in mind. Perhaps the phrase has been oftenest used, though never defined, in the widest sense it can have (*i. e.*, the widest which excludes cost, and so is intelligible as a proposed criterion coördinate with cost)—the resultant of all the considerations other than cost (and discrimination) which ought as a matter of public policy to influence rates.

Value of the service, in any of these senses, not only is not, but should not be, and in some directions could not be, allowed to overrule cost. The most obvious objection to a value criterion is its indefiniteness. This results not merely from the fact that its formal definition is a matter of uncertainty and dispute. The several proposed definitions are each incapable of being applied to particular facts with any approach to certainty. What is the measure of what "commodities and the industries that use them can well stand"? How many rates elsewhere are to be collected for comparison, and is their simple average, a weighted average, or some other function to be selected? Is the rate per ton on every commodity to constitute the same fraction of its value, and if not, on what are variations from normal to be based? Just how much do all the considerations of public policy (independent of cost) make it desirable that the rate on coal from Scranton to New York should be? Value of the service cannot be made a primary criterion of rates without asking some questions of this sort; and if such questions are to be answered at all, they cannot fail to be answered in a great and shifting variety of ways. As Commissioner Meyer, speaking for the Interstate Commerce Commission, has said:

"As between . . . the cost of the service and the value of the service, the first is decidedly more capable of exact determination and mathematical expression than the latter. If, as some would have us believe, no measure has yet been discovered for ascertaining the cost of the service, what measure is there suggesting anything definite and tangible and sufficiently practical in its application to carry conviction which can be applied to the value of the service?"<sup>89</sup>

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<sup>89</sup> *Boileau v. P & L. E. R. R.*, 22 I. C. C. 640, 652 (1912). Cf. *Duluth St. Ry. Co. v. R. R. Com. of Wis.*, 161 Wis. 245, 152 N. W. 887 (1915).

It has been pointed out that if any value criterion were set up as coördinate with the cost criterion, rates would sometimes have to be fixed below cost and sometimes above it. Consider first the idea of fixing rates below cost. Doubtless an economy is conceivable in which people would not produce goods and services because it was made financially worth their while, and in which capital would not be in private hands at all. But we are living in a society in which capital is in private hands, and one which gets its work done chiefly by the economic motive. Physicians and artists sometimes may, but the owners of capital as such certainly do not, do for us what does not promise to be worth their while. Now more capital is constantly needed for public utilities. The chance of its earning a great return, which is considerable in some kinds of business, is now comparatively negligible in this. The needed capital is nevertheless supplied — because a reasonable return is considered certain. If we are to continue to get this capital by voluntary induction from private sources, we must continue regularly to allow it a return.<sup>90</sup>

Doubtless the rates for some particular services might be fixed below cost; but, if capital were still to be attracted into public utilities, it would be necessary to allow such high rates at other points in the schedule as to make the aggregate return satisfac-

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<sup>90</sup> Cf. Robert H. Whitten, "Fair Value for Rate Purposes," 27 HARV. L. REV. 419, 422: "There is . . . sound reason why in the long run the public cannot pay less" than the normal cost of production. THORSTEIN VEBLEN, *THE NATURE OF PEACE*, 325, "So long as the price system rules, that is to say so long as industry is managed on investment for a profit, there is no escaping this necessity of adjusting the processes of industry to the requirements of a remunerative price."

In *Re Portland Railway, Light & Power Co.*, P. U. R. 1918 B, 266, 274, 275, the Public Service Commission of Oregon, in granting an application for increased street-car fares, said: "A prime consideration in the investment of capital in enterprises designed to serve the public is the attitude of the public toward its servants, and this attitude is indicated chiefly by the actions of the rate-making authorities. . . . If any Public Service Commission should make a practice of enforcing rates which would not attract free capital, it is certain that the community would eventually lose more than it would gain."

Cf., also, L. R. A. 1915 A, 30, note.

*Re Bronx Gas & Electric Co.*, P. U. R. 1918 D, 300, 331, 332 (New York Pub. Serv. Com., First Dist.): "Capital can be drawn to public utilities from private enterprises only by establishing an attractive relationship between the *certainty* of the return and the *percentage* of the return the utility is allowed to earn upon the money put into the project by investors. If the Commission cannot make a moderate return fairly certain, the percentage of return must be higher, else capital will be repelled."



tory. The favored consumers would be parasitic on other consumers; they could not long be upon the producer. The economics of such a course would be of a sort which has long been thoroughly discredited among economists, and is beginning to be among other people. If A wants a thing and is prepared to pay its cost, there is (at least if it is beneficial or harmless) no reasonable excuse for refusing to let him have it. It is perfectly inequitable to charge him more than its cost in order that a different thing may be furnished at less than cost to some one else.<sup>91</sup>

If a particular industry is unable to pay the cost of the service it desires, it should do what most people do with respect to what they cannot pay for; it should go without. Traffic which will not bear the cost of carrying it ought not to be carried. Its owners have no vested right to live at other people's expense, and that is what happens if they pay only part of the cost of their service while the utility collects the rest from others. The situation is not altered if the article carried, or otherwise served, is of low value. That a thing is cheap no more gives it a right to be carried free, or without fully paying its way, than an individual's poverty entitles him to be carried free.<sup>92</sup> If companies elsewhere are so fortunately situated that they can profitably furnish a given service at a lower rate than A, that is no reason for requiring A to furnish it at a loss. And as for public policy, the public has no such interest in this or that industry as to raise a policy in favor of putting its costs upon other industries; at least, it has no such obvious interest that commissions and courts may properly act on it.

There are as serious objections to fixing rates above cost. So far as a given service is competitive, that also cannot be done; if it were attempted, competitors would simply get all the business. And some public utilities have actual or potential competition.

<sup>91</sup> *Pub. Serv. Com. v. Puget Sound International Ry. & Power Co.*, P. U. R. 1916 B, 81 (*Pub. Serv. Com. of Wash.*); *Re United Traction Co.*, P. U. R. 1916 E, 249 (*N. Y. Pub. Serv. Com., Second Dist.*); Hughes, J., in *Northern Pacific Railway v. North Dakota*, 236 U. S. 585, 598 (1915).

<sup>92</sup> "It is urged by the State that the commodity in question is one of the lowest classes of freight. This may be assumed, and it may be a good reason for a lower rate than that charged for carrying articles of a different sort, but the mere grade of the commodity cannot be regarded as furnishing a sufficient ground for compelling the carrier to transport it for less than cost or without substantial reward." *Northern Pacific Railway v. North Dakota*, 236 U. S. 585, 597, 598 (1915).

Usually it is potential, and the costs of the potentially competing concern are not unlikely to be greater than those of the established one; but if rates are fixed seriously above the point at which the potential competitor could supply the demand, he will presently supply it. If the utility is free from competition, actual or potential, it can easily fix rates at the point of greatest net return, however far that may be above cost; if the law leaves it alone. But it seems clear that the law should, as it does, undertake to prevent that. It would be hard to find a presentable reason of policy for allowing the beneficiaries of a monopoly, natural or legal, more than a reasonable return on the value of their whole property, or more than a reasonable profit on any particular service. It is said that the utility should share in the prosperity of its customers; but it is not made clear why it should, and moreover it inevitably does,<sup>83</sup> through disposing of more of its product when its customers are prosperous. Should an industry pay a rate that yields more than a fair return, simply because it can pay such a rate and still do business? The proposition that it should leads logically to the old idea that a utility may properly charge "what the traffic will bear"; which means that it may absorb the entire profit of its customers, except just enough to keep them running. There may be good reason why the results of the enterprise or luck of the men in a particular business should go to others than themselves, to the state, for example; but why they should go to the monopolies which serve them it is hard to imagine.

Again, suppose companies elsewhere generally charge a rate which would give the particular company an inordinate profit. The most which one company can at all plausibly argue from the case of another is that it is entitled to parallel treatment. As the rates of the other companies are presumably based on their costs, and accordingly allow them only a reasonable profit, the particular company gets essentially parallel treatment if it also is allowed a reasonable profit. The fact that  $n$  is the rate which will yield a reasonable return to A company is no more reason for keeping the rates of B company, whose costs are lower, up to  $n$ , than for keeping the rates of C, whose costs are higher, down to  $n$ . Companies are concerned with rates only so far as they bear on

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<sup>83</sup> The Interstate Commerce Commission points this out in *Central Yellow Pine Assn. v. Illinois Central R. R.*, 10 I. C. C. 505, 536 (1905).

profits. Whether a company's net profits are more or less than is normal for similar companies has an immediate bearing on the question whether its profits, and consequently its rates, are reasonable; but a comparison of the rates themselves is significant only indirectly.

As to the value of the article, of which much is made in discussions of the value of the service, it is hard to see why the shippers of valuable articles are not as well entitled as the shippers of cheaper ones to be served at cost, including risk and a reasonable profit. There is no public policy against owning or shipping valuable articles, and consequently no reason for imposing a tax on their circulation. Even if and when it is well to impose a tax on the circulation of some things, as being harmful or luxurious, the tax should be collected by the state and not by utility companies.

To charge something in addition to cost for the transportation of a commodity has the same sort of effect as a customs tariff between the places affected. That interstate customs tariffs are forbidden by the Constitution is not the worst that can be said of them. They would prevent people in one part of the country from getting the maximum benefit from the low cost of production of particular things in other parts of the country. They would injure the consuming region by reducing consumption (and consequently the production of other things for purposes of exchange), and the producing region by reducing production (and consequently the consumption of other things got by exchange). A transportation charge which exceeds cost acts in the same way.

In practice it would nearly always be impossible to fix rates below cost, whatever legal theory might have to say about it; while it would be very easy, if the law permitted, to fix them above cost in every case in which competition would not be stirred up by doing so. The net result of adopting the two halves of the value-of-the-service theory would therefore be a serious increase in public utility rates as a whole.

It appears, then, that the various circumstances other than cost which are sometimes referred to, under the name of value of the service, as bearing on rates — such as the prosperity or de-

pression of a class of patrons; the cheapness or costliness, the necessary or luxurious character of an article served; the fact that rates elsewhere are high or low — not only do not, but should not and in some directions could not operate to overrule cost or reasonableness to the producer. There must always be a substantial return to the utility, if that is possible; and this could not be so if rates were limited at the upper end by any consideration of value of the service or reasonableness to the consumer. The return to the utility must never be enormous, and this could not be so if rates were limited at the lower end by any such consideration. The sole primary requirement is that the return to the utility shall be reasonable; in other words, the maximum and minimum limits of rates are fixed exclusively by cost.

It does not follow that the circumstances referred to as value of the service have no effect on rates. They readily may, there are reasons why they should, and some of them undoubtedly do, operate to fix rates at a higher or lower point within the range of cost. There is no uniform rule that a reasonable return consists of a given percentage on the fair value of the property employed. On the contrary, the percentage of return upon the fair value of the property which it is reasonable for a utility to earn is agreed to be a variable percentage. Between the lowest return that is substantial and the highest that is not inordinate, there is a belt, more or less broad, of returns which are reasonable in some circumstances and not in others. In accordance with what does the return which it is reasonable for a utility to earn vary? It cannot vary in accordance with the cost of the service. The cost of the service consists of the costs of operation, maintenance, and insurance, depreciation, and the very item we are now considering — a reasonable percentage on the value of the property employed. The percentage of return which is reasonable cannot depend upon itself, or upon the value of the property to which the percentage is to be applied, or upon the size of any of the items which must be covered before a return begins to accrue — maintenance, operating expenses, insurance, and depreciation — unless it be, in some cases, operating expenses.<sup>94</sup> Since it cannot normally

<sup>94</sup> It is sometimes said that the efficiency of the company should affect the rate of return allowed; *Taylor v. Northwest Light & Water Co.*, P. U. R. 1916 A, 372, 389,

depend upon the elements that go to make up cost, it cannot depend upon cost. It must therefore depend on something other than cost. That is to say that it must depend upon the value of the service, if not in one or more of the specific senses which have been suggested for that phrase, then in the broad sense of all the circumstances other than cost (and discrimination) which strike the court as affecting the question what rate is proper.

Since the primary requirement is that rates shall equal cost, the value of the service can take effect only so far as cost is in doubt. But cost is always in doubt. Even the cost of a company's whole product is by no means free from doubt. The mere amount of the property employed is certain, and the cost of maintenance and operation is tolerably certain; but the value of the property and its rate of depreciation are matters of opinion, and the proper rate of return is eminently a matter of opinion. Ideas of public policy exert their chief influence in the determination of what constitutes a reasonable rate of return; but judges could not if they would, and there is no reason why they should, altogether exclude the influence of such ideas in deciding on the fair value of the property and its rate of depreciation. In the case of a particular service, the doubtful element in cost is far larger still. When, as in the case of a carrier, a company is performing a variety of services, it is clear and familiar that there is no means of determining neatly the share of the value of the whole property, or of depreciation, or of the costs of operation and maintenance, which ought to be attributed to each. The question exactly what a particular service costs is therefore "one of almost insuperable difficulty."<sup>96</sup>

It is unquestioned that the profit which a utility may earn on its entire business is variable; and observations to that effect have frequently been coupled with references to the interest of consumers. The United States Supreme Court has said:

"If the answer had not alleged, in substance, that the tolls prescribed . . . were wholly inadequate for keeping the road in proper repair and

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390 (Idaho Pub. Util. Com.); *Duluth St. Ry. Co. v. R. R. Com.*, 161 Wis. 245, 152 N. W., 887 (1915); P. U. R. 1915 D, 192, 206. There is little objection to putting the matter in this way, and considering that it involves varying the return (inversely) with the cost. But, if cost is defined as reasonable or normal cost, the return above cost is not made to fluctuate when the efficient company is allowed a greater profit than the inefficient one.

<sup>96</sup> *Central Yellow Pine Assn. v. Illinois Central R. R.*, 10 I. C. C. 505, 538 (1905).

for earning dividends, we could not say that the act was unconstitutional merely because the company (as was alleged and as the demurrer admitted) could not earn more than four per cent on its capital stock. It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored." <sup>96</sup>

But the statement of variability is most commonly made, as one would expect, with reference to the return on particular services. In *Northern Pacific Railway v. North Dakota*, the very case in which it was laid down that the value of a service could not be made an excuse for fixing rates below cost, the United States Supreme Court said:

"The legislature, undoubtedly, has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and it is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business. There are many factors to be considered — differences in the articles transported, the care required, the risk assumed, the value of the service, and it is obviously important that there should be reasonable adjustments and classifications. . . . The court . . . is not called upon to concern itself with mere details of a schedule; or to review a particular tariff . . . which yields substantial compensation for the services it embraces, when the profitability of the intrastate business as a whole is not involved." <sup>97</sup>

And the actual effect of the value of the service on rates is, naturally, most evident in cases dealing with classification, or other-

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<sup>96</sup> *Covington Turnpike Co. v. Sanford*, 164 U. S. 578, 596 (1896). Cf. *Southern Indiana Ry. Co. v. R. R. Com.*, 172 Ind. 113, 128, 87 N. E. 966, 971 (1909). "What that profit shall be — whether ten, six, two, or any other per cent — must be determined from the facts of each particular case, taking into account, as against the cost and earning capacity of the railroad, the value of the service to the shipper, and the amount he can reasonably afford to pay. In short, as the charge approaches oppression to the shipper, it should in the same degree approach the point of minimum profit to the carrier."

<sup>97</sup> 236 U. S. 585, 598, 599 (1915). Similarly, in *Norfolk & Western Railway v. West Virginia*, 236 U. S. 605, 609 (1915), the court said: "The state is under no obligation to secure the same rate of return from each of the two principal departments of business, passenger and freight." Cf. *Bogart v. Wis. Tel. Co.*, P. U. R. 1916 C, 1020, 1053, 1054 (Wis. R. R. Com.).

wise passing on particular rates. As the Interstate Commerce Commission said in 1912,

"In all classification consideration must be given to what may be termed public policy, the advantage to the community of having some kinds of freight carried at a less rate than other kinds."<sup>98</sup>

For example, the Interstate Commerce Commission has treated the prosperity or depression of the business affected by a particular rate as bearing on the question what the rate should be, when there has been no question of going above or below the limits of cost. The complainant's prosperity was treated in *Hitchman Coal & Coke Co. v. Baltimore & Ohio Railroad*<sup>99</sup> as pointing more or less to the conclusion, which the commission reached, that the rates complained of were not too high; and in *Cattle Raisers' Association of Texas v. M. K. and T. Railway*<sup>100</sup> the depression of the complainants' business was treated as having some tendency, though a slight one, to justify the commission's action in lowering rates.<sup>101</sup> But it can hardly be said to be established law that prosperity or the lack of it on the part of consumers is entitled to any weight at all.

On the other hand, it is entirely settled that the value of an article served counts in fixing the rate. In 1917, in dismissing a

<sup>98</sup> *In re Advances in Coal Rates*, 22 I. C. C. 604, 623 (1912). The *dictum* in this case that the Norfolk & Western did not prove itself entitled to an advance by the mere showing that existing rates did not cover the cost of the service is overruled, if it was ever law — which is very doubtful — by *Northern Pacific Railway v. North Dakota*, 236 U. S. 585 (1915).

In *Coke Producers' Assn. v. B. & O. R. R.*, 27 I. C. C. 125, 132, 140 (1913), rates were lowered on the ground, among others, of public policy in favor of the dissemination of an article. The Public Service Commission of West Virginia took similar action in *Greer v. B. & O. R. R. Co.*, P. U. R. 1916 D, 286, 301. Cf. *R. R. Passenger Rate Case*, P. U. R. 1915 B, 362, 386. (Mass. Pub. Serv. Com.), and *Bogart v. Wis. Tel. Co.*, P. U. R. 1916 C, 1020, 1053, 1054, on propriety of favoring some classes of traffic.

<sup>99</sup> 16 I. C. C. 512 (1909).

<sup>100</sup> 11 I. C. C. 296, 348 (1905).

<sup>101</sup> In *Central Yellow Pine Assn. v. Illinois Central R. R. Co.*, 10 I. C. C. 505 (1905); and *Tift v. Southern Railway*, 10 I. C. C. 548 (1905); the Interstate Commerce Commission, in holding that the prosperity of a business cannot excuse the imposition of a rate which exceeds cost, used language which, taken literally, would indicate that the prosperity of a business served has nothing at all to do with the propriety of a rate. But the Commission may be supposed to have had in mind only the question with which it was dealing, *viz.*, the question of allowing a rate to exceed cost. The question of fixing a rate higher or lower within the range of cost is distinct.

complaint against a carrier's rate on raw silk, the Interstate Commerce Commission said:

"The increase in the hazard is not the only fact to be considered in prescribing rates for the transportation of highly valued commodities. The Supreme Court in *N. P. Ry. v. North Dakota*, 236 U. S. 585, 599, in giving some of the many factors which should be considered in making rates, names 'the risk assumed' and also 'the value of the service.' This Commission has throughout its history given consideration to the value of a commodity when determining what is a reasonable rate thereon. Illustrative of the value of service is the percentage that the rate paid bears to the value of the article. . . . Silk is one of the commodities of the highest value in proportion to the ratio which the charges bear to the value of the commodity."<sup>102</sup>

Weight is constantly being given, in passing on rates, to comparisons with rates at other points where conditions are similar.<sup>103</sup>

In passing on the rate for a particular service, tribunals not infrequently refrain altogether from guessing what the cost of the service may be. The difficulty or impossibility of fixing exactly the cost of a particular service, and the special regard which is

<sup>102</sup> *Silk Assn. of America v. Penn. R. R.*, 44 I. C. C. 578, 580, 581 (1917). Similarly, in 1916, in a case involving advances on live stock, the commission adjudged that "rates for the transportation of any of the animals named . . . which are increased . . . by more than 2 per cent for each 50 per cent . . . of additional value are . . . unreasonable." *National Society of Record Assns. v. Aberdeen & Rockfish R. R. Co.*, 40 I. C. C. 347, 355 (1916). The same principle was applied in *Iowa R. R. Comms. v. A. T. & S. F. Ry. Co.*, 36 I. C. C. 79, 85 (1915). *Cf.* *Coke Producers Assn. v. B. & O. R. R.*, 27 I. C. C. 125 (1913); *Ford Co. v. Michigan Central R. R.*, 19 I. C. C. 507, 509 (1910); *Union Tanning Co. v. Southern Ry.*, 26 I. C. C. 159, 163 (1913).

State tribunals have recognized the same principle. *Cf.*, *e. g.*, *Copeland Ore. Co. v. M. T. Ry. Co.*, P. U. R. 1917 F, 182, 195 (Colo. Pub. Util. Com.).

<sup>103</sup> *E. g.*, *Freight Bureau of Cincinnati v. Cincinnati, N. O. & T. P. Ry.*, 6 I. C. C. 195 (1894); *Oregon & Washington Lumber Mfrs. Assn. v. S. P. Co.*, 21 I. C. C. 389, 392, 393 (1911); *Boileau v. P. & L. E. R. R. Co.*, 22 I. C. C. 640 (1912); *Marian Coal Co. v. D. L. & W. R. R.*, 24 I. C. C. 140, 142 (1912). *Cf.* *Interstate Commerce Com. v. Louisville & Nashville Ry.*, 118 Fed. 613 (1902). Comparisons with other rates were used in support of increases in *Re East St. Louis Light & Power Co.*, P. U. R. 1918 B, 320 (Ill. Pub. Util. Com.); *Railroad Passenger Rate Case*, P. U. R. 1915 B, 362, 392 (Mass. Pub. Serv. Com.); and in support of reductions or refusals to increase, in *State ex rel. Watts Engineering Co. v. Pub. Serv. Com.*, 269 Mo. 525, 191 S. W. 412, P. U. R. 1917 C, 581, 591; *Pub. Serv. Gas Co. v. Board of Pub. Util. Comms.*, 84 N. J. L. 463, 474, 475, 87 Atl. 651 (1913); *Hocking Valley R. R. Co. v. Pub. Util. Com. of Ohio*, 92 Ohio St. 362, 110 N. E. 952 (1915), P. U. R. 1916 B, 406; *Re Kans. City Elec. Lt. Co.*, P. U. R. 1917 C, 728, 790 (Mo. Pub. Serv. Com.); *Re Kent Water & Light Co.*, P. U. R. 1917 D, 394, 397 (Ohio Pub. Util. Com.).



consequently shown for value in fixing the rates on particular services, have sometimes led to the assertion—notably by the Interstate Commerce Commission<sup>104</sup>—that very different considerations must govern the fixing of particular rates from those that apply to an entire schedule; that the cost of a particular service, being unascertainable, can have little to do with the propriety of a particular rate, and that particular rates must therefore be governed largely by value of service. This assertion is true within limits, but there are two observations to be made upon it which greatly qualify its apparent meaning. In the first place, it implies that the value of a service is ascertainable, if not quite definitely, at least more definitely than its cost. But if one recalls the variety of elusive ideas which go under the name of value of the service it is evident that this is not so. On the contrary, as the Interstate Commerce Commission itself has pointed out, “the cost of the service is ascertainable with much more precision and capable of more tangible expression than the value of the service.”<sup>105</sup> In the second place, the proposition more or less suggests that, in respect to particular rates, the criterion of value is deliberately preferred and preferable to the criterion of cost; in other words, it overrules cost. That is far from true. To allow value to influence rates within the range where cost is doubtful is not to prefer value to cost; it is simply to prefer value to nothing. The question which is to prevail can arise only when both are known; so far as either is unknown there is no conflict. And, as has been pointed out, when there is a conflict it is cost and not value that prevails. The Supreme Court has held that coal rates<sup>106</sup> and passenger rates<sup>107</sup> which are below cost must be raised, and that lumber rates which exceed cost must be lowered.<sup>108</sup> From the fact that costs are less accurately determinable in the case of a particular service than in that of an entire business, it follows that the range of what may or might be found to be cost is a broader range in the case of the particular service; and this is the

<sup>104</sup> *Central Yellow Pine Assn. v. Ill. Central R. R. Co.*, 10 I. C. C. 505, 539, 540 (1905).

<sup>105</sup> *Boileau v. P. & L. E. R. R.*, 22 I. C. C. 640, 652 (1912).

<sup>106</sup> *Northern Pacific Railway v. North Dakota*, 236 U. S. 585 (1915), (note 53, *supra*).

<sup>107</sup> *Norfolk & Western Ry. Co. v. Conley*, 236 U. S. 605 (1915), (note 56, *supra*).

<sup>108</sup> *Southern Railway v. Tift*, 206 U. S. 428 (1907); *Illinois Central R. R. v. Interstate Commerce Com.*, 206 U. S. 441 (1907) discussed above.

truth in the statement that cost has less, and value more, to do with rates for particular services than with entire schedules.

The proposition that the value of the service does not count at all in fixing rates is evidently only less erroneous than the proposition that it is of coördinate importance with cost. To say that nothing counts but cost is to say that courts require a rate of profit which is absolutely uniform on a fair value which is definitely ascertainable; whereas the fact is that the fair value of an entire property is matter of opinion, the proportion of it which should be attributed to a particular service is matter of guess, and various rates of profit are thought proper in various cases. The value of the service, in the sense of some of the considerations of public policy which affect the question, what the rate ought to be, is an actual rate-making criterion, although subordinate to cost.

And it seems highly desirable that this subordinate effect should be allowed to some of these considerations. The argument rests in part on the assumption that a general diffusion of things is desirable. As time goes on, more kinds of things are used by more people in more places. This constitutes progress in the sense that it is the direction in which we are moving, and it is generally assumed to be progress in the sense of being desirable. And attention to the value-of-the-service sort of consideration in the making of rates encourages this diffusion.

Take the prosperous or depressed condition of an industry which a public utility serves. To say that an industry is prosperous means that it is disposing of an unusually large amount of its product, or selling it at an unusually high price, or both. From the fact of large sales it follows that the dissemination of the product does not, relatively to other commodities, need encouragement, and is not likely to cease or become insignificant if it is made necessary to charge a higher price. From the large margin of profit it follows that a higher rate to the public utility might not make it necessary or feasible to charge a higher price for the commodity. From both circumstances or either it appears that the use of the article will not be disastrously interfered with by a higher charge on the part of the public utility. The reverse of all this is true in the case of a depressed industry. It is, by hypothesis, marketing unusually little of its product, or selling it on an unusually narrow

margin, or both. The use of the article, already subnormal, will be further restricted if the price of it is raised; and the small present profit makes it probable that the price will have to be raised if the public utility's rate is raised. All this would constitute no excuse for charging the prosperous industry a rate which would yield the utility more than a reasonable return, to the enrichment of the utility or its other consumers, or for charging the depressed industry a rate which would not cover cost, and throwing the resulting burden on other consumers. But it does constitute a reason for giving the benefit of the doubt, in valuation of plant, apportionment of costs, and determination of what return is reasonable, to the utility in the case of the prosperous customer and to the purchaser in the case of the depressed one. A similar argument can be made for considering the value of the article served, and allowing a more generous return, within the limits of cost, from the more valuable than from the less valuable article. The dearer a commodity is, the smaller in general is the fraction of its cost which consists of freight rate or other public-utility charge. But for the fact that freight rates are graduated more or less in accordance with the value of the article, the rate would be a smaller fraction of the article's whole cost in the case of the dearer in exactly the proportion that it is dearer. A cent a pound in a freight rate may make a difference of 1 per cent in the price of a dearer article and of 50 per cent in the price of a cheaper one. It follows that a higher public-utility charge does not so greatly interfere with the use of the dearer commodity as of the cheaper.

So far as high-cost commodities are in the nature of luxuries, this proposition doubtless fails in some degree; since it is in general easier to check the demand for a luxury than for a necessity. But this, as an argument against high rates on luxuries, is offset by the consideration that the distribution of luxuries, while important, is less important than the distribution of necessities. Their use may be the more checked by a higher rate, but the checking of their use is the less unfortunate. On the whole, therefore, the benefit of the doubt concerning costs and returns may well be given to the company as against the luxury, and to the necessity as against the company. And with luxuries, or beyond them, should be classed for this purpose articles the consumption of which is

regarded as an evil; and with necessities, articles the consumption of which is thought specially desirable.

The interest of manufacturers, dealers, and employees furnishes an argument which parallels, in large part, that based on the interest of consumers. It is obviously to the interest of the people engaged in an industry that it survive. So far as anything tends to kill it, to them it is, in that proportion, an evil. And a prosperous business is obviously less likely to be ruined by increasing its costs than a depressed one.

The case is less strong for making anything turn on a mere comparison of rates in different localities; yet there does appear to be a certain advantage, other things being equal, in uniformity. People in one locality tend to be placed at a disadvantage in competition with people in another if they have to pay higher rates to public utilities. Moreover, the general prevalence of a given rate, since it tends to show what costs are and rates should be in many places, is some evidence, though slight and indirect, of what they are and should be in a particular place. Though the fact that rates are higher or lower elsewhere is no reason for fixing them above or below cost anywhere, it is some reason for taking a broader or narrower view of cost.

In summary: It is frequently said, by eminent courts, commissions, and text-writers, that the value of a service is entitled to quite as much weight as the cost of the service in the fixing of public-service rates. The decisions do not bear out, but contradict, such statements. The decisions establish that the value of the service — which means substantially public policy — is not a criterion either superior to or coördinate with the cost of the service. This is entirely sound and largely inevitable. But the uncertainties of cost (though narrower than the uncertainties of value) offer room for value to operate as a subordinate criterion, by fixing rates higher or lower within the range of cost; and some aspects of value do, and quite as many should, operate in that way.

*Henry White Edgerton.*

BOSTON, MASS.

# HARVARD LAW REVIEW

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Published monthly, during the Academic Year, by Harvard Law Students

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SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER

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In the closing days of the battle of the Argonne, Captain Reuben B. Hutchcraft, Jr., 106th Infantry, was killed in action. He was leading a reconnaissance patrol, and, encountering a machine-gun fire from which the character of the terrain afforded no adequate protection for his men, he led them in a successful charge on the machine-gun nests which were put out of action. He himself, however, was killed. Captain Hutchcraft graduated from the University of Kentucky in 1907, and received the degree of LL.B. *cum laude* from Harvard in 1911. From 1909 until 1911 he was an editor of this REVIEW. After his graduation from the law school, he practiced law in Kentucky, his native state. He was twice elected to the Kentucky legislature, and was a member of the state Tax Commission, and a professor in the law school of the University of Kentucky. With his intellectual ability, his enthusiasm, his devotion to the public welfare, and his engaging personality he was a man who could ill be spared by his commonwealth and his country.

FORGERY OF AN INTERSTATE BILL OF LADING AS A FEDERAL CRIME. — By the Pomerene Act approved in August, 1916, Congress undertook to regulate the effect of interstate bills of lading.

That this statute in its main provisions is constitutional is hardly open to doubt, since the decision of *Atchison, Topeka & Santa Fé R. R. v. Harold*.<sup>1</sup> This case held a Kansas statute unconstitutional which provided that the innocent holder of the bill of lading should be vested with rights not available to the shipper. Not only the provisions of the

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<sup>1</sup> 241 U. S. 371 (1916).

Pomerene Act, which relate directly to the contract between the shipper and the carrier are thus governed by federal law, but those which relate to the transfer of the bill of lading between third parties, if for no other reason than because the rights of the transferee necessarily affect the obligation of the carrier. If the purchaser of the bill of lading acquires an indefeasible title to the goods, the carrier must recognize that title, and will be liable in damages if he fails to do so.

In *United States v. Ferger*,<sup>2</sup> however, it has recently been held that section 41 of the Pomerene Act, which makes criminal the forging of an interstate bill of lading, is unconstitutional, "since the forged bills of lading were nothing but pieces of paper fraudulently inscribed. . . . They were not receipts for goods. . . . They did not affect interstate commerce."

The court excluded from contemplation, as possibly presenting a different question, the counterfeiting of an existing genuine interstate bill of lading.

An argument of this character is applicable not alone to forged bills of lading, but to any case where Congress seeks to punish a simulation of a lawful means or agency for promoting a constitutional object. The court refers in its opinion to the counterfeiting of money of the United States, and distinguishes the admitted power of Congress to punish counterfeiting money from the asserted power to punish counterfeiting bills of lading on the ground that the Constitution itself gives power to Congress "to provide for the punishment of counterfeiting the securities and current coin of the United States."

This express statement in the Constitution certainly does deprive the illustration of counterfeit money of value as an argument; but Congress has undertaken to punish not only counterfeiting its own money and securities, but those of foreign countries, and this legislation has been held constitutional,<sup>3</sup> though no direct authority is given in the Constitution similar to that regarding domestic money and securities. The Supreme Court did, indeed, in reaching its conclusion, rely mainly on the provision in the Constitution which gives Congress power to punish offenses against the law of nations, but also relied on the power of Congress to regulate commerce with foreign nations; and the fact that the forging of foreign securities might be a subject of foreign commerce was held a reason for protecting such commerce by punishing the forgery.

Another statute, also held constitutional,<sup>4</sup> shows the power of the government to punish simulation of what has been put under the protection of the national government. It has been enacted by Congress:<sup>5</sup> "Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States . . . shall be fined," etc. It will be observed that this provision punishes the fraudulent demanding or obtaining from "any person" any money, paper, etc.; and this provision has been sustained by the Supreme Court, though the guilty defendant purported to hold an office under the United States which

<sup>2</sup> So. Dist. Ohio, October, 1918.

<sup>3</sup> *United States v. Aijoua*, 120 U. S. 479 (1887).

<sup>4</sup> *United States v. Barnow*, 239 U. S. 74 (1915).

<sup>5</sup> COMP. STATS. § 10196 (1913).

had no actual existence, and was engaged in an activity properly exercised by no officer of the United States.

The analogy between this case and the case concerning bills of lading is close. Congress doubtless has power to appoint officers to carry out the functions of government. Similarly it has power to regulate interstate commerce. It is not expressly given power to punish persons who are neither officers of the United States nor attempt to exercise the powers of real officers, any more than it is expressly given power to punish persons who simulate the methods of interstate commerce without actually engaging in such commerce. But because the respect and authority of its officers cannot be maintained without punishing those who simulate them, a statute was upheld which authorized the prosecution of one fraudulently assuming to be such an officer, whether the office or the powers he purported to have were or could be held by any one. By a parity of reasoning, one who interferes with the legitimate transaction of interstate commerce by simulated documents may be punished in order that the legitimate instrumentalities of commerce may not fall into disrepute and fail to achieve their proper effect.

The inference justified by these decisions is borne out by the general attitude of the Supreme Court towards the question of interstate commerce. "Commerce among the several states' is a practical conception";<sup>6</sup> and the Supreme Court has indicated abundantly its determination to prevent anything and everything which practically impedes and interferes with interstate commerce. It has refused to permit interference with the physical operation of the ordinary channels of interstate commerce. A state was not allowed to stop the operation of telegraph lines by injunction for failure to pay taxes.<sup>7</sup> Nor was a state court allowed to order the removal of a railroad bridge which formed part of a direct channel of interstate commerce.<sup>8</sup>

"The freedom from interference on the part of the States is not confined to a simple prohibition of laws impairing it, but extends to interference by any ultimate organ."<sup>9</sup> "The state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic."<sup>10</sup> Nor are individuals allowed any greater freedom than the agencies of the state in interrupting interstate commerce.<sup>11</sup>

In *In re Debs*,<sup>12</sup> the United States, finding that the interstate transportation of persons and property, as well as the carriage of the mails, was forcibly obstructed, and that a combination and conspiracy existed to subject the control of such transportation to the will of the

<sup>6</sup> *Reanich v. Pennsylvania*, 203 U. S. 507, 512 (1906).

<sup>7</sup> *Western Union v. Attorney-General*, 125 U. S. 530 (1888). See *Williams v. Talladega*, 226 U. S. 404, 415 (1912).

<sup>8</sup> *Kansas City Southern Ry. Co. v. Kaw Valley Drainage District*, 233 U. S. 75 (1914).

<sup>9</sup> *Ibid.*, 78.

<sup>10</sup> *Ibid.*, 79.

<sup>11</sup> *Houston & Texas Railway v. United States*, 34 U. S. 342 (1914). In the course of its opinion the court said, page 351, "Congress is empowered to regulate, that is, to provide the law for the government of interstate commerce; to enact 'all appropriate legislation' for its 'protection and advancement' (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures 'to promote its growth and insure its safety' (*County of Mobile v. Kimball*, 102 U. S. 651); 'to foster, protect, control and restrain' (*Second Employers' Liability Cases*, 223 U. S. 1)."

<sup>12</sup> 158 U. S. 564 (1895).

conspirators, applied to one of their courts, sitting as a court of equity, for an injunction to restrain such obstruction and prevent carrying into effect such conspiracy. The injunction was granted.

The same power which can thus protect from physical interference the ordinary means of interstate transportation does not become powerless when the method of obstruction is less tangible though equally effective. Tax laws,<sup>13</sup> inspection laws,<sup>14</sup> and laws of other kinds<sup>15</sup> have been held unconstitutional whenever their operation has been such as to cast a direct burden upon interstate commerce.

It can hardly be contested that the effect of forged interstate bills of lading is to discredit and render hazardous the use of genuine interstate bills; or that the section of the statute in question is aimed to protect the business of dealing in genuine interstate bills. This can be its only purpose, and its provisions are calculated to effect that purpose. There is here no question of attempting to use the constitutional power to regulate commerce for an indirect object. The power is invoked only to protect business which it is a function of the national government to protect.

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THE EFFECT OF REFERENCES IN A BILL OF EXCHANGE TO SHIPPING DOCUMENTS OR GOODS. — "The enormous volume of sales of produce by a vendor in one country to a purchaser in another has led to the creation of an equally great financial system intervening between vendor and purchaser, and designed to enable commercial transactions to be carried out with the greatest money convenience to both parties."<sup>1</sup> The vendor draws a bill of exchange and sells it, with the order bill of lading and insurance papers for the goods attached, to a bank or exchange house, thus getting his money immediately after shipment. Sometimes the draft is drawn on the purchaser, but where it is payable on time the exchange house is often unwilling to part with the collateral in return for an acceptance by a mercantile house, and it is common for the purchaser to arrange that a bank of high standing shall be drawee and accept the draft. On acceptance the shipping documents are surrendered to the acceptor, and the purchaser can make immediate sale of the goods so as to secure funds to pay the draft at maturity.

Bills of exchange secured in this way usually bear some reference to the attached documents or to the goods. It is convenient for all parties to be able to identify the bill as relating to a particular transaction and check the documents of title accordingly. Even after acceptance,

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<sup>13</sup> See *Crenshaw v. Arkansas*, 227 U. S. 389 (1913); *Stockard v. Morgan*, 185 U. S. 27 (1902), and cases cited therein.

<sup>14</sup> *Brimmer v. Rebman*, 138 U. S. 78 (1891); *Minnesota v. Barber*, 136 U. S. 313 (1890).

<sup>15</sup> *International Paper Co. v. Massachusetts*, 246 U. S. 135 (1918) (taxation on par value of the capital stock of a foreign corporation); *Darnell v. Memphis*, 208 U. S. 113 (1909) (a law exempting from taxation growing crops and articles manufactured from the produce of the state); *Buck Stove, etc. Co. v. Vickers*, 226 U. S. 205 (1912) (a law requiring certain statements from foreign corporations).

<sup>1</sup> *Scrutton, L. J.*, in *Guaranty v. Hannay*, [1918] 2 K. B. 623, 659, gives an excellent description of the system.



when the documents have been detached, a bill which professes to be a "produce" bill founded on a commercial transaction gets a better market than a bill which shows nothing on its face and may be a "kite" or accommodation bill. It is very common, therefore, to find on the face of the bill a statement "pay . . . and charge same to the account of" certain specified commodities. A witness from the Guaranty Trust Company recently testified that in 23,000 bills in a period of five years, 93 per cent bore on their face these or similar words referring to the commercial transaction giving rise to the bill.<sup>2</sup>

The weak point in this system is evidently the bill of lading. Such documents get their validity merely from the signature of the carrier's agent at the shipping point, whose handwriting is not likely to be well known in the world of high finance. The shipper usually writes out the rest of the bill of lading himself on one of the blanks kept in his possession, and if he adds the name of a freight agent at the bottom, the fraud is not likely to be detected until the time arrives for the non-existent goods to reach their stated destination. A few years ago, the firm of Knight, Yancey and Company of Decatur, Alabama, fell into the habit of accelerating the time for receiving payment for cotton sold by discounting a draft with a forged bill of lading for nonexistent cotton attached, and afterwards shipping actual cotton to correspond with the false document. The cotton arrived before the draft was due, so that the fraud was undiscovered. But one day there was no cotton to ship, innumerable forged bills of lading were outstanding, and Knight, Yancey and Company closed their business career by insolvency.

Like the jaunty testatrix who writes her own will, the perpetrator of colossal frauds furnishes plenty of employment for lawyers. Many of the drafts secured by forged documents had been accepted or paid before the absence of cotton was discovered. Who should bear the loss, the bankers who had discounted the drafts in reliance on the forged collateral, or the buyers who had authorized acceptance and payment in order to obtain the cotton which never existed?<sup>3</sup>

It is settled law in cases where the draft makes no reference to the collateral that the loss falls on the drawee (or his principal), if the draft has been accepted or paid. Money paid can not be recovered back, and the acceptor can get no relief on account of the mistake. The holder who presented the instrument is not liable as a warrantor of its genuineness or on any other ground.<sup>4</sup> There clearly is no warranty, for he does

<sup>2</sup> Scrutton, L. J., in *Guaranty v. Hannay*, [1918] 2 K. B. 660.

<sup>3</sup> *Knight, Yancey and Company*, besides issuing forged bills of lading, persuaded a railroad freight-agent to sign bills of lading without receiving cotton, and used these also to obtain money. It was held that the bank discounting such bills could not recover from the railroad. *Louisville & N. R. R. Co. v. National Park Bank*, 188 Ala. 109, 65 So. 1003 (1914). The carrier would now be liable under § 22 of the Federal Bills of Lading Act (Pomerene Act), August 29, 1916, c. 415; 39 U. S. STAT. 542; 8 U. S. COMP. STAT. 1916, § 8604 *kk*.

<sup>4</sup> WILLISTON ON SALES, § 435 (1909), collects the authorities. *Hawkins v. Alfalfa Co.*, 152 Ky. 152, 153 S. W. 201 (1913); *Central Mercantile Co. v. Oklahoma State Bank*, 83 Kan. 504, 112 Pac. 332 (1910); *Seattle National Bank v. Powles*, 33 Wash. 21, 73 Pac. 887 (1903); *First National Bank v. Mineral, etc. R. R.*, 133 S. W. 1099 (Tex. Civ. App. 1911); *Burrton State Bank v. Pease-Moore Co.*, 163 Mo. App. 135, 145 S. W. 508 (1912) *semble*; *Tapee v. Varley, Wolter Co.*, 184 Mo. App. 470, 171

not sell the bill of lading to the drawee, but merely relinquishes his lien in exchange for the new security afforded by the acceptance.<sup>6</sup> It has been argued that he ought to be liable on quasi-contractual grounds to refund money paid under a mistake of fact as to the genuineness of the bill of lading,<sup>6</sup> and that the cases are consequently wrong. Dean Ames, however, points out that under the doctrine of *Price v. Neal*<sup>7</sup> the principle of unjust enrichment can not be applied to shift this loss from one innocent person to another.<sup>8</sup> The drawee has paid value for the draft and bill of lading, but so has the holder, and when the holder has the money the drawee possesses no superior equity to take it away from him. Those who reject Dean Ames's explanation of *Price v. Neal* and rest that case on the duty of the drawee to find out that the drawer's signature has been forged<sup>9</sup> can not support the bill of lading cases, in the same way, for a drawee in England is certainly in no position to pass upon the genuineness of the signature of an American freight agent. The only sound explanation, apart from Dean Ames's, is that a *bona fide* purchaser of a genuine bill of exchange should not be affected by extrinsic transactions between the drawer and drawee,<sup>10</sup> even though they involve fraud<sup>11</sup> or failure of consideration.<sup>12</sup> It is just as if the drawee had accepted or paid the draft under a mistake about the financial standing of the drawer or the value of collateral copper stock.<sup>13</sup>

The Knight, Yancey and Company cases, however, introduce an

S. W. 19 (1914); *Spencer & Co. v. Bank of Hickory Ridge*, 115 Ark. 326, 171 S. W. 128 (1914) *semble*; *American National Bank v. Warren*, 96 Misc. 265, 160 N. Y. Supp. 413 (1916), *accord*. The principle is recognized by all the cases on drafts which refer to the goods. See notes 14, 15, *infra*. The holder of the bill of lading for security is not a warrantor under § 37 of the Uniform Bills of Lading Act, enacted as § 36 of the Federal Pomerene Act, August 29, 1916, c. 415; 39 U. S. STAT. 544; 8 U. S. COMP. STAT. 1916, § 8604 *rr*. The contrary doctrine of warranty by the holder was adopted in a few cases which have been overruled except perhaps in Mississippi. *Williston, loc. cit.*; *Cosmos Cotton Co. v. First National Bank*, 171 Ala. 392, 54 So. 621 (1911).

<sup>6</sup> James Barr Ames, 4 HARV. L. REV. 302, LECTURES ON LEGAL HISTORY, 270, quoted by Pickford, L. J., in *Guaranty v. Hannay*, [1918] 2 K. B. 623, 631 (C. A.); Warrington, L. J., *Ibid.*, 653.

<sup>7</sup> KEENER, THE LAW OF QUASI-CONTRACTS, 154, note: "It is impossible to reconcile with the principles that have been considered in this chapter many of the results reached."

<sup>8</sup> 3 Burr. 1354 (1762). The drawee of a bill of exchange who has paid it can not recover the money from the holder, although the drawee's name is forged. See Lord Mansfield's opinion.

<sup>9</sup> James Barr Ames, "The Doctrine of *Price v. Neal*," 4 HARV. L. REV. 303, LECTURES ON LEGAL HISTORY, 393, citing among other cases *Leather v. Simpson*, L. R. 11 Eq. 398 (1871); *First National Bank v. Burkham*, 32 Mich. 328 (1875). See also *Guaranty v. Hannay*, 210 Fed. 810, 813 (C. C. A. 2d, 1913); *Ibid.*, [1918] 2 K. B. 623, 633, 664 (C. A.). In *Munson v. De Tamble*, 88 Conn. 415, 91 Atl. 531 (1914), the holder was held liable as a seller.

<sup>10</sup> WOODWARD, THE LAW OF QUASI-CONTRACTS, § 91.

<sup>11</sup> WOODWARD, *loc. cit.*, and cases cited; *Tolerton v. Anglo-California Bank*, 112 Iowa 706, 84 N. W. 930 (1901).

<sup>12</sup> *Fort Dearborn v. Carter*, 152 Mass. 34, 25 N. E. 27 (1890); *Alton v. First National Bank*, 157 Mass. 341, 32 N. E. 228 (1892); *Heuertemette v. Morris*, 101 N. Y. 63 (1885), 4 N. E. 1; *Southwick v. First National Bank*, 84 N. Y. 420, 433 (1881).

<sup>13</sup> *Guaranty v. Hannay*, [1918] 2 K. B. 623, 632, 662 (C. A.); *Robinson v. Reynolds*, 2 Q. B. Rep. 196, 211 (1841); 1 DANIEL, NEGOTIABLE INSTRUMENTS, 6 ed., § 174 a.

<sup>14</sup> *Springs v. Hanover National Bank*, 209 N. Y. 224, 233, 103 N. E. 156, 158 (1913).

interesting variation of this question. Most of the drafts involved contained references to cotton. Since there was no cotton, did such a reference give the drawee the right to rescind his acceptance or payment? It was easy to decide that the mere use of the word "cotton" lithographed on the draft effected no alteration in the general rule that the drawee bears the loss.<sup>14</sup> Other drafts described the supposed cotton in specific terms by the number and marking of the bales — *e. g.*, "charge same to account of  $\frac{100}{R. S. M. I.}$  bales of cotton." After seven years of litigation on both sides of the Atlantic, the English Court of Appeals has recently decided that in spite of these words the loss still falls on the buyer and not on the lien-holding bank.<sup>15</sup> The decision expressly determines the construction of section 3 of our Negotiable Instruments Law on the subject, which is declared to reach the same result as the English law, so that the case ought to have much weight if the question ever arises again in American courts.<sup>16</sup>

<sup>14</sup> *Springs v. Hanover*, *supra*; *Varney v. Monroe*, 119 La. Ann. 943, 44 So. 753 (1907) — "25b/c," *i. e.*, bales of cotton, *accord*.

<sup>15</sup> *Hannay and Company*, cotton brokers at Liverpool, bought cotton from Knight, Yancey and Company of Alabama, to be paid by shippers' drafts upon the Bank of Liverpool, the buyer guaranteeing acceptance and payment if the shipping documents proved to be in order. In pretended performance of this contract Knight, Yancey and Company forged a through bill of lading running to shippers' order, and attached it to a draft drawn by themselves for the contract price upon the Bank of Liverpool, worded: "Sixty days after sight this first of exchange (second unpaid) pay to the order of ourselves Fourteen hundred and sixty four pounds and nine shillings value received, and charge same to account of  $\frac{100}{R. S. M. I.}$  bales of cotton." The draft also contained, in the margin, the date of the sale contract and a reference to the quality of the cotton. The letters R. S. M. I. purported to be the marks upon the bales. The draft and bill of lading were duly indorsed and sold in New York to the Guaranty Trust Company, an exchange house. The trust company presented the bill to the drawee bank, which accepted under instructions from the buyers after inspection by them of the shipping documents, which were detached and retained by the acceptor. The trust company sold the accepted bill. Some suspicions were afterwards aroused as to the genuineness of the bill of lading, but the acceptor felt itself obliged, against the instructions of the buyer, to pay the ultimate holder of the draft at maturity, and debited the buyers' account with the amount. The buyers, on discovering the forgery, sued the Guaranty Trust Company in the United States Circuit Court to recover the amount paid. A demurrer to the complaint was overruled, *Noyes, J.*, holding that the draft was conditional upon the existence of the cotton. *Hannay v. Guaranty Trust Co.*, 187 Fed. 686 (C. C. S. D. N. Y., 1911). At the trial a verdict was directed for the buyers, but on appeal the Circuit Court of Appeals held that English law governed and that it had been proved at the trial that under English law the draft was unconditional and the money could not be recovered. Judgment was accordingly reversed and a new trial ordered. *Guaranty Trust Co. v. Hannay*, 210 Fed. 810 (C. C. A. 2d, 1913). The Guaranty Trust Company thereupon sued the buyers in England to obtain a declaration that there was no liability to the buyers. The buyers counterclaimed for the amount of the draft. After trial *Bailhache, J.*, held that the question whether the draft was conditional was governed by American law, under which it was conditional, and allowed the buyers to recover. *Guaranty Trust Co. v. Hannay*, [1918] 1 K. B. 43. On appeal this decision was reversed and the trust company held not to be liable on any ground. The Court of Appeal found the draft to be unconditional, even if American law governed. *Guaranty Trust Co. v. Hannay*, [1918] 2 K. B. 623 (C. A.).

<sup>16</sup> The various decisions in this litigation abstracted in note 15 raise an odd problem in the conflict of laws. The upper American court applied English law, while both English courts applied American law in part. It seems that the English Court of

The arguments in favor of the buyer are that the acceptance is conditional upon the delivery of the cotton, and otherwise imposes no obligation upon the drawee; and that the draft is conditional and not negotiable, so that the acceptor can have all the defenses against a *bonâ fide* purchaser which it has against the drawer-payee.<sup>17</sup> If the acceptance expressly provided for the existence of the cotton or the genuineness of the bill of lading, the acceptor would clearly not be liable. The same result has been reached when the acceptance was "against endorsed bills of lading" for specified goods.<sup>18</sup> An acceptance in general terms would also be treated as conditional, if the drawer's order should require payment only in case of existence of the goods, since the acceptance is construed according to the tenor of the drawing.<sup>19</sup> It was urged that the words "charge to the account of" specified cotton import such a condition in the drawing and consequently in the acceptance.

At this point a distinction must be taken between classes of conditions. The reference in a draft to collateral which has been given as security for the draft or the mere attachment of collateral documents to the draft does impose a condition that the collateral shall be surrendered to the drawee on acceptance,<sup>20</sup> or, in some instances, upon pay-

Appeal is right; that the question whether the bill is unconditional and negotiable is determined by the place of drawing (New York, or possibly Alabama), *Amsinck v. Rogers*, 189 N. Y. 252, 266, 82 N. E. 134 (1907), while the quasi-contractual right of the acceptor to revoke its acceptance and payment because of implied warranty, representation, mistake, or failure of consideration is determined according to the only law which could create such a right, *viz.*, that of England, where the acceptance and payment took place. The solution was rendered much easier by the court's finding that the law of England and the United States were the same. If the instrument was found to be conditional by American law, it would then have been necessary to construe § 72 of the Bills of Exchange Act, especially the clause which allows a foreign bill in the English form to be treated as valid between English parties for purposes of enforcement. Would this also apply to the recovery of money paid under such a bill? See the remarks of Scrutton, L. J., in [1918] 2 K. B. 670, and those of Bailhache, J., below in [1918] 1 K. B. 55.

<sup>17</sup> *Hannay v. Guaranty*, 187 Fed. 686 (S. D. N. Y. 1911); *Guaranty v. Hannay*, [1917] 1 K. B. 43, 54, 55. But even if the draft were conditional and the acceptor could revoke its acceptance, it is doubtful if this ought to alter the decision. After notice of the forgery, the acceptor paid regardless of the alleged defense and contrary to the instructions of its principal, the buyer. As this was a voluntary payment, it could not be recovered, and the buyer's remedy would be against the acceptor. There is a further question, — even if the recipient of payment is liable to refund, why should the Guaranty Trust Company, a previous owner of the draft, be so liable? *Pickford and Warrington, L. JJ.*, thought the buyer could not recover in any event. *Guaranty v. Hannay*, [1918] 2 K. B. 623, 648, 653 (C. A.).

<sup>18</sup> *Guaranty v. Grottrian*, 114 Fed. 433 (C. C. A. 2d, 1902), affirming 105 Fed. 566 (S. D. N. Y. 1900). The correctness of this discussion is open to serious question, on the ground that the language of the acceptance was satisfied by the surrender of bills of lading for the specified goods, though forged. "Bills of lading" in a contract does not necessarily mean genuine bills of lading. A buyer can not complain if the drawee, his agent, when instructed to accept a draft with "bill of lading" attached does so on the faith of a forged bill of lading. *Woods v. Thiedemann*, 1 H. & C. 478 (1862); *Ulster Bank v. Synnott*, 1 R. 5 Eq. 595 (1871). The same construction applies to a letter of credit agreeing to pay drafts with a "bill of lading" for cotton attached. *Young v. Lehman*, 63 Ala. 519 (1879). See also *Smith v. Vertue*, 30 L. J. C. P. (N. S.) 56 (1860); 38 L. R. A. (N. S.) 747 note.

<sup>19</sup> *Guaranty v. Grottrian*, *supra*.

<sup>20</sup> *Shepherd v. Harrison*, L. R. 5 H. L. 116 (1871); *National Bank v. Merchants'*

ment. Such a condition is a mere incident to collection, which does not impair negotiability. But a second class of conditions, relating to extrinsic facts, does impair negotiability. For example, the instrument may be payable out of a particular fund. Payment need not be made in full unless the specified fund is adequate, so that the instrument is not payable at all events and is not negotiable.<sup>21</sup> Such a construction could hardly be given to international cotton drafts, which are clearly not payable out of the proceeds of the cotton, but must be met regardless of a fall in the market.<sup>22</sup> If these drafts throw the loss on the presenting bank because of a condition, that condition must relate to the genuineness of the attached bill of lading. It would be odd if the words on the Knight, Yancey and Company draft imported such a condition when they do not mention the bill of lading at all, but it was urged that they describe cotton, and so might be taken as requiring its existence. Such a condition would not be one of the first class just discussed, for it does not concern the surrender of collateral on acceptance. The bill of lading was the collateral given when the draft was issued, not the cotton; the document and not the cotton was to be handed to the drawee on acceptance. The cotton is an outside fact, and a condition relating to it would consequently render the draft non-negotiable, so that a *bonâ fide* purchaser would be subject to all sorts of equitable defenses and not merely to defects in the bill of lading. Such a result would indeed startle American and English bankers in view of the enormous number of such drafts. Drafts in similar language have repeatedly been held negotiable.<sup>23</sup> The reference to the cotton simply earmarks the bill of exchange, makes it correspond to the bill of lading, informs the drawee that shipping documents for the goods described are to be surrendered on acceptance, and mentions the source from which he may expect to reimburse himself. It indicates that the draft is drawn to carry out a cotton transaction and is not a finance or accommodation draft.<sup>24</sup> The principal case reaches a sound mercantile result in holding that this very frequent reference to the goods in bills of

Bank, 91 U. S. 92 (1875); *Lanfear v. Blossman*, 1 La. Ann. 148, 155 (1846); 30 HARV. L. REV. 514.

<sup>21</sup> NEGOTIABLE INSTRUMENTS LAW, § 3; *Munger v. Shannon*, 61 N. Y. 251 (1874). In *Lowery v. Steward*, 25 N. Y. 239 (1862), this draft was held payable out of a fund: "Please pay . . . on account of 24 bales cotton shipped to you, as per bill of lading, by steamer *Colorado*, enclosed to you in letter." The court, however, took the terms of the letter into consideration. Hence the decision is of no authority in *Guaranty v. Hannay*. See [1918] 2 K. B. 641, 643; *Whitney v. Eliot*, 137 Mass. 351, 355 (1884).

<sup>22</sup> [1918] 2 K. B. 637, 656, 667. Similar provisions in produce drafts have been held not to be an equitable assignment of the goods in *Robey v. Ollier*, L. R. 7 Ch. App. 695 (1872); *In re Entwistle*, L. R. 3 Ch. D. 477 (C. A. 1876); *Brown v. Kough*, L. R. 29 Ch. D. 848 (C. A. 1884). *Contra*, *National Bank v. Merchants' Bank*, 91 U. S. 92, 95 (1875) *semble*.

<sup>23</sup> *Martin v. Brown*, 75 Ala. 442 (1883) — "charge same to a/c of 502 bales of cotton per steamer *J.*"; *Bank of Guntersville v. Jones*, 156 Ala. 525, 46 So. 971 (1908) — "charge to account of one bale of cotton, bill of lading attached;" *Whitney v. Eliot*, 137 Mass. 351 (1884) — "Charge the same to account of 250 bbls. meal ex schooner *A.*"; *Waddell v. Hanover*, 48 N. Y. Misc. 578, 97 N. Y. Supp. 305 (1905), — "400 c/a R. L. No. 3362 via A. R. R. B. L. direct," meaning eggs. See cases in note 22. *Contra*, *Lanfear v. Blossman*, 1 La. Ann. 148 (1846), *semble* — "Bill of lading of 344 LB. cotton per P. attached hereto."

<sup>24</sup> *Pickford, L. J.*, in [1918] 2 K. B. 636.

exchange<sup>26</sup> does not render them conditional or non-negotiable, and alters in no way the general principle that after acceptance or payment the loss from forgery or other defects in the collateral falls on the drawee or buyer.<sup>26</sup>

The great losses caused by the Knight, Yancey and Company frauds have led to some steps toward the establishment of a validation bureau at which bankers can present collateral cotton bills of lading and have the agents' signatures checked by the railroads. It has also been suggested that surety companies guarantee the genuineness of the documents.<sup>27</sup> In some such way it may be possible to protect all parties from loss.

PROPERTY IN NEWS. — Courts too often formulate a rule which is exclusive as well as inclusive and which tends to become a rigid guide for the future. Then begins the process of puncturing the inadequate rule with exceptions, new rules, until finally the light shines clear through the old doctrine and a principle takes its place.<sup>1</sup> The United States Supreme Court, in the recent case of *International News Service v. The Associated Press*,<sup>2</sup> has gone a long way toward establishing as law the principle that no one shall be permitted to appropriate to himself the fruits of another's labor.

This proposition would seem to carry conviction in its mere statement. Property rights in tangible objects are, of course, universally protected. There is discernible in the cases, however, a tendency to distinguish between values inhering in some palpable form which can be physically dominated and values of a less tangible character; and this, although the latter may have cost vast sums and, given legal protection, have vast

<sup>26</sup> See page 561, *ante*, and note 2.

<sup>26</sup> In accord with *Guaranty v. Hannay*, *supra*, note 15, are *Springs v. Hanover and Varney v. Monroe*, *supra*, note 14, and *Bank of Guntersville v. Jones*, 156 Ala. 525, 46 So. 971 (1908) (goods subject to landlord's lien); *Woddell v. Hanover*, 48 N. Y. Misc. 578, 97 N. Y. Supp. 305 (1905) — no goods shipped (not a bill of lading case); 18 Col. L. Rev. 480. *Contra*, *La Fayette v. Merchants' Bank*, 73 Ark. 561, 84 S. W. 700 (1905) (forged bill of sale on back of draft); and *dicta* in *Hoffman v. Bank*, 12 Wall. (U. S.) 181, 189, 190 (1870), and *Guaranty v. Grotian*, note 18, *supra*.

<sup>27</sup> 27 BANKING L. J., 763, 937; 28 *Ibid.*, 450, 710, 787.

<sup>1</sup> *E. g.*, contrast the able opinions of Sanborn, Circuit Judge, in *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865, 57 C. C. A. 237 (1903), and of Cardozo, J., in *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916).

<sup>2</sup> U. S. Sup. Ct., December 23 (October Term, No. 221), 1918. The court granted an injunction against, *inter alia*, the taking of news from early editions of complainant's newspapers and from its bulletin boards and selling it to defendant's customers, until after its news value had disappeared. The court treated the case as one of unfair competition, speaking of a limited or *quasi*-property in news. Mr. Justice Holmes dissented in part; he took the ground that there are some values which the law does not protect, including that in gathered news, but he was of the opinion that this was a converse case of "passing off," where the defendant passed off another's goods as his own, and that an injunction might be granted against the use of news gathered by the complainant without giving credit. Mr. Justice Brandeis, in dissenting, admitted the propriety of some remedy; he argued that the granting of relief would require the making of a new rule, and without denying the court's right to make new rules on the analogy of old ones in order to cope with a new wrong, he maintained that, there being probably a public interest involved, legislatures could best deal with the problem.

possibilities of realization.<sup>3</sup> On the other hand, there has been a growing recognition that such values deserve better treatment at the hands of the courts. Thus the infliction of harm on another through the exercise of a right otherwise legal, when the reason for such exercise was malice, has been declared a wrong.<sup>4</sup> The taking away of another's customers, although only the usual means of competition were used, has been held actionable when the motive was not the continued prosecution of a competing enterprise but destruction of the plaintiff's business.<sup>5</sup> It was not, indeed, until the nineteenth century that there was general recognition that "passing off" one's goods as those of another by means of similarity of marks and names is a tort.<sup>6</sup> The law of unfair competition has grown with the growth of printing and transportation and the consequent increase of values based upon reputation.<sup>7</sup> This in itself is a strong argument against the view that a limited or *quasi*-property in news cannot be recognized for lack of a close analogy in previous cases. It is submitted that many or most of the cases where such values have not been protected from appropriation may be explained on the ground of social policy, and that this is the test which should be applied.<sup>8</sup>

The common law secured to an author the right of first publication.<sup>9</sup> But once he had "dedicated his work to the public" it was held that duplication in competition with him was permissible.<sup>10</sup> The public interest in the discovery of truth requires that one's right of property in his mind-creations come to an end at some point. Society will eventually demand that another be allowed to appropriate these values. The common law, however, drew its arbitrary line too close. That this was felt by the judges is indicated by the decisions, some of which go a long way, holding that a private circulation of a writing, the oral delivery of a lecture, or even a series of public performances of a play or opera, does not constitute a dedication to the public.<sup>11</sup> Subsequent legislators recognized the counter-policy that industry and invention must be stimulated by a greater legal protection to its fruits.

There are numerous instances where on public grounds profiting by another's labor is permitted. One whose activities form the subject-

<sup>3</sup> *Brown Chemical Co. v. Meyer*, 139 U. S. 540 (1891); *Canal Co. v. Clark*, 13 Wall. (U. S.) 311 (1871); *Borden Ice Cream Co. v. Borden Condensed Milk Co.*, 201 Fed. 510 (1912); *Dunston v. Los Angeles Van, etc. Co.*, 165 Cal. 89, 131 Pac. 115 (1913); *Westminster Laundry Co. v. Hesse Envelope Co.*, 174 Mo. App. 238, 156 S. W. 767 (1913).

<sup>4</sup> *Flaherty v. Moran*, 81 Mich. 52, 45 N. W. 381 (1890); *Norton v. Randolph*, 176 Ala. 381, 58 So. 283 (1912); *Wilson v. Irwin*, 144 Ky. 311, 138 S. W. 373 (1911).

<sup>5</sup> *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946 (1909); *Dunshee v. Standard Oil Co.*, 152 Iowa, 618, 132 N. W. 371 (1911).

<sup>6</sup> See *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537 (1891). See also HOPKINS, TRADEMARKS, TRADENAMES, AND UNFAIR COMPETITION, 3 ed., § 20.

<sup>7</sup> See HOPKINS, TRADEMARKS AND UNFAIR COMPETITION, *supra*, §§ 19-20.

<sup>8</sup> See the opinions in *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011 (1900). See also Wyman, "Competition and the Law," 15 HARV. L. REV. 427, and Jeremiah Smith, "Crucial Issues in Labor Litigation," 20 HARV. L. REV. 253, 345, 429.

<sup>9</sup> *Prince Albert v. Strange*, 2 De G. & Sm. 652 (1848); *Kiernan v. Manhattan Telegraph Co.*, 50 How. Pr. (N. Y.) 194 (1876).

<sup>10</sup> *Wagner v. Conried*, 125 Fed. 798 (1903); *Jewelers' Agency v. Jewelers' Publishing Co.*, 155 N. Y. 241, 49 N. E. 872 (1898).

<sup>11</sup> *Boucicault v. Fox*, 5 Blatchf. 87, Fed. Case, No. 1, 691 (1862); *Aronson v. Baker*, 43 N. J. Eq. 365, 12 Atl. 177 (1887); *Universal Film Co. v. Copperman*, 218 Fed. 577,

matter of news has not the sole right of making it public,<sup>13</sup> unless, through contracts or other property rights, he can control the sources of information. Facts must be open to all who can fairly learn them, but equity will not permit them to be discovered by means of breaches of contract or of confidence.<sup>13</sup> Again, one who makes a site or a city an especially advantageous place for the production of a particular commodity, cannot, as Mr. Justice Brandeis points out, prevent others from engaging in the same business in the same locality and thus profiting by the industry of the pioneer.<sup>14</sup> The economic needs of society require that no such shackles be put upon the development of its resources. One may copy exactly the unpatented or uncopyrighted work of another.<sup>15</sup> Here again the gain to the public from competition under the existing economic order is paramount.

In spite of certain language in some of the cases,<sup>16</sup> it is conceded that there is no absolute property in news. These cases, as Mr. Brandeis points out, involved breaches of contract or of confidence. The question seems to be, Is a few hours' delay in the transmission of news to certain quarters of such importance that to prevent such delay public policy requires that the law permit appropriation of news gathered by others? *Per contra*, it is doubtful whether the enormous expense and labor of gathering news from every part of the earth will be continued without legal protection to the product.

The dissenting opinion points to the evils which might arise from a failure of certain communities or newspapers to receive the news gathered by a powerful organization and refers the problem to the legislature. If, however, there is deemed to be a serious public interest involved, we are still not obliged to allow appropriation; the courts can very well deal with the situation on principles of public utility law. Either the shutting off of the correspondents of competitors from the sources of news,<sup>17</sup> or the great outlay required to maintain a news-gathering agency, may result in a virtual monopoly.<sup>18</sup> Illinois has so held.<sup>19</sup> The association

<sup>134</sup> C. C. A. 305 (1914); *Thomas v. Lennon*, 14 Fed. 849 (1883); *Caird v. Sime*, 12 A. C. 326 (1887).

<sup>135</sup> *Sports and General Press Agency, Ltd. v. "Our Dogs" Publishing Co. Ltd.*, [1916] 2 K. B. 880, cited by Mr. Justice Brandeis.

<sup>136</sup> *Morison v. Moat*, 9 Hare, 241 (1851); *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236 (1905); *F. W. Dodge Co. v. Construction Information Co.*, 183 Mass. 62, 66 N. E. 204 (1903).

<sup>137</sup> *Elgin National Watch Co. v. Illinois Watch Co.*, 179 U. S. 665 (1901). But where a geographical name has acquired a special trade significance, passing off by means of the use of this name will not be permitted. *Wolf Bros. & Co. v. Hamilton-Brown Shoe Co.*, 165 Fed. 413 (1908); *French Republic v. Saratoga Vichy Co.*, 191 U. S. 427 (1903).

<sup>138</sup> *Saxlehner v. Wagner*, 216 U. S. 375 (1910); *Elaterite Paint & Mfg. Co. v. S. E. Frost Co.*, 105 Minn. 239, 117 N. W. 388 (1908); *Gendell v. Orr*, 13 Phila. (Pa.) 191 (1879).

<sup>139</sup> See *Western Union Telegraph Co. v. Foster*, 224 Mass. 365, 369, 113 N. E. 192, 194 (1916); *Cleveland Telegraph Co. v. Stone*, 105 Fed. 794, 795 (1900).

<sup>140</sup> For example, it seems in the principal case that the allied governments prohibited the correspondents of the International News Service from obtaining news in their respective countries and from using the cable and telegraph lines therefrom.

<sup>141</sup> See WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 120-56, especially §§ 138 and 156.

<sup>142</sup> *Inter-Ocean Publishing Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822 (1900);



which has a *quasi-monopoly* in news may be compelled to furnish its product to consumers including communities which have no newspapers belonging to such association, at reasonable rates.<sup>20</sup> The constitutional guaranty of freedom of the press would protect news against too close public control. Mr. Justice Brandeis fears that the courts are not equipped to deal with the problem in all its aspects. But, although public services are often best regulated by administrative bodies, the courts have not for that reason denied the relief at their disposal pending the inauguration of such bodies.<sup>21</sup>

**TRESPASS BY AIRPLANE.** — The rapid approach of the airplane as an instrumentality of commerce presents the occasion for defining more precisely the doctrine of the ownership of the air space, as embodied in Coke's maxim, *cujus est solum, ejus usque ad coelum*.<sup>1</sup> Examining first the cases which involve interferences with the column of air by encroachments from adjoining lands, we find that not only is the subjacent landowner permitted to cut away as nuisances overhanging shrubbery and projecting cornices,<sup>2</sup> but in some states he may resort to an action in ejectment.<sup>3</sup> That the encroaching landowner is liable also for all foreseeable damage is settled;<sup>4</sup> but whether there is a cause of action

New York & Chicago Grain & Stock Exchange v. Board of Trade, 127 Ill. 153, 19 N. E. 855 (1889); News Publishing Co. v. Associated Press, 114 Ill. App. 241 (1904); News Publishing Co. v. Associated Press, 190 Ill. App. 77 (1914). See also Friedman v. Telegraph Co., 32 Hun (N. Y.) 4 (1884); Smith v. Telegraph Co., 42 Hun (N. Y.) 454 (1886). See *contra*, State v. Associated Press, 159 Mo. 410, 60 S. W. 91 (1901); Matthews v. Associated Press, 136 N. Y. 333, 32 N. E. 981 (1893); Metropolitan Grain & Stock Exchange v. Board of Trade, 15 Fed. 847 (1883).

<sup>20</sup> Inter-Ocean Publishing Co. v. Associated Press, *supra*; Moore v. Southern Railway Co., 136 Ga. 872, 72 S. E. 403 (1911).

<sup>21</sup> Allnutt v. Inglis, 12 East, 527 (1810); Shepard v. Gold & Stock Telegraph Co., 38 Hun (N. Y.) 338 (1885); Western Union Telegraph Co. v. State, 165 Ind. 492, 76 N. E. 100 (1905).

<sup>1</sup> COKE ON LITT., § 4*a*.

<sup>2</sup> Penruddock's Case, 5 Coke Rep. 100 (1598); Baten's Case, 9 Coke Rep. 53 (1611); Lemmon v. Webb, [1895] A. C. 1; Smith v. Giddy, [1904] 2 K. B. 448; Wandsworth Board of Works v. United Telephone Co., 13 Q. B. D. 904, 927 (1884); Codman v. Evans, 7 Allen (Mass.), 431 (1863); Aiken v. Benedict, 39 Barb. (N. Y.) 400, 402 (1863); McCourt v. Eckstein, 22 Wis. 153, 158 (1867); Meyer v. Metzler, 51 Cal. 142 (1875); Lawrence v. Hough, 35 N. J. Eq. 371 (1882); Grandona v. Lovdal, 70 Cal. 161, 11 Pac. 623 (1886); Lyle v. Little, 83 Hun (N. Y.), 532, 33 N. Y. Supp. 8 (1895); Tanner v. Wallbrunn, 77 Mo. App. 262, 265 (1898); Norwalk Heating & Lighting Co. v. Vernam, 75 Conn. 662, 664, 55 Atl. 168 (1903); Harndon v. Stultz, 124 Iowa, 440, 100 N. W. 329 (1904); Huber v. Stark, 124 Wis. 359, 102 N. W. 12 (1905); Hazle v. Turner, 2 Sess. (Scotland) 886 (1840); see also Crocker v. Manhattan Life Ins. Co., 61 App. Div. 226, 70 N. Y. Supp. 492 (1901) (swinging shutters).

<sup>3</sup> Murphy v. Bolger, 60 Vt. 723, 15 Atl. 365 (1888); McCourt v. Eckstein, 22 Wis. 153 (1867); Beck v. Ashland Cigar & Tobacco Co., 146 Wis. 324, 130 N. W. 464 (1911); Butler v. Frontier Telephone Co., 186 N. Y. 486, 79 N. E. 716 (1906) (telephone wires not touching any part of the land). Cf. Rasch v. Noth, 99 Wis. 285, 74 N. W. 820 (1898); Huber v. Stark, 124 Wis. 359, 362, 102 N. W. 12 (1905). *Contra*, Wilmarth v. Woodcock, 58 Mich. 482, 486, 25 N. W. 475 (1885); Norwalk Heating & Lighting Co. v. Vernam, 75 Conn. 662, 664, 55 Atl. 168 (1903). See 16 YALE L. J. 275.

<sup>4</sup> Pickering v. Rudd, 4 Camp. 219, 221 (1815); Fay v. Prentice, 1 C. B. 828 (1845) (depreciation in the value of the land); Smith v. Giddy, [1904] 2 K. B. 448; Langfeldt v. McGrath, 33 Ill. App. 158 (1889); Barnes v. Berendes, 139 Cal. 32, 72 Pac. 406

for the mere entry into the air space resulting in no real injury is not so clear. In England there are, in addition to conflicting *dicta* on the exact case of a balloon,<sup>5</sup> irreconcilable statements concerning the encroachment cases.<sup>6</sup> In this country, however, actual damage from the encroachment does not seem to be requisite for a cause of action.<sup>7</sup> The air space, at least near the ground, is almost as inviolable as the soil itself.

On the reasoning of these cases, the aviator would be held a wrongdoer and, therefore, would be liable for all foreseeable damage to the land.<sup>8</sup> This financial responsibility for all the natural consequences of the flight over the land, regardless of the care exercised, may prove so great a burden that it will retard considerably the flow of capital into the airplane service and hamper materially its development. Yet states adopting the doctrine of absolute liability in the conduct of dangerous undertakings might impose that burden at any rate on the aviator. Massachusetts, however, has already provided against such a difficulty by enacting that there be liability only for failure to take every reasonable precaution;<sup>9</sup> and the statute is probably constitutional.<sup>10</sup>

The consequences of the trespass, other than liability for actual

(1903). Cf. *Whittaker v. Stangvick*, 100 Minn. 386, 111 N. W. 295 (1907); *Lamprey v. Danz*, 86 Minn. 317, 90 N. W. 578 (1902). See also cases cited in note 2.

<sup>5</sup> *Pickering v. Rudd*, 4 Camp. 219 (1815) (Lord Ellenborough refused to hold that an overhanging board was a trespass, for it would follow that an aeronaut would be liable to an action of trespass *quare clausum fregit*); *Kenyon v. Hart*, 6 B. & S. 249, 252 (1865) (Justice Blackburn saw no legal reason for doubting that it would be a trespass). See HAZELTINE, *THE LAW OF THE AIR*, 66; Valentine, 22 JURIDICAL REV. 94; 24 JURIDICAL REV. 321 (note on a French case); Kuhn, 4 AM. JOUR. OF INT. LAW, 124; Blewett Lee, 7 AM. JOUR. OF INT. LAW, 473; Meyer, 36 LAW MAG. AND REV. 17; CLERK AND LINDSELL, *TORTS*, 6 ed., 362; POLLOCK, *TORTS*, 10 ed., 363; SALMOND, *TORTS*, 4 ed., 190; 12 LAW NOTES (Thompson Publishing Company), 108.

<sup>6</sup> *Fay v. Prentice*, 1 C. B. 828 (1845) (damage presumed); *Smith v. Giddy*, [1904] 2 K. B. 448, 451 (if no damage, the plaintiff's only right is to cut back trees). Cf. *Ellis v. Loftus Iron Co.*, 10 C. P. 10 (1874) (trespass for a horse thrusting his head over a fence); *Clifton v. Bury*, 4 T. L. R. 8 (1887) (firing bullets over land not a technical trespass).

<sup>7</sup> *Puotó v. Chieppa*, 78 Conn. 401, 405, 62 Atl. 664 (1905); *Ackerman v. Ellis*, 81 N. J. L. 1, 79 Atl. 883 (1911); *Smith v. Smith*, 110 Mass. 302 (1872) (projecting eaves are "a wrongful occupation of the plaintiff's land for which he may maintain an action in trespass"); *Harrington v. McCarthy*, 169 Mass. 492, 494, 48 N. E. 278 (1897); *McCourt v. Eckstein*, 22 Wis. 153, 159 (1867); *Beck v. Ashland Cigar and Tobacco Co.*, 146 Wis. 324, 327, 130 N. W. 464 (1911); *Hannabalsen v. Sessions*, 116 Iowa, 457, 90 N. W. 93 (1902) (leaning on a fence so that an arm extends over is a trespass); *Butler v. Frontier Telephone Co.*, 186 N. Y. 486, 491, 79 N. E. 716 (1906) ("the law regards the empty space as if it were a solid inseparable from the soil and protects it from hostile occupation accordingly." The owner has "the right to the exclusive possession of that space which is not personal property but a part of the land"). *Contra*, *Grandona v. Lovdal*, 78 Cal. 611, 618, 21 Pac. 366 (1889); *Countryman v. Lighthill*, 24 Hun (N. Y.) 405 (1881); *Murphy v. Bolger*, 60 Vt. 723, 727 (1888). See COOLEY, *TORTS*, 3 ed., 1177; 18 CASE AND COMMENT, 119.

<sup>8</sup> See POLLOCK, *TORTS*, 10 ed., 30. Cf. *Guille v. Swan*, 19 Johns. (N. Y.) 381 (1822) (descending balloonist liable for trespasses by a crowd that gathered to aid him); *Canney v. Rochester, etc. Ass'n*, 76 N. H. 60, 79 Atl. 517 (1911); *Scott's Trustees v. Moss*, 17 Sess. (Scotland) 32 (1889).

<sup>9</sup> MASS. ACTS 1913, chap. 663. Cf. CONN. PUBLIC ACTS, 1911, chap. 86 (which imposes absolute liability). See also 146 L. T. 105 (December 14, 1918), for a summary of the report of the Civil Aerial Transport Committee which recommends that Parliament establish absolute liability as the standard.

<sup>10</sup> *Sawyer v. Davis*, 136 Mass. 239 (1884); *Commonwealth v. Parks*, 155 Mass. 531, 30 N. E. 174 (1892).

damage, need concern the aviator but little. . A litigious owner will find it expensive seeking nominal damages, especially where statutes make costs at law discretionary.<sup>11</sup> Further, he will be an ingenious landowner who can keep the trespassing airplane off without seriously endangering the aviator's life; whatever means he employs will be far from reasonable.<sup>12</sup> Then, too, there will be practically no basis for an injunction to prevent the repeated trespasses, since the sum total of the damage would be nominal and the danger of an easement's arising the slightest, when we consider the difficulty of establishing twenty years' adverse user of a particular lane at a fixed height as well as within a certain width.<sup>13</sup>

If we rigorously apply Coke's maxim, the result is that the law will frown upon the aviator, but unless he causes actual damage it will connive at the formal wrong. This branding of the inoffensive aviator as a tortfeasor, even if only in form, may be an embarrassing annoyance to one who acclaims the elasticity of the common law. Fortunately there are no binding decisions which stamp the aviator a trespasser; and of the cases adopting Coke's maxim unqualifiedly it may be said that the particular situation of a passage by an airplane was not considered. They have, then, only an inferential bearing on our problem, so that the courts may feel free to invoke general principles and practical considerations in balancing the interest of the aviator in the unrestrained development of a beneficial enterprise and that of the landowner in the free use of his superincumbent air space.

During the past decade foresighted lawyers have been discussing the problem, and several have ventured a theory upon which the balance should be struck. It has been suggested that although, according to the maxim, the landowner does own the air space up to the heavens, there is also a right of public passage, as long as the enjoyment of the landowner is not interrupted; a situation similar to the right of passage over navigable rivers privately owned.<sup>14</sup> The similarity, however, is slightly incomplete, for on rivers it is the navigator who is not to be interfered with by the bed-owner; <sup>15</sup> here, the owner is to be left undisturbed.

Another theory construes Coke's maxim as securing to the landowner only a right of user, and maintains that the aviator is within the circle of law-abiding citizens, until he causes actual damage.<sup>16</sup> This doctrine, however, imposes absolute liability for any interference with the landowner's use.

A third doctrine asserts that "the scope of possible trespass is limited by that of effective possession,"<sup>17</sup> just as possession is at the basis of pro-

<sup>11</sup> See BLISS, N. Y. ANN. CODE, §§ 3228, 3230 (if the defendant does not dispute plaintiff's ownership).

<sup>12</sup> See 36 LAW MAG. AND REV. 20.

<sup>13</sup> Cf. *Corbett v. Hill*, 9 Eq. Cas. 671 (1870) (the owner of the soil may build over a window projecting rightfully); *Keats v. Hugo*, 115 Mass. 204, 217 (1874) (similarly as to caves).

<sup>14</sup> Valentine, 22 JURIDICAL REV. 86, 96; HAZELTINE, THE LAW OF THE AIR, 77.

<sup>15</sup> See GOULD, WATERS, §§ 88-89.

<sup>16</sup> HAZELTINE, THE LAW OF THE AIR, 57; Blewett Lee, 7 AM. JOUR. OF INT. LAW, 474; 51 SOLICITOR'S JOURNAL, 771; SALMOND, LAW OF TORTS, 4 ed., 190; 1 WIGMORE, SELECT CASES ON THE LAW OF TORTS, 560.

<sup>17</sup> POLLOCK, TORTS, 10 ed., 363.

proprietary rights in land, so is it the basis of any proprietary right in the air space.<sup>18</sup> The passage at a high altitude is, then, not a trespass. But there is liability for all interferences with the air effectively possessed.

Although the flight of an airplane will very likely not be held a tort, the common law seems to afford no basis for holding the aviator liable only for negligence. If the burden of absolute liability for injuries to the land tends to check the growth of the airplane industry, we must look to the legislatures for relief. It is to be observed, however, that a duty of due care under the circumstances surrounding travel by airplane is practically as burdensome as absolute liability.

## RECENT CASES

**ADMIRALTY — MARITIME LIEN — SUPPLIES FURNISHED TO VESSEL — CONSTRUCTION OF STATUTE.** — A federal statute provides that any person furnishing supplies to any vessel should have a maritime lien. (ACT, JUNE 23, 1910, c. 373, § 1, 60 STAT. 604.) Pursuant to contract the libellant delivered coal to A's wharf with the understanding that A use a large part for his vessels, and that the libellant have a maritime lien therefor. A did appropriate a large part to various vessels, and the libellant now seeks to enforce a maritime lien against a *bond fide* purchaser on each vessel for the amount each vessel had used. *Held*, that no maritime lien had been created, as the coal had not been furnished to any particular vessel, appropriation by the owner being insufficient. *The Walter Adams*, 253 Fed. 20 (C. C. A. 1st Circ.).

Prior to the statute, although there was a conflict, the prevailing view, independent of local statutory provisions, was that no maritime lien was created unless the supplies were put on board, or brought within the immediate presence and control of the officers of the particular ship. *The Vigilancia*, 58 Fed. 698; *The Cimbria*, 156 Fed. 383. See Smith, "New Federal Statute Relating to Liens on Vessels," 24 HARV. L. REV. 182, 200. The statute in the principal case does not define "furnishing . . . to a vessel," and, as the statute is remedial, it should be construed liberally. *Wall v. Platt*, 169 Mass. 398, 48 N. E. 272; *Robinson v. Harmon*, 157 Mich. 276, 122 N. W. 106. Such interpretation, however, is applied only to the extent of effectuating the purpose of the enactment. *Hudler v. Golden*, 36 N. Y. 446, 447. In the present case the apparent purpose was to do away with the existing confusion and conflict. Beyond this it should not be construed, especially as creditors and *bond fide* purchasers may be prejudiced. *Vandewater v. Mills*, 19 How. (U. S.) 82, 89; *The Cora P. White*, 243 Fed. 246, 248. Accordingly, it seems that the act merely codifies the prior prevailing view which required a delivery to and for a specific vessel. *The Cora P. White, supra*; *Astor, etc. Co. v. White, etc. Co.*, 154 C. C. A. 246, 241 Fed. 57. *Cf. The Yankee*, 147 C. C. A. 593, 233 Fed. 919.

**APPEAL AND ERROR — DETERMINATION AND DISPOSITION OF CAUSE — UNAVOIDABLE DESTRUCTION OF RECORD BY FIRE.** — A judgment was rendered in the lower court against the defendant, and in due time he filed his appeal. Before he could make out his bill of exceptions based on voluminous evidence and certain exceptions taken during the trial, the courthouse, containing the records and the official stenographer's notes, was destroyed by fire. *Held*, on appeal, that a new trial be granted. *Woods v. Bottmos*, 206 S. W. 410 (Mo.).

By the weight of authority, if, without the appellant's fault, the transcript

<sup>18</sup> HAZELTINE, *THE LAW OF THE AIR*, 74.

on appeal does not contain all the evidence offered, a new trial will be granted. *Barlon v. Burbank*, 119 La. 224, 43 So. 1014; *State v. Huggins*, 126 N. C. 1055, 35 S. E. 606. So, also, where by the death or illness of the trial judge the appellant cannot get his bill of exceptions signed and sealed. *Hume v. Bowie*, 148 U. S. 245; *Sullivan v. White*, 15 S. W. 126 (Texas). Or where the appellant is deprived of his bill of exceptions by the loss of the official stenographer's notes. *Richardson v. State*, 15 Wyo. 465, 89 Pac. 1027. See *Matheus v. Mulford*, 53 Neb. 252, 73 N. W. 661. Logically, the appellant must furnish a complete report of the evidence to give the appellate court jurisdiction to review the case. *Morin v. Clafin*, 100 Me. 271, 61 Atl. 782; *Felheimer v. Eagle*, 79 Ark. 201, 95 S. W. 139. Some courts, taking a middle ground, dismiss the appeal if the appellant has made no effort, by proper proceedings in the lower court, to reinstate the lost part of the record. *Buckman v. Whitney*, 28 Cal. 555; *Close v. Close*, 28 Ore. 108, 42 Pac. 128. It is submitted that an arbitrary rule in favor of or against the appellant should not be adopted. But if the records were lost or destroyed long after the trial, so that the evidence or rulings of the court could not be recalled accurately enough to be reinstated, then justice would require a new trial. Otherwise, grave hardship would ensue, especially in criminal cases.

**ATTORNEYS — PROFESSIONAL ETHICS — SOLICITATION OF BUSINESS BY MEANS OF PERSONAL LETTERS.** — An attorney made a practice of sending letters and then additional "follow-up" letters to business firms soliciting them to intrust him with their legal business. The letters contained no false or misleading statements, being merely requests for a trial on legal work. *Held*, that respondent's conduct merited censure and must cease. *In re Gray*, 172 N. Y. Supp. 648.

In some states, it is a criminal offense for an attorney to advertise for divorce cases. 1915, CAL. PEN. CODE, 74, § 159 a; 1917, ILL. REV. STAT., c. 40, § 21. Even where there is no such statute, such unprofessional conduct is held to be sufficient ground for suspension or disbarment. *People ex rel. Maupin v. McCabe*, 18 Colo. 186, 32 Pac. 280; *In re Schnitzer*, 33 Nev. 581, 112 Pac. 848. Solicitation of legal business by means of paid agents or runners is conduct warranting suspension or disbarment. *Chreste v. Commonwealth*, 171 Ky. 77, 186 S. W. 919; *In re Clark*, 184 N. Y. 222, 77 N. E. 1. The contracts for hiring such solicitors are void as against public policy. *Langdon v. Conlin*, 67 Neb. 243, 93 N. W. 389; *Alpers v. Hunt*, 86 Cal. 78, 24 Pac. 846. *Contra*, *Vocke v. Peters*, 58 Ill. App. 338. See 20 HARV. L. REV. 576. Mere personal solicitation of clients, if accompanied by such objectionable features as false statements, mental incompetency, or distress of the person solicited, has been punished by the courts. *In re Welch*, 156 N. Y. App. Div. 470, 141 N. Y. Supp. 381; *In re Lauterbach*, 169 N. Y. App. Div. 534, 155 N. Y. Supp. 478. Recently, widespread advertising in newspapers and by means of printed circulars and folders in extravagant terms brought judicial censure on an attorney. *In re Schwarz*, 175 N. Y. App. Div. 335, 161 N. Y. Supp. 1079. But the principal case seems to be the first case where an attorney has been disciplined by a court for mere personal solicitation unconnected with fraud or the use of paid runners. The New York courts' thus giving official sanction to the Canons of Ethics of the American Bar Association should meet with the approval of the profession.

**BILLS AND NOTES — DOCTRINE OF PRICE VERSUS NEAL — PAYMENT OF BILL WITH FORGED BILL OF LADING ATTACHED.** — An order draft containing the words "value received and charge to the account of  $\frac{100}{\text{R.S.M.I.}}$  bales of cotton" was sold to an exchange house with an order bill of lading attached

for the specified cotton. The exchange house surrendered the bill of lading to the drawee bank and obtained its acceptance. The bill of lading was forged. The acceptor paid the ultimate holder of the draft, and debited the buyer of the cotton. *Held*, the buyer can not recover the amount of the draft from the exchange house. *Guaranty Trust Co. v. Hannay & Co.*, [1918] 2 K. B. 623 (C. A.). See NOTES, page 560.

CARRIERS — BILLS OF LADING — FORGERY OF AN INTERSTATE BILL OF LADING AS A FEDERAL CRIME. — Defendant was indicted for forging an interstate bill of lading, an act made criminal by section 41 of the Pomerene Act of 1916. *Held*, that as such a bill is void, it does not affect interstate commerce, and hence section 41 is unconstitutional. *United States v. Ferger*, So. Dist. Ohio, October, 1918.

For a discussion of this case, see NOTES, page 557.

CONFLICT OF LAWS — ADMIRALTY — MARITIME LIEN — FOREIGN LAW. — Two foreign vessels collided in an Algerian port. Thereupon the master of one of the vessels brought an action *in personam* in the Algerian court against the master of the other. No maritime lien was given by the local law, but an attachment of the vessel, there known as a "protective seizure," followed. Upon giving a letter of indemnity the vessel was released and then came to the United States where she was libeled by the plaintiff in the foreign action which had not proceeded to trial or judgment, but was still pending. *Held*, that the libellant had a maritime lien under the general maritime law of the United States, enforceable by a proceeding *in rem*. *The Kongsli*, 252 Fed. 267 (Dist. Ct., Dist. Me.).

As a result of the collision the *lex loci* gave a cause of action, but did not create a maritime lien. In such a case admiralty may take jurisdiction between foreigners to enforce a maritime lien, given by the general maritime law, even though none was given where the cause of action arose. *The Kaiser Wilhelm II*, 230 Fed. 717. See *The Maggie Hammond*, 9 Wall. (U. S.) 435, 450, 452. If jurisdiction depends on a maritime lien, it is difficult to see how the court, in the principal case, had jurisdiction, as the *lex loci* of the collision did not give such a lien. However, there being a cause of action, and the vessel being within the jurisdiction of the court, it seems that the court could give a maritime lien, recognized by its law, as a means of enforcing the cause of action, one of the remedies of its judicial proceeding. See MARSDEN, COLLISIONS AT SEA, 6 ed., 198. And as the jurisdiction was *in rem*, the pendency of the action *in personam* in the foreign country would not be a bar to the present action. *The Kalorma*, 10 Wall. (U. S.) 204; *The Bold Buccleugh*, 7 Moore (Privy Council), 267.

CONFLICT OF LAWS — DIVORCE — REMARRIAGE WITHIN PROHIBITED TIME — PROPERTY RIGHTS. — A statute in Washington prohibits remarriage by either party within six months of a decree of divorce. (1915, REM. CODE, 419, § 992.) The plaintiff and her husband were divorced in Washington. Two months later, the plaintiff, in company with the defendant, a resident of Washington, went to Canada where the two were married. They immediately returned to their domicile in Washington believing in good faith that the marriage was valid. The plaintiff brings suit for annulment and for a division of the property acquired subsequent to the marriage. *Held*, the marriage was void, the property to be divided as that of a partnership. *Knoll v. Knoll*, 176 Pac. 22 (Wash.).

It is well settled that the validity of a marriage contract depends upon the law of the place of celebration. *Henderson v. Ressor*, 265 Mo. 718, 178 S. W. 175; *Dalrymple v. Dalrymple*, 2 Hagg. Cons. 54. See 1 NELSON, DIVORCE AND SEPARATION, § 33. But although the contract by the *lex loci contractus* is

valid, the *lex domicilii* may refuse to impose thereon the resulting status of marriage. *Hall v. Industrial Commission*, 165 Wis. 364, 162 N. W. 312; *Brook v. Brook*, 9 H. of L. Cas. 193. See 26 HARV. L. REV. 538. Construing the statute in the principal case as a limitation upon the decree of divorce, the original marriage was not completely dissolved until the specified time had elapsed. Accordingly, although the marriage contract was valid by the *lex loci*, the *lex domicilii* could not impose thereon the marriage status. *Warter v. Warter*, 15 P. D. 152. Cf. *Hooper v. Hooper*, 67 Ore. 191, 135 Pac. 525. The Washington decisions, however, construe the statute as applying only to persons who remain domiciled in the state, so that either party could remarry during the prohibited period by acquiring a new domicile. *State v. Fenn*, 47 Wash. 561, 92 Pac. 417; *Pierce v. Pierce*, 58 Wash. 622, 109 Pac. 45. As to property acquired after marriage by the husband or wife, or both, Washington, following the civil-law doctrine, considers such to be community property. See 1915, REM. CODE, 2155, § 5917. Even where the marriage is annulled, yet if the parties in good faith believed they were married, as in the principal case, the community doctrine permits the acquets to be divided equally between the man and woman. *Lawson v. Lawson*, 30 Tex. Civ. App. 43, 69 S. W. 246; *In re Brechley's Estate*, 96 Wash. 223, 164 Pac. 913. It is unfortunate, however, to call this property "partnership" property, for that term implies not a marital relation but a business relation entered into for profit. See LINDLEY, PARTNERSHIP, 6 ed., 3, 10; BALLINGER, COMMUNITY PROPERTY, §§ 15, 16.

FEDERAL COURTS — DIVERSITY OF CITIZENSHIP — DOMICILE AS THE EQUIVALENT OF STATE CITIZENSHIP. — The plaintiff, a citizen of the United States, had acquired a domicile in California. He left that state never intending to return, and toured the United States. In the course of his travels he came temporarily to Virginia. He there sued the defendant in a federal court, claiming citizenship in California. *Held*, that the bill be dismissed for want of jurisdiction. *Pannill v. Roanoke Times Co.*, 252 Fed. 910 (Dist. Ct.).

To sue in a federal court the plaintiff must be a citizen of some state. *New Orleans v. Winter*, 1 Wheat. (U. S.) 91. A citizen of the United States is a citizen of the state wherein he resides. U. S. CONST., Art. XIV, § 1. But the residence must be *animo manendi*. *Marks v. Marks*, 75 Fed. 321; *Hammerstein v. Lyne*, 200 Fed. 165. As in the principal case a person may thus be a citizen of the United States and not a citizen of any particular state. *Hough v. Société Elec. Westinghouse de Russie*, 231 Fed. 341. See *Slaughter House Cases*, 16 Wall. (U. S.) 36, 74. This fact is also illustrated by the status of citizens of territories and of the District of Columbia. *Hepburn v. Ellzey*, 2 Cranch (U. S.) 452; *New Orleans v. Winter*, *supra*. The courts requiring a residence *animo manendi* for citizenship also say domicile in a state is the substantial equivalent of citizenship in that state. See *Harding v. Standard Oil Co.*, 182 Fed. 421, 423; *Hammerstein v. Lyne*, 200 Fed. 165, 170. Now one's last domicile remains until a new one is acquired. *Desmare v. United States*, 93 U. S. 605. It might seem to follow that one remains a citizen of the state of his domicile even when he leaves it *sans animum revertendi*, so long as he has not acquired a new domicile. But the court in the present case correctly sees that such a result would be utterly inconsistent with the settled view that state citizenship requires permanent residence.

GARNISHMENT — EFFECT OF GARNISHMENT — VALIDITY OF JUDGMENT AGAINST GARNISHEE WHEN PRINCIPAL DEFENDANT IS GIVEN NO NOTICE. — In an action in Tennessee to recover wages, the defendant proved as a defense a judgment obtained against it as garnishee in a proceeding in Virginia. In the garnishment proceeding no service, actual or constructive, was made on

the principal defendant, the present plaintiff, and no notice was given him by the garnishee. *Held*, that the garnishment judgment was valid and a defense to the present action. *Southern Ry. Co. v. Williams*, 206 S. W. 186 (Tenn.).

It is established law that jurisdiction over a debt in garnishment proceedings may be obtained by acquiring personal jurisdiction anywhere over the garnishee. *Harris v. Balk*, 198 U. S. 215; *Louisville & Nashville R. R. Co. v. Deer*, 200 U. S. 176. The soundness of this doctrine may well be questioned. See 27 HARV. L. REV. 107; 31 HARV. L. REV. 917. Exercising the jurisdiction so obtained with no notice to the principal defendant except an "extrajudicial" one from the garnishee has been held by the Supreme Court of the United States to be "due process of law." *Baltimore & Ohio Ry. Co. v. Hostetter*, 240 U. S. 620. The principal case is in accord with the latter decision on this point, because the presence or absence of such an extrajudicial notice can have no effect on the constitutionality of the proceedings. But it has been held, contrary to the decision in principal case, that such notice is necessary to protect the garnishee from repayment of the debt to the principal defendant. *Pierce v. Chicago Ry.*, 36 Wis. 283; *St. Louis & S. F. R. Co. v. Crews*, 151 Pac. 879 (Okla.). See also *Morgan v. Neville*, 74 Pa. St. 52, 57; *Harris v. Balk*, 198 U. S. 215, 227. On ordinary principles, the failure by the garnishee to give notice can make him liable to pay the debt a second time only because his negligence has injured the principal defendant to that extent. It should therefore, it is submitted, be necessary for the principal defendant, in his suit against the garnishee, to show (1) (*injury*) that the claim of the plaintiff in the garnishment proceedings was unjust, and (2) (*causation*) that the claim could have been successfully resisted if the garnishee had given the omitted notice. Since neither of these elements of liability was established in the principal case, the decision, notwithstanding its obvious injustice to the present plaintiff, seems the correct one if we are logically to follow *Harris v. Balk* and *Baltimore & Ohio Ry. Co. v. Hostetter*, *supra*.

**HUSBAND AND WIFE — CRIMINAL CONVERSATION — RIGHT OF WIFE TO SUE.** — The plaintiff, a married woman, sued another woman for criminal conversation with the plaintiff's husband. *Held*, the plaintiff may recover. *Turner v. Heavrin*, 206 S. W. 23 (Ky.).

Under the old common law a wife either had no right of action for the alienation of her husband's affections or for criminal conversation with him, or else she had a right she could not enforce because of the necessity of joining her husband, one of the wrongdoers as a party plaintiff. See *Lynch v. Knight*, 9 H. L. 577, 594, 595; *Humphrey v. Pope*, 122 Cal. 253, 257, 53 Pac. 847, 848 (affirmed in 1 Cal. App. 374, 82 Pac. 223); *Haynes v. Nowlin*, 129 Ind. 581, 584, 29 N. E. 389, 390. A few jurisdictions still follow the old rule, sometimes on account of a needlessly narrow interpretation of Married Women's Property Acts. *Morgan v. Martin*, 92 Me. 190, 42 Atl. 354; *Lellis v. Lambert*, 24 Ont. App. 653. Most jurisdictions now, however, allow a wife recovery in an action for alienation of affections, especially where the action involves both alienation of affections and criminal conversation. *Messervy v. Messervy*, 82 S. C. 559, 64 S. E. 753; *Nolin v. Pearson*, 191 Mass. 283, 77 N. E. 890. While generally the cases fail to distinguish the two actions, one court has held that a wife may maintain an action for alienation of affections, but not for criminal conversation. *Kroessin v. Keller*, 60 Minn. 372, 62 N. W. 438. Another court held in a *dictum* the wife could maintain either. *Dodge v. Rush*, 28 App. D. C. 149, 153. The present case, allowing recovery for criminal conversation alone, seems sound.

**JURISDICTION — CIVIL AND MILITARY TRIBUNALS — CALL TO SERVICE UNDER THE DRAFT ACT WHILE AWAITING SENTENCE IN A CIVIL TRIBUNAL.** — The



petitioner was duly registered and subject to draft under the Selective Service Law. (ACT OF CONGRESS, May 18, 1917.) Following his registration he committed grand larceny, was indicted and pleaded guilty, and was awaiting sentence when called to report for military duty. Claiming his call to service changed his status to that of a soldier subject to military law, and that the jurisdiction of the military authorities was absolute, the petitioner applied for a writ of *habeas corpus*. *Held*, that the application be denied. *Ex parte Henry*, 253 Fed. 208 (Dist. Ct.).

When one in military service commits an offense which is both a civil and military crime, the jurisdiction of the civil and military tribunals is in times of peace concurrent. But should the jurisdiction of the civil authorities first attach, the military authorities must yield thereto. A. W. 74; should the jurisdiction of the military authorities first attach, they may, but need not, give way to the civil tribunals. A. W. 74; *United States v. Lewis*, 200 U. S. 1. In times of war, however, the military authorities are supreme and need not yield to the civil authorities though the jurisdiction of the latter first attached. *Ex parte King*, 246 Fed. 868. They may allow the civil authorities to punish the offender as a matter of comity or expediency. That has been declared to be the proper policy where the charge is serious. J. A. G. O., October 30, 1917; *Ibid.*, June 11, 1917. See *Ex parte Bright*, 1 Utah, 145. In the principal case the petitioner, though subject to draft, was not at the time the offense was committed subject to military law, and his call to service while he was awaiting sentence from the civil tribunal could not deprive that tribunal of his custody unless it was the intent of Congress so to do. That Congress had no such intent is shown by the Selective Service Regulations which places infamous criminals in Class V, and all other criminals awaiting trial or serving sentence in Class IV. S. S. REG., 2 ed., § 79. Moreover, the result of the principal case is sound, for it is not the military authorities but the wrongdoer himself who seeks his release. See *Ex parte Calloway*, 246 Fed. 263.

**LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — STATEMENTS OF ALDERMEN.** — Defendant as alderman made charges of want of integrity and unfitness against the plaintiff, a policeman, before the board of aldermen, which had power to remove policemen. The plaintiff was exonerated and sued the defendant for libel. *Held*, that actual malice could not be inferred from the mere falsity of the defendant's statements, and that in the absence of malice the plaintiff could not recover. *Sweeney v. Higgins*, 104 Atl. 791 (Me.).

Usually, action lies for false statements about a person in his trade or profession tending to bring him into general contempt, hatred, or ridicule. *Farmer's Life Insurance Co. v. Wehrle*, 165 Pac. 763 (Colo.); *Carver v. Greason*, 101 Kan. 639, 168 Pac. 868. Sometimes, however, public interest in freedom of comment outweighs individual interests in untarnished reputations. A person with a duty or interest, although only social or moral, in communicating his belief about another to a third person with a corresponding interest in hearing it is protected if the informant does not abuse the exigencies of the occasion. *Everest v. McKenny*, 195 Mich. 649, 162 N. W. 277; *State v. Fish*, 90 N. J. L. 17, 102 Atl. 378. Public interest in the freedom of speech by members of legislatures, judges, persons in judicial proceedings, and high executive officers is so great that their statements made in the course of duty are absolutely privileged. *Dillon v. Balfour*, 20 Ir. L. R. 600; *Scott v. Stansfield*, L. R. 3 Exch. 220; *Rogers v. Thompson*, 89 N. J. L. 639, 99 Atl. 389; *Farr v. Valentine*, 38 App. D. C. 413. This is hardly true of inferior boards such as city councils and investigation committees, but there is some authority for holding their privilege absolute, not qualified. *Bolton v. Walker*, 197 Mich. 699, 164 N. W. 420. *Contra*, *Ivie v. Minton*, 75 Or. 483, 147 Pac. 395. The court in the principal case adopts the sounder view.

**MUNICIPAL CORPORATIONS — ACTION AGAINST TOWN — AUTHORITY OF COMMITTEE TO EMPLOY ATTORNEY.** — By vote at a town meeting a committee was authorized to build a bridge. Litigation arose concerning the bridge and the committee employed counsel in connection therewith. In a suit by counsel against the town to recover for his professional services, *held* that the town is not liable, the committee having acted beyond its authority in employing counsel. *Stewart v. Inhabitants of York*, 104 Atl. 701 (Me.).

In the absence of express or implied restrictions a town has the authority to employ an attorney to attend to its corporate interests. *Cheesebrow v. Town of Mt. Pleasant*, 71 W. Va. 199, 79 S. E. 350; *City of Holdenville v. Lawson*, 40 Okla. 38, 135 Pac. 405. See **TIEDEMAN, MUNICIPAL CORPORATIONS**, 316, § 176. But there is no authority to employ an attorney in regard to matters not affecting the interests of the town. *Peck v. Spencer*, 26 Fla. 23, 7 So. 642; *Tharp v. Blake*, 171 S. W. 549 (Tex. Civ. App.). See 2 **DILLON, MUNICIPAL CORPORATIONS**, 5 ed., 1246, § 824. In the principal case, as the court points out, the authority given the committee to build a bridge carried with it the incidental authority to select an engineer, obtain plans and specifications, advertise for bids, and award and execute the contract. See *Blaisdell v. York*, 110 Me. 500, 518, 87 Atl. 361, 370. It would seem that the committee also had power to employ counsel in regard to the litigation in question, for that litigation affected the interests of the town in that it was purely an expense of building the bridge. *Waterbury v. Laredo*, 60 Tex. 519, reversed on other grounds in 68 Tex. 565, 5 S. W. 81. In deciding otherwise, the court was apparently influenced by two Massachusetts decisions. See *Buller v. Charlestown*, 7 Gray (Mass.) 12; *Fletcher v. Lowell*, 15 Gray (Mass.) 103. But the latter case decided that authority in the mayor to employ counsel in defending an action for damages against the city did not include the employment of counsel for the extraordinary purpose of putting through the legislature an act diminishing the claim for damages. In the former case there was no official action at all, the legal services being rendered merely at the request of individual aldermen. Accordingly neither case is in point.

**PLEDGES — MORTGAGE COLLATERAL — DUTY OF PLEDGEE TO FORECLOSE ON REQUEST OF PLEDGOR.** — Defendant assigned overdue real estate mortgages and bonds to the plaintiff as collateral security for his note. Without tendering money to cover the expenses, the defendant requested the plaintiff to foreclose at a time when the property would have satisfied the debt. The plaintiff assented, but failed to do so. Subsequently the obligor on the bond went bankrupt and the property depreciated. In an action on the note the defendant counterclaimed for negligence in failing to foreclose. *Held*, that the plaintiff was not negligent. *City Bank of York v. Ricker*, 104 Atl. 804 (Pa.).

Inasmuch as both the pledgor and the pledgee of collateral security are interested in its application there is a duty of due care imposed on the latter in handling the security. See **COLEBROOKE, COLLATERAL SECURITIES**, 2 ed., §§ 87, 117. He may not sell the collateral to satisfy his debt, but must hold and collect it as it becomes due. *Joliet Iron & Steel Co. v. Scioto Fire Brick Co.*, 82 Ill. 548. Ordinary diligence is required of the pledgee in collecting on the collateral at maturity. *Farm Investment Co. v. Wyoming College*, 10 Wyo. 240, 68 Pac. 561; *Larkin Co. v. Dawson*, 37 Tex. Civ. App. 345, 83 S. W. 882. See *Coleman v. Lewis*, 183 Mass. 485, 487, 67 N. E. 603. The same is true where overdue collateral is pledged. *Wakeman v. Gowdy*, 10 Bosw. (N. Y.) 208. In the principal case the pledgee was requested to foreclose, which would involve litigation and risk. It may be argued that if the security is ample the foreclosure should not be left to the caprice of the pledgee. See 19 **HARV. L. REV.** 471. The pledgor, however, can protect his interest by taking up the security or having a third person do so. It is generally held, therefore, as in the principal

case, that the pledgee is under no duty to sue. *Black River Bank v. Page*, 44 N. Y. 453; *Rice v. Benedict*, 19 Mich. 132; *Smith v. Felton*, 85 Ind. 223. But see *Wakeman v. Gowdy*, *supra*. This is especially true where the pledgor makes no tender covering the expense of litigation. *Wells & Dewing v. Wells & Scriber*, 53 Vt. 1. See *Culver v. Wilkinson*, 145 U. S. 205, 213. Although the pledgee's assent and subsequent failure to foreclose might constitute such negligence as to render him liable, yet if the pledgor had notice of this inaction and an opportunity to protect himself, the pledgee would not be liable. See *City Savings Bank v. Hopson*, 53 Conn. 453, 457.

**QUASI-CONTRACT — RECOVERY OF MONEY PAID UNDER MISTAKE OF FACT — PAYMENT BY MISTAKE ON A POST-DATED CHECK.** — A bank paid the payee of a post-dated check, not noticing the future date. After payment, but before the date of the check, the drawer ordered payment stopped. The bank sought to recover the amount from the payee. *Held*, defendant's ignorance that the bank paid under a mistake is not a sufficient defense. *Second National Bank of Reading v. Zable*, 66 Pitts. L. J. 774.

Generally, one who pays another money under a mistake of fact may recover. *Hummel v. Flores*, 39 S. W. 309 (Texas); *United States v. Phillips*, 21 D. C. 309. The purpose of allowing such a quasi-contractual action is to prevent the unjust enrichment of the defendant. *Moses v. McFarlan*, 2 Burr. 1005, 1012. There is no recovery, therefore, in cases where the plaintiff, though under a duty to pay, paid under a mistake as to the nature of his obligation or legal liability. *Johnson v. Hernig*, 53 Pa. Super. Ct. 179; *Buel v. Boughton*, 2 Den. (N. Y.) 91; *Morrison v. Payton*, 31 Ky. L. Rep. 992, 104 S. W. 685. And recovery is not allowed when the defendant has with honesty so changed his position that if the plaintiff recovered, he could not be restored to his former status. *Bend v. Hoyt*, 13 Pet. (U. S.) 263; *Behring v. Somerville*, 63 N. J. L. 568, 44 Atl. 641. From the foregoing it would seem that in the principal case the bank should recover. The law, however, for commercial security treats banks more strictly, and in the absence of fraud, denies them recovery for money paid the holders of checks under mistake as to the sufficiency of the funds of the drawers or their solvency. *National Exchange Bank v. Ginn*, 114 Md. 181, 78 Atl. 1026; *American National Bank v. Miller*, 185 Fed. 338. The present case seems to relax the strict rules.

**RAILROADS — STATE REGULATION — UNLAWFUL INTERFERENCE WITH INTERSTATE COMMERCE.** — A Missouri statute prohibits railroad corporations from issuing mortgage bonds without authority from the Public Service Commission, imposes heavy penalties for violation of the statute and purports to invalidate bonds so issued. (1913, MO. LAWS, 592, 593, 600.) The commission is required to charge a fee proportionate to the value of the authorized issue. (*Ibid.*, 567.) The plaintiff company is a Utah corporation engaged in interstate transportation, a small part of its line extending into Missouri. The company applied to the Missouri Public Service Commission for a certificate authorizing it to issue \$31,848,900 worth of bonds secured by a mortgage on its entire interstate line. The commission granted the authority, charging a fee of \$10,962.25. The company accepted the grant under protest, alleging that the fee was an unconstitutional interference with interstate commerce. The Supreme Court of Missouri held that the company by accepting the benefits was estopped to assert the invalidity of the fee. (In a subsequent case the Missouri court held the statute inapplicable to foreign corporations. *Public Service Commission v. Union Pac. R. R. Co.*, 271 Mo. 258.) On appeal to the United States Supreme Court, *held*, the charge was an unlawful interference with interstate commerce, the company not being estopped to assert its illegality, since the payment was under duress. *Union*

*Pac. R. R. Co. v. Public Service Commission*, U. S. Supreme Court, October Term, 1918, No. 65.

A corporation, in accepting the benefits permitted by statute, estops itself from contesting the validity of the statute. *Minneapolis & St. L. Ry. Co. v. Gourie & N. W. Ry. Co.*, 123 Iowa, 543, 99 N. W. 181; *Commonwealth v. Southern Pac. Co.*, 150 Ky. 97, 149 S. W. 1105. If, however, accepting the benefits is not a voluntary act, but is procured by duress, no estoppel is created. See *Cicotte v. Wayne*, 59 Mich. 509, 513, 26 N. W. 686, 687; BIGELOW, ESTOPPEL, 6 ed., 646. In the principal case, it appears that the payment of the fee in return for the certificate was an act under duress. The issuance of the mortgage bonds was necessary to reimburse the railroad company for expenditures upon its property. Without the certificate, the bonds would be not only unmarketable but, if the statute were held applicable, would be absolutely void, and the corporation would be subject to heavy penalties. *Scottish Union & National Ins. Co. v. Herriott*, 109 Iowa 606, 80 N. W. 665; *Swift v. United States*, 111 U. S. 22. It is true the Missouri court later held the statute inapplicable, but the corporation was not bound to take the risk of the court deciding otherwise. *Atchison, T. & S. Fe Ry. Co. v. O'Connor*, 223 U. S. 280. Accordingly, the jurisdiction of the United States Supreme Court was not excluded on the ground that the company waived its federal rights. *Cresswill v. Grand Lodge*, 225 U. S. 246. Since the charge for the certificate was fixed in proportion to the value of the bonds issued, the same being secured by railroad property most of which was in states other than Missouri, the burden on the railroad was apparently so heavy as to constitute an illegal interference with interstate commerce. Cf. *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1; *International Paper Co. v. Massachusetts*, 246 U. S. 135. See JUDSON, INTERSTATE COMMERCE, 3 ed., §§ 21, 22, 39.

SEAMEN — SEAMEN'S ACT OF 1915 — DEDUCTIONS IN AMERICAN PORT OF ADVANCES MADE TO FOREIGN SEAMEN BY A FOREIGN VESSEL IN FOREIGN PORT. — The Seamen's Act (38 STAT. AT L. 1165) provides that "every seaman of a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs a one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void. Any failure on the part of the master to comply with this demand shall release the seaman from his contract, and he shall be entitled to full payment of the wages earned. . . . This section shall apply to seamen of foreign vessels while in the harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement." A British vessel in a British port made advances to the seamen, a lawful and customary practice by the law of England. On arriving in an American port the seamen demanded half the wages earned. The master deducted the advances made in Liverpool, and the seamen deserted and libeled the ship. *Held*, the libellants cannot recover. *The Talus*, U. S. Supreme Court, October Term, 1918, No. 392.

It is well established that advances made to seamen by any vessel, American or foreign, in any port of the United States are within the statute and illegal. *The Eudora*, 190 U. S. 169; *The Kestor*, 110 Fed. 432. See 15 HARV. L. REV. 411. The cases are in conflict as to advances made in a foreign port by an American or foreign vessel where by the law of such foreign country advances are allowed. *The Windbrush*, 250 Fed. 180; *The Imberhorne*, 240 Fed. 830; *The Ixion*, 237 Fed. 142; *The Belgier*, 246 Fed. 966. See 31 HARV. L. REV. 1169. The reasons for allowing such advances to be deducted on reaching an American port are that the contract is good by the law of the place where made, that Congress had no intention of rendering such contract void or of

imposing a criminal liability thereon, if such were possible. However, such construction, it is submitted, does violence to the English language. The statute states expressly that it is applicable to foreign vessels in American ports. The violation is not the making of a contract in a foreign country, but in deducting such advances in an American port and in refusing to pay one-half of the wages then earned. Though the result reached in the principal case is a desirable one from an international point of view, the real remedy would seem to be with the legislature and not the judiciary.

**SHIPPING — FREIGHT — WHEN RIGHT TO FREIGHT BEGINS.** — The claimant, a shipowner, contracted to carry a cargo of paper for the libellant from New York to Bordeaux. The bill of lading provided that restraints of princes and rulers were to be excepted and "freight for the said goods to be prepaid in full without discount retained and irrevocably, ship and / or cargo lost or not lost." Before the ship was ready to sail, an embargo was placed upon all vessels whose voyages would bring them within the submarine zone, and clearance was consequently refused to the claimant's ship. The cargo was subsequently discharged and the shipowners refused to return the prepaid freight. *Held*, that the shipowner may retain freight though the ship had not broken ground. *The Gracie D. Chambers*, 253 Fed. 182 (Circ. Ct. App.).

At common law, no freight is due until the cargo has been delivered at the port of destination. *Osgood v. Growing*, 2 Camp. 466; *Post v. Robertson*, 1 Johns. (N. Y.) 24. As the carrier's contract is entire, it follows, then, that he could not recover for services rendered prior to the ship's breaking ground. *Curling v. Long*, 1 B. & P. 634; *The Tornado*, 108 U. S. 342. By the law maritime the result would be the same, since the right to freight begins only upon inception of the voyage. *Curling v. Long*, *supra*. See MACLACHLAN, *MERCHANT SHIPPING*, 5 ed., 546. In England, however, if the contract provides that freight be prepaid, it is not recoverable whether earned or not. *De Silvale v. Kendall*, 4 M. & S. 37; *Allison v. Bristol Marine Ins. Co.* (1876), 1 A. C. 209. In such a case, therefore, where the cargo is destroyed before the ship breaks ground, but after the time fixed for prepayment of freight, the owner may retain the sums advanced. *Coker v. Limerick S. S. Co.*, 34 L. T. R. 18. In the United States the common law applies alike to prepaid freight, and it must be returned when there has been no full performance. *Watson v. Duykinck*, 3 Johns. (N. Y.) 335; *Benner v. Equitable Ins. Co.*, 6 Allen (Mass.) 222. See 1 PARSONS, *SHIPPING AND ADMIRALTY*, 210. But a specific contract similar to the one in the principal case clearly suspends the common-law rule and produces the same effect as a provision for prepaid freight under the English law. On the basis of the English decision and as a matter of pure construction, therefore, the principal case seems correctly decided. The dissenting opinion prompted by a desire to avoid a harsh result cannot, however, be supported in view of the clear terms of the contract.

**STATUTE OF FRAUDS — INTEREST IN LANDS — VALIDITY OF AN ORAL AGREEMENT TO PAY FOR IMPROVEMENTS TO LAND.** — By an oral agreement defendant leased his premises to plaintiff, and promised to allow plaintiff to remove all improvements or to compensate him for their value. After plaintiff had made certain improvements, including the planting of an orchard, defendant terminated the lease and took possession. The plaintiff brings this action on the oral agreement for the value of the improvements. *Held*, that plaintiff could recover on equitable principles as well as on the oral agreement. *Fredell v. Ormand Mining Co.*, 97 S. E. 386 (N. C.).

By the better view, an oral agreement for the sale of standing trees is invalidated by the Statute of Frauds. *Green v. Armstrong*, 1 Denio (N. Y.) 550; *Hirth v. Graham*, 50 Ohio St. 57. *Contra*, *Marshall v. Green*, 1 C. P. D. 35.

See 13 HARV. L. REV. 225. But an agreement between a landowner and an outsider for payment for planting trees or making other improvements to land is generally held not to be within the statute. *Frear v. Hardenbergh*, 5 Johns. (N. Y.) 272; *Lower v. Winters*, 7 Cow. (N. Y.) 263. But see *Falmouth v. Thomas*, 1 Crompt. & M. 89, 108. The reasoning is that such an agreement is simply a contract for payment for certain labor and chattels to be applied in a given manner, and does not effect a transfer of any interest in the land. The agreement in the principal case comes within this reasoning, so that it seems unnecessary to resort to equitable principles to justify the recovery.

**TORTS — UNFAIR COMPETITION — PIRACY OF NEWS.** — The Associated Press brought a bill in equity against the International News Service asking that the latter be enjoined, *inter alia*, from copying news from bulletin boards and early editions of complainant's newspapers and selling this, either bodily or after rewriting it, to defendant's customers, until its commercial value as news to the complainant and all of its members had passed away. *Held*, such acts constitute unfair competition, complainant has a limited property in news gathered by it, and a preliminary injunction will be granted. *International News Service v. The Associated Press*, U. S. Sup. Ct., December 23 (October Term, No. 221), 1918.

For a discussion of this case, see NOTES, page 566.

## BOOK REVIEWS

A SHORT TREATISE ON CANADIAN CONSTITUTIONAL LAW. By A. H. F. Lefroy. Toronto: Carswell Company. \$4.00.

Mr. Lefroy has written a valuable and informative book. American lawyers are in general lamentably ignorant of the working of federalism in the two great English commonwealths; and it has been in the past the excuse that books like Mr. Lefroy's larger treatise on Canada and Mr. Moore's admirable volume are too large for anyone save the student of details. Mr. Lefroy's book removes the basis for this excuse, so far, at least, as Canada is concerned. In three hundred pages he gives us an admirable summary of the main legal hypotheses of Canadian federalism and a mass of notes which refer to the more important cases on the subject. Professor Kennedy of Toronto contributes a useful historical introduction in which Canadian constitutionalism prior to 1867 is discussed.

One or two observations of special importance may be noted. Legally the question meets us on the threshold as to whether Canada is to be regarded as a federation at all. If *A. G. for Australia v. Colonial Sugar Refining Co.*, [1914] A. C. 237, is to be accepted as good law, Canada is to be regarded as simply a rather striking instance of decentralization in which old powers were redistributed. Mr. Lefroy argues that it is impossible to accept this point of view. It mistakes a confederation for what may be the same thing in result, but utterly different in its origin. The Federation Act of 1867 clearly intended to recognize national unity in the *milieu* of a very complete right to local self-government, exactly as in the case of the Constitution of the United States.

It is well known that Mr. Lefroy is the urgent advocate of a complete distinction between American and Canadian federalism, and it is worth while to summarize the grounds of his argument. (1) In Canada there is no separation of powers. The existence, both in the federal and provincial governments, of the English parliamentary system, with its fusion of executive and legislature, marks a fundamental difference from the system of America. (2) There

is no such restriction on the legislative power as in things like the Fourteenth Amendment. The limitation of the constitution is not as to the contents of an act but as to its subjects. (3) Residual sovereignty belongs not to the local but to the central government. (4) No popular reserve power of constitutional amendment exists in Canada. This is, without question, an interesting attitude. At least it is certain that the Canadian system did not consciously, as did Australia, attempt the adaptation of the American system to its peculiar problem. Yet it is worth noting that Australia, like Canada, has a parliamentary executive without any marked divergences from American federalism. And both in Canada and Australia the power of judicial review — the real keystone of the federal arch — has been very notably developed, particularly in recent years.

Several minor points of distinct utility may be noted. The remarks on copyright (page 159 *f.*) are wholly admirable and put the problem in the clearest possible light, despite its complexity. The note on estoppel from setting up unconstitutionality as a plea (page 196) is most suggestive. Particularly interesting is the discussion on locally restricted dominion laws (page 88 *f.*). Altogether the volume suggests how differently existing books on American constitutional law might be written if they were intrusted to people with Mr. Lefroy's broad constitutional insight. His work, on its scale, is a model for American lawyers to emulate.

H. J. L.

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A SOURCE-BOOK OF MILITARY LAW AND WAR-TIME LEGISLATION. Prepared by the War Department Committee on Education and Special Training. St. Paul: West Publishing Company. 1919.

The idea of establishing a Students' Army Training Corps in the colleges of the country was well conceived. It is probable that in practice the plan would eventually have worked out well, and that there would have been a reservoir from which young officers could have been drawn. The wisdom of establishing units of the S. A. T. C. in the law schools was much more doubtful. The leading law schools of the country had already been drained of all the students who were available for military service in any form. Only in schools in which high school graduates were admitted could be found possible officer material in any numbers. The plan of the Committee on Education and Special Training of the War Department included a course on International Law, one on Military Law, one on War-Time Legislation, and one on War Issues; and such ordinary law courses as time allowed. It would seem that the committee in attempting to provide for the imparting of information of practical military value and for the general intellectual training of the student in order to make him a more useful member of the army, and in attempting at the same time to assist him in preparing for his subsequent career at the bar, was attempting to ride several horses with very different gaits — a difficult feat even for the War Department. It is difficult to see just what would have been the advantage to the military establishment in keeping students in the law schools. A smattering of legal knowledge would hardly make a young man — certainly not one from eighteen to twenty-one years of age — more useful in the army, even though that knowledge should include a few weeks' acquaintance with International Law, Military Law, and such statutes as the National Defense Act, the Shipping Board Act, the Espionage Act, and the War Risk Insurance Act. And useful as such knowledge is, it could hardly take the place of the usual law courses as a preparation for the practice of the law.

However this may be, if the S. A. T. C. was to be established in the law schools, it was necessary to provide material for the courses to be pursued.

In the course on International Law there was plenty of material available in the way of case-books and text-books. In the course on Military Law the excellent Manual for Courts-Martial was available to take care of the subject of the law relating to the discipline of the army. But there was no book available covering the other subjects included in Military Law and the course on War-Time Legislation. Colonel Wigmore, versatile and ready for any emergency, immediately set to work to have a book prepared and, with the aid of Dean Merton L. Ferson, in a very few weeks produced the source-book. What the book purports to do, it does well; it furnishes an abundance of material for the proposed courses. In it are collected pre-war statutes relating to the military organization, and judicial opinions on a variety of matters affecting "military persons and others who have relations with them;" and war-time statutes, regulations and general orders, federal judicial opinions and opinions of the Judge Advocate General. The war-time statutes include the principal acts of Congress made necessary by the emergency; the war-time judicial opinions and opinions of the Judge Advocate General deal with a vast variety of subjects from the constitutionality of the Selective Service Law to the compensation for labor of prisoners of war. The range of the material is extremely wide; the arrangement is for the most part chronological. Of course no teacher would be cruel enough to take up the subject in the order in which it is presented, nor could he possibly cover all the matter presented; of course it could not have been intended that he should. It would be possible however by a wise selection and arrangement to give a course of considerable interest and perhaps of some value — a course which could not be given without the aid of a book like the source-book. With the signing of the armistice the whole plan fell through and probably nowhere will any course be given based upon the source-book. The book is however available as a useful book of reference. Dramatically it shows how the military problems of peace and the problems of the war were met by Congress, the courts and the War Department. Of especial interest are the opinions of the Judge Advocate General, for only a digest of these is elsewhere published.

AUSTIN W. SCOTT.

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COMMERCIAL ARBITRATION AND THE LAW. By Julius Henry Cohen. D. Appleton and Company. 1918. pp. xx, 339.

The title of this volume rather leads one to expect a discussion of the relative merits of arbitration and ordinary litigation, together with information concerning the actual use made of arbitration in various jurisdictions. There is something of this in the first fifty pages. The treatment however is by the way. It is neither complete nor very well arranged. This is probably explained by the fact that the book, according to the preface, is an amplification of a brief filed in a New York case by Mr. Cohen, as *amicus curiae*, acting at the request of the New York Chamber of Commerce. The only report of that case which has come to the writer's attention is found in 163 N. Y. Supp. 516. It says nothing as to arbitration. Questions of that kind must have been eliminated in the lower court.

The main thesis of Mr. Cohen's work seems to be that courts of law should recognize all agreements for arbitration as valid and enforce them with all the powers at their command. Possibly he goes so far as to believe that courts with equity powers should specifically enforce such agreements. See pages 250, 251, and 274. Of course it is settled law that equity will not specifically enforce them. Probably the best reason for equity's refusal to act is that it would be difficult to supervise the performance of such an intricate proceeding as an arbitration. When Mr. Cohen, on page 251, says that Mr. Justice Story was wrong in his statement that no case supports specific performance of such an



agreement, he fails to cite any authority for his criticism of Story. He may have been relying on a few early cases in which courts of equity have refused to lend their special aid to a plaintiff who filed his bill in actual breach of an agreement to arbitrate. He discusses these cases in Chapter XIII. However, the difference between, on the one hand, refusing the aid of an equity court to one who violates an arbitration agreement and, on the other hand, specifically enforcing such an agreement is obvious.

Specific performance aside, one may in the main agree with Mr. Cohen's contentions concerning what the law ought to be. That agreements to arbitrate are valid contracts for the breach of which an action for damages will lie, should be and is the common law. Whether a court should refuse relief to a party who has broken an agreement to arbitrate depends on whether such a breach is substantial, goes to the essence of the contract. Probably it is of the essence in most cases. The common law refused to consider such a breach a bar. It took a statute in England to change the rule. But the common law held that a party could protect himself against a suit in disregard of a contract to arbitrate by making arbitration an express condition precedent to liability. Then no suit could be brought prior to the performance of the condition. This common-law rule with the addition of the English statutory rule just mentioned seems then to reach the sound result. Unfortunately statutes like the English one have not been generally adopted in this country. It would seem that Mr. Cohen should urge the adoption of such statutes. Instead he attempts to convince us that the early common law did bar suits in breach of an agreement (not put as a condition precedent) for arbitration and, that after a period of unfortunate error the English courts have at last returned to their original and correct position. In this he fails. Outside the condition precedent cases, the English courts do not refuse to entertain suits in violation of an arbitration agreement except under the statute already mentioned.

The writer wishes to express no opinion on the accuracy of Mr. Cohen's use of authorities: he simply offers the following samples of it.

(a) On page 104 a case from Bracton's Note Book (number 649) is explained at some length. The actual gist of the case is that Simon de Chelefeuldia sued William de la Mare for having prosecuted an action against Simon, concerning a rick of hay, in the Court Christian — contrary to a prohibition from, probably, the King's Bench. Simon produced his suite (*sectam*) which was examined and found insufficient. William put in a plea (possibly actually proffered before the examination of Simon's *secta*) that he had not sued Simon after the prohibition and that in truth they had agreed to arbitrate the matter. It was decided that since Simon's suite was insufficient, William should go without hay and Simon be in mercy. Mr. Cohen's idea of the case is that William sued Simon for damages to hay, that Simon pleaded that the matter should be tried in a peaceful Christian court under an agreement to arbitrate, that William contended that the agreement was insufficient, that Simon produced another such agreement which the court held sufficient to bar William from this suit in the King's Bench. Mr. Cohen in his interpretation of the case translates *secta* as equivalent to writing or agreement. That it means the suite of witnesses which a party in early procedure was bound to bring with him is sufficiently established by referring to Pollock and Maitland's "History of English Law," I, 467, II, 599, 607, 634-37.

(b) On page 113 Mr. Cohen discusses a case found in Y. B. 21 H. VI, pl. 30 a. It was an action of debt. The defendant pleaded *nil debet*. Quoting now Mr. Cohen's language, "The case does not disclose its outcome. All that we find at the end is: 'And he made his law.'" That this means that the defendant won by compurgation is clear by a reference to Pollock and Maitland's "History of English Law," II, 212, 608, 633.

(c) To turn to more modern matters, on page 227, Mr. Cohen gives two lists

of cases, one of cases allowing a party to revoke the power of an arbitrator at any time before the award, the other of cases opposed to such revocability. After these are some later cases not definitely assigned to either column. An examination of the cases alleged to be opposed to revocability and of those not placed in either column shows that not a single one of them decides anything about revocability. One case, *Drew v. Drew*, 2 McQ. Sc. Ap. 1, contains a *dictum* that the common law holds the arbitrator's authority *revocable* though the court thinks the common law unfortunate. What then do these cases hold? Simply various points in the English law of arbitration. They may be summarized as follows: A contract to refer is valid and once made cannot be rescinded by one party alone. *Piercy v. Young*, L. R. 14 Ch. D. 200. (Distinguish rescinding the contract to refer and breaking it by revoking the power of the arbitrator.) An agreement to refer is not a bar to legal proceedings before reference. *Collins v. Locke*, L. R. 4 A. C. 674. Two early equity cases refusing the special aid of equity to one who had broken his agreement to refer. *Waters v. Taylor*, 15 Ves. Jr. 10; *Harcourt v. Ramsbottom*, 1 Jac. & W. 505. Where arbitration is made an express condition precedent to a cause of action, no suit lies without arbitration whether in equity, *Halfhide v. Fenning*, 2 Bro. Ch. C. 336, *Dimsdale v. Robertson*, 2 Jones & La Touche, 58, or at law, *Scott v. Avery*, 5 H. L. Cases, 811, and several later cases following it. Arbitration of the *cause of action* as well as the *amount of damage* may be made a condition precedent to suit. *Trainor v. Fire Assurance Co.*, 65 L. T. R. 825, *Spurrier v. La Cloche* (1902), A. C. 446, *Gaw v. British Law Fire Insurance Co.* (1908), 1 Ir. R. 245. Cases distinguishing from contracts to arbitrate agreements that the sufficiency of performance, value, or other matters shall be decided *ex parte* by an architect or engineer. *Northampton Co. v. Parnell*, 15 C. B. 630, *London Co. v. Bailey*, L. R. 3 Q. B. D. 217. Cases on the effect of arbitration agreements in Scotland, *Caledonia Co. v. British Law Fire Insurance Co.*, 10 Sess. Cas. 3d Ser., 869. And, finally, omitting three or four miscellaneous decisions, cases in which suits, brought in breach of an agreement to arbitrate, were stayed under the English statutes. *Russell v. Pellegrini*, 6 E. & B. 1020, *Hamlyn & Co. v. Distillery* (1894), A. C. 202, and others. Did Mr. Cohen think that every case which expressed an opinion favorable to settlement of disputes by arbitration could be cited as establishing that the authority of an arbitrator is irrevocable?

CLARKE B. WHITTIER.

# HARVARD LAW REVIEW

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VOL. XXXII

APRIL, 1919

NO. 6

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## JURISDICTION TO TAX

THE power to tax is one of the attributes of sovereignty; and the jurisdiction to exercise the power is coterminous with the bounds of the sovereign's jurisdiction. "It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation. . . . The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission. . . . The power to tax involves the power to destroy."<sup>1</sup> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business."<sup>2</sup> "The taxing power of the state . . . cannot reach over into any other jurisdiction to seize upon persons or property for purposes of taxation. No officer, however armed by statute or court process of this state, can seize upon [such property] for taxes."<sup>3</sup> A personal tax may be laid upon persons subject to the jurisdiction of the sovereign; a property tax upon all property situated in his territory; an excise or license tax upon all acts done within his boundaries.<sup>4</sup>

The sovereign who has power to tax is that sovereign who by

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<sup>1</sup> Marshall, C. J., in *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316, 429, 431 (1819).

<sup>2</sup> Field, J., in *State Tax on Foreign-Held Bonds*, 15 Wall. (U. S.) 300 (1872).

<sup>3</sup> Emery, J., in *Augusta v. Kimball*, 91 Me. 605, 40 Atl. 666 (1898).

<sup>4</sup> *Commonwealth v. Standard Oil Co.*, 101 Pa. 119 (1882).

personal ownership of the territory has the general control of it. Thus where land near the New Jersey shore, under the waters of New York bay, were taxed by New Jersey this tax was held valid, though "exclusive jurisdiction of and over all the waters of the Bay of New York . . . and of and over the land covered by said waters" was by agreement of the two states given to New York, saving to New Jersey "the exclusive property in and to the land under water" on the west side of the bay.<sup>5</sup> Mr. Justice Holmes said that "The boundary line is the line of sovereignty. . . . Boundary means sovereignty since in modern times sovereignty is mainly territorial, unless a different meaning clearly appears." On the other hand, where land within a state is ceded to the United States for federal purposes the complete sovereignty passes away from the state, which can no longer levy taxes within the ceded territory.<sup>6</sup>

If a subject of taxation is within the taxing power of a sovereign, he has full power to tax it, irrespective of what has been done by another sovereign. Thus the fact that property within the jurisdiction has paid a tax for the same year to another sovereign does not in any way affect the right of the former sovereign to tax it;<sup>7</sup> nor does an exemption granted by another sovereign withdraw the subject of taxation from his power.<sup>8</sup>

The method of taxation now almost universally adopted is to levy a tax annually, payable usually in money, but now and then in labor, as in the case of a "road-tax." The day on which the tax is levied is fixed by the sovereign at his will; and on that day he levies a tax based upon his needs for a year. It may of course happen that a person is domiciled within one state on its taxing day, or property is then situated there, and is therefore liable to be taxed there, and that the domicile of the person or situs of the property is then changed to another state before its taxing day, so that the new sovereign also has a right to levy the tax. The right

<sup>5</sup> *Central R. R. v. Jersey City*, 209 U. S. 473 (1908), affirming s. c. 70 N. J. L. 81, 56 Atl. 239 (1903); 72 N. J. L. 311, 61 Atl. 1118 (1905) followed; *Leary v. Jersey City*, 208 Fed. 854 (1913).

<sup>6</sup> *Commonwealth v. Clary*, 8 Mass. 72, 77 (1811) (*semble*).

<sup>7</sup> *Coe v. Errol*, 116 U. S. 517 (1886); *Shaw v. Hartford*, 56 Conn. 351, 15 Atl. 742 (1888); *Hudson v. Miller*, 10 Kan. App. 532, 63 Pac. 21 (1900); *General Electric Co. v. Board of Assessors*, 121 La. 116, 46 So. 122 (1908); *Winkley v. Newton*, 67 N. H. 80, 36 Atl. 610 (1891); *Crosby v. Charlestown* (N. H.), 95 Atl. 1043 (1915); *State v. Fidelity & Deposit Co.*, 35 Tex. Civ. App. 214, 80 S. W. 544 (1904).

<sup>8</sup> *Bonaparte v. Appeal Tax Court*, 104 U. S. 592 (1881).

of the second sovereign to tax is not abridged by the fact that a tax is due to the other.<sup>9</sup>

In the United States the power of a state to tax has been greatly affected by the Constitution of the United States. With constitutional questions as such we are not here concerned. In so far, however, as the Constitution is merely confining a state within the boundaries of its jurisdiction, a decision based upon the Constitution is quite in point on the question, how far does the jurisdiction of the state extend. In fact, the interpretation of several constitutional limitations, and particularly of the Fourteenth Amendment in its bearing on the taxing power, is merely an exposition of the legal requirement of jurisdiction to tax. When this is the case, decisions upon the constitutionality of tax laws will be freely used as authorities in determining the legal jurisdiction to tax.

### I. PERSONAL TAX

A sovereign may impose upon everyone domiciled within his territory a personal tax, which is "the burthen imposed by government upon its own citizens for the benefits which that government affords by its protection and its laws."<sup>10</sup> Any domiciled person is subject to this tax, though he may be an alien<sup>11</sup> or a corporation.<sup>12</sup> The tax may be a poll-tax of fixed amount, a tax based to some extent upon wealth,<sup>13</sup> or a tax payable in labor.<sup>14</sup>

No sovereign may lay a personal tax upon a person or corporation not domiciled within his territory.<sup>15</sup> For this reason he cannot impose upon such a nonresident a personal obligation to pay a tax levied upon property within the territory. Land or a chattel within the territory is subject, as has been seen, to the taxing

<sup>9</sup> *Spaulding Mfg. Co. v. Kendall*, 19 Okla. 345, 91 Pac. 1031 (1907).

<sup>10</sup> *Green, C. J.*, in *State v. Ross*, 23 N. J. L. (3 Zab.) 517, 521 (1852).

<sup>11</sup> *Frantz's Appeal*, 52 Pa. 367 (1866); *Kuntz v. Davidson County*, 6 Lea (Tenn.) 65.

<sup>12</sup> *The Delaware Railroad Tax*, 18 Wall. (U. S.) 206 (1873).

<sup>13</sup> *The Delaware Railroad Tax*, 18 Wall. (U. S.) 206, 231 (1873), per Field, J.: "The State may impose taxes upon the corporation as an entity existing under its laws. . . . And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion." See also *Elmer, J.*, in *State v. Bentley*, 23 N. J. L. (3 Zab.) 532 (1852).

<sup>14</sup> *On Yuen Hai Co. v. Ross*, 8 Sawy. (U. S.) 384, 14 Fed. 338 (1882).

<sup>15</sup> *Ibid.*; *Boston Investment Co. v. Boston*, 158 Mass. 461, 33 N. E. 580 (1893); *State v. Ross*, 23 N. J. L. (3 Zab.) 517 (1852).

power although the owner is absent, and a tax laid upon such property may be enforced *in rem*,<sup>16</sup> but the tax cannot be made a personal obligation of the owner, upon whom the sovereign has no jurisdiction to impose an obligation.

This principle has been forcibly stated by the courts. Thus, in *Dewey v. Des Moines*,<sup>17</sup> Mr. Justice Peckham said:

"The State may provide for the sale of the property upon which the assessment is laid, but it cannot under any guise or pretence proceed farther and impose a personal liability upon a non-resident to pay the assessment or any part of it. . . . The jurisdiction to tax exists only in regard to persons and property, or upon the business done within the State, and such jurisdiction cannot be enlarged by reason of a statute which assumes to make a non-resident personally liable to pay a tax of the nature of the one in question."

The language of Judge Rumsey in *New York v. McLean*<sup>18</sup> was equally clear and forcible:

"No one will claim that any law of this State can have any extra-territorial force, or affect in any way the status of a non-resident, or impose any personal liability upon him. So that, when this tax was assessed in the year 1896 it certainly put no personal duty upon the defendant to pay it. It was only effectual then as a lien upon the property taxed. . . . Although a State has the power to levy a tax upon personal property of a non-resident situated within its boundaries and subject to its jurisdiction, and for that purpose may separate the situs of the owner from the actual situs of the property within the State, and subject it to taxation because it is within the State, yet it can only enforce the payment of that tax by virtue of its jurisdiction over the property and it has not by virtue of that jurisdiction any power to subject the owner of it to a personal liability for the tax."

Since a personal tax may be laid upon a resident, graduated upon his wealth, it was possible at common law to include in such a tax the value of his foreign chattels.<sup>19</sup> This power was often rested upon the fiction that movable property is situated at the

<sup>16</sup> *Paddell v. New York*, 211 U. S. 446 (1908).

<sup>17</sup> 173 U. S. 193, 202, 203 (1899).

<sup>18</sup> 57 N. Y. App. Div. 601, 606-09, 68 N. Y. Supp. 606 (1901).

<sup>19</sup> *Baltimore v. Western Maryland R. R.*, 50 Md. 274 (1878); *Bemis v. Boston*, 14 Allen (Mass.) 366 (1867); *Commonwealth v. Pennsylvania Coal Co.*, 197 Pa. 551 (1901); *Norfolk & Western Ry. v. Board of Public Works*, 97 Va. 23, 32 S. E. 779 (1899).

domicile of the owner, *mobilia sequuntur personam*,<sup>20</sup> but the true nature of the tax, as in reality a personal tax, was well recognized; "the proceeding is personal only."<sup>21</sup> In some states foreign chattels were not included in the tax laid upon a resident, but this was because the court found such to be the legislative will.<sup>22</sup>

While a resident was thus often taxed on the value of his foreign chattels, it is universally agreed that the value of foreign land can never enter into taxation.<sup>23</sup> The immovable nature of land and the impossibility of conceiving of it as "attached to the person" sufficiently justify the distinction in this respect between land and chattels; but the absence of a logical distinction finally influenced the Supreme Court of the United States to hold that a state cannot, in accordance with due process of law, tax its own corporation upon the value of its chattels permanently situated outside the state.<sup>24</sup>

In his case the Union Refrigerator Transit Company was a Kentucky corporation, owning cars which were used on railroads throughout the United States; a small proportion only being used in Kentucky. The Court of Appeals of Kentucky ordered the taxation of all the cars; but this was reversed in the Supreme Court of the United States. In the argument for the Commonwealth it was argued that "the laws of that State protect such domestic corporation, the person of the owner of such property, and, as a consideration for such protection, that State is entitled to tax all of its personal property, because it is a creature of the laws of that State." The court, however, regarded the cases which supported this contention as based on the outworn maxim, *mobilia sequuntur personam*, and did not deem the principle suggested as worthy of direct discussion.

The gist of Mr. Justice Brown's argument was this: The power of taxation is based upon the assumption of an equivalent rendered

<sup>20</sup> "Part of his general estate attached to his person." Bradley, J., in *Coe v. Errol*, 116 U. S. 517 (1886).

<sup>21</sup> Agnew, J., in *McKeen v. Northampton*, 49 Pa. 519 (1865). The opinion proceeds: "Though different kinds of property are specified as the subjects of taxation, it is not as a proceeding *in rem*, but only as affording the means and measure of taxation. The tax is assessed personally."

<sup>22</sup> *Hoyt v. Commissioners of Taxes*, 23 N. Y. 224 (1861).

<sup>23</sup> *Bittinger's Estate*, 129 Pa. 338, 18 Atl. 132 (1889).

<sup>24</sup> *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194 (1905). Fuller, C. J., and Holmes, J., dissenting.

to the taxpayer; and the taxation of property without such an equivalent is a taking of property without due process of law. No property can be taxed which is not within the territorial jurisdiction of the taxing power. The most familiar example is that of land; and no legislature has assumed to place a tax on foreign land. But the argument against taxing foreign property applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing state, but does not and cannot receive protection under its laws. There is an obvious difference between tangible and intangible property, in the fact that the latter is held secretly; there is no method by which its existence or ownership can be ascertained in the state of its situs; and if the owner be discovered, there is no way in which he can be reached there by process. Tangible property is visible.

Mr. Justice Holmes, in a dissenting opinion, said:

"It seems to me that the result reached by the court probably is a desirable one, but I hardly understand how it can be deduced from the Fourteenth Amendment."

It is indeed difficult to prove that a practice which had prevailed in half the states of the Union for a century was contrary to due process of law. The few authorities cited by the court as supporting the decision are easily distinguishable. The court did not even notice the true nature of the tax, as a personal tax, not a tax on property, and in the actual case a tax on an artificial person, owing its very existence and its right to hold its property to the taxing state.

It was soon held that the doctrine of this case does not apply to a chattel having no taxable situs elsewhere, like a vessel<sup>25</sup> or a freight car,<sup>26</sup> which, though having no situs within the owner's domicile, is never permanently enough in any other state to be taxed there; and by the very terms of *Union Refrigerator Transit Co. v. Kentucky* it does not apply to intangible property.<sup>27</sup> The ground of distinction between cases where a tax upon the owner could, and where it could not, take into account personal property

<sup>25</sup> *Southern Pacific Co. v. Kentucky*, 222 U. S. 63 (1911).

<sup>26</sup> *New York Central R. R. v. Miller*, 202 U. S. 584 (1906).

<sup>27</sup> "There is an obvious distinction between the tangible and intangible property. . . . The latter . . . may be taxed at the domicil of the owner," per Brown, J.



not situated within the state of his domicile, evidently was that in the one class of cases the property was not findable and taxable elsewhere, and in the other class of cases it could be found and was taxable in another state.

There exists, however, as will be explained, a doctrine that certain intangible things may be taxed as property situated in a certain place, and thus subject to the taxing power of the sovereign, on the ground that they have a "business situs" there. A bank deposit used in the business has such a business situs, and may be taxed where the business is carried on and the deposit made. Yet in the recent case of *Fidelity & Columbia Trust Co. v. Louisville*<sup>28</sup> it was held that such a deposit might be included in the tax laid upon the depositor at his domicile; Mr. Justice Holmes remarking that the principle of *Union Refrigerator Transit Co. v. Kentucky* had not been pressed so far by the court.

As a result of this decision it would seem that under no circumstances will the doctrine of *Union Refrigerator Transit Co. v. Kentucky* be applied to a tax on intangible property, whether the property has a business situs or is for any other reason under the taxable control of a state other than that of the owner's domicile; but that the personal tax laid upon the owner at his domicile may include a tax upon all his intangible property, of whatever nature.

## II. LAND TAX

A state may levy a tax on all land situated within its boundaries.<sup>29</sup> The fact that the land is the property of a nonresident does not withdraw it from the taxing power of the sovereign of situs.<sup>30</sup> Any interest in the land may be taxed to the owner of the interest; such as the interest of a mortgagor or mortgagee, or the interest of a lessee. So of any incorporeal hereditament, or any privilege connected with the land. Thus where a corporation received a lease of certain land for the purpose of sinking oil-wells in it, and then assigned the lease to an individual, on consideration of receiving a certain percentage of the oil produced, this rental in

<sup>28</sup> 245 U. S. 54 (1917).

<sup>29</sup> *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210 (1866); *Central R. R. v. Jersey City*, 70 N. J. L. 81, 56 Atl. 239 (1903).

<sup>30</sup> *Mt. Sterling O. & G. Co. v. Ratliff*, 127 Ky. 1, 104 S. W. 993 (1907); *State v. Ross*, 26 N. J. L. (2 Dutch.) 224 (1857); *People v. Dunckel*, 69 N. Y. Misc. 361, 125 N. Y. Supp. 385 (1910).

kind was taxable to the corporation.<sup>31</sup> On the other hand, the predominant owner, for instance the mortgagor, may be taxed not on the value of his interest, but on the entire value of the land;<sup>32</sup> the person to whom the land is taxed is immaterial, so far as the validity of the tax lien is concerned.<sup>33</sup>

A franchise appurtenant to land may be taxed as an interest in the land, and is taxable where the land lies to which it is appurtenant. Thus a franchise to construct a bridge may be taxed as appurtenant to the shore from which the bridge is allowed to be extended.<sup>34</sup> A ferry franchise is taxable by the state from whose shore the ferry is allowed to run,<sup>35</sup> and cannot be taxed by another state, for instance, the state which controls the opposite bank but has not granted the franchise.<sup>36</sup> It follows that in the case of an interstate bridge or ferry, which is in fact attached to two opposite shores, the sovereign of either shore might grant and tax a franchise.

Land outside the boundaries of the state is of course not subject to taxation.<sup>37</sup> It has therefore been held that in taxing an aggregate mass of property, such as the capital of a corporation, foreign real estate must be omitted.<sup>38</sup>

An apparent difference of opinion has developed on the taxation of a debt secured by a mortgage of land.

It is usually held that the debt, being the principal thing, fixes the nature of the thing to be taxed; that it has no situs where the security is, and is taxable only through power over the owner. It is therefore not subject to taxation in the state where the mortgaged land lies, if the owner is a nonresident of the state;<sup>39</sup> and

<sup>31</sup> *Mt. Sterling O. & G. Co. v. Ratliff*, 127 Ky. 1, 104 S. W. 993 (1907).

<sup>32</sup> *Faxton v. McCosh*, 12 Ia. 527 (1861); *Paddell v. New York*, 211 U. S. 446 (1908).

<sup>33</sup> *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210 (1866).

<sup>34</sup> *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150 (1897).

<sup>35</sup> *Conway v. Taylor*, 1 Black (U. S.) 603 (1861).

<sup>36</sup> *Louisville & J. F. Co. v. Kentucky*, 188 U. S. 385 (1903).

<sup>37</sup> *Winnipiseogee, L. C. & W. M. Co. v. Gilford*, 64 N. H. 337, 10 Atl. 849 (1887).

<sup>38</sup> *People v. Barker*, 23 N. Y. Misc. 188, 51 N. Y. Supp. 102 (1897); *Commonwealth v. American Dredging Co.*, 122 Pa. 386, 15 Atl. 443 (1888).

<sup>39</sup> *Territory v. Gila County Delinquent Tax List*, 3 Ariz. 179, 24 Pac. 182 (1890); *People v. Eastman*, 25 Cal. 601 (1864); *Arapahoe County v. Cutter*, 3 Colo. 349 (1877); *Foresman v. Byrns*, 68 Ind. 247 (1879); *Senour v. Ruth* (Ind.), 39 N. E. 946 (1895); *Theobald v. Clapp*, 43 Ind. App. 191, 87 N. E. 100 (1909); *Faxton v. McCosh*, 12 Ia. 527 (1861); *Davenport v. Mississippi & Mo. R. R.*, 12 Ia. 539 (1861); *State v. Smith*, 68 Miss. 79, 8 So. 294 (1890); *Adams v. Colonial & U. S. Mortgage Co.*, 82 Miss. 263, 34 So. 482 (1903); *Holland v. Commissioners of Silver Bow County*,

conversely notwithstanding the situs of the land, it may be taxed at the domicile of the owner.<sup>40</sup>

Yet the conveyance of the land in mortgage is the creation of an interest in land, whether we call that interest the legal ownership, subject to an equity of redemption, or a mere lien on the land for security. The land itself being within the taxing power of the sovereign of situs, it is doubtless within his power to tax each interest in the land, if he prefers this to taxing the entire body of such interests once for all in the name of the owner of the predominant interest. A tax on the interest of the mortgagee is therefore within the jurisdiction of the sovereign of situs.<sup>41</sup>

In *Kinney v. Treasurer & Receiver General*<sup>42</sup> Knowlton, C. J., said:

"Under the laws of Massachusetts a mortgagee takes not merely a lien upon the land as security, but he holds the legal title to it, subject to a right of redemption in the mortgagor. The interest of the mortgagee is made subject to taxation by our statutes, and the property taxable to the mortgagor is diminished by a deduction of the value of the interest held by the mortgagee. . . . While, for general purposes the interest of the mortgagee is treated as personal property, it has a local situs, and carries with it an ownership of the land until it is redeemed by the payment of the debt in performance of the condition. The debt, which is the obligation of the debtor to pay, and the land, which is the security for the payment of the debt, are individual parts of a single valuable property in the mortgagee, which may be made available in different ways. . . . The same doctrine has been held in States where the mortgagee has only a lien upon real estate. . . . The fact that the

15 Mont. 460, 39 Pac. 575 (1895); *State v. Earl*, 1 Nev. 394 (1865); *Crispin v. Vansyckle*, 49 N. J. L. 366, 8 Atl. 120 (1887); *People v. Smith*, 88 N. Y. 576 (1882); *Matter of Preston*, 75 App. Div. 250, 78 N. Y. Supp. 91 (1902); *Grant v. Jones*, 39 Ohio St. 506 (1883); *Myers v. Seaberger*, 45 Ohio St. 232, 12 N. E. 796 (1887).

<sup>40</sup> *Mackay v. San Francisco*, 113 Cal. 392, 45 Pac. 696 (1896); *Kirtland v. Hotchkiss*, 42 Conn. 426 (1875), 100 U. S. 491 (1879); *Darcy v. Darcy*, 51 N. J. L. 140, 16 Atl. 160 (1888); *Bullock v. Guilford*, 59 Vt. 516, 9 Atl. 360 (1887).

<sup>41</sup> *Savings & Loan Society v. Multnomah County*, 169 U. S. 421 (1898); *Frankfort v. Fidelity T. & S. V. Co.*, 111 Ky. 667, 64 S. W. 470 (1901) (*semble*); *Allen v. National State Bank*, 92 Md. 509, 48 Atl. 78 (1901); *Kinney v. Treasurer and Receiver General*, 207 Mass. 368, 93 N. E. 586 (1911); *Common Council of Detroit v. Assessors*, 91 Mich. 78, 51 N. W. 978 (1892); *In re Merriam*, 147 Mich. 630, 111 N. W. 196 (1907); *Susquehanna Canal Co. v. Commonwealth*, 72 Pa. 72 (1872); *Mumford v. Sewall*, 11 Ore. 67, 4 Pac. 585 (1883).

<sup>42</sup> 207 Mass. 368, 93 N. E. 586 (1911).

laws of the State and the jurisdiction of its courts must be invoked for the preservation and enforcement of rights under the mortgage is an important consideration leading to this result."

The reconciliation of these cases must be sought in the form of the taxing statute. If there is no special statute, only the ordinary provision for taxing all real and personal property within the state, the courts, following the ordinary practice and the provisions of the common law, will tax the land at its full value as the property of the mortgagor, since he owns the predominant, though not necessarily the largest, interest in it. The land having been once taxed at its full value, there is nothing left to tax except the debt it secures; and if the debt is due to a nonresident it is not within the jurisdiction. But by an express statutory provision dividing the land for purposes of taxation between the mortgagor and mortgagee, it is possible for the sovereign to tax the interest of the nonresident mortgagee in the land, though the debt itself cannot be reached. This doctrine is very clearly set out in the opinion of Mr. Justice Gray in *Savings & Loan Society v. Multnomah County*.<sup>43</sup> In that case a statute of Oregon provided that a mortgage, whereby land was made security for a debt, should be taxed as land. In several decisions in the state and federal courts a tax levied under this statute had been held valid;<sup>44</sup> and these decisions were followed in the Supreme Court. Mr. Justice Gray said:

"The State may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full value. It may do this either by taxing the whole to the mortgagor, or by taxing to the mortgagee the interest therein represented by the mortgage, and to the mortgagor the remaining interest in the land. And it may, for the purposes of taxation, either treat the mortgage debt as personal property, to be taxed, like other choses in action, to the creditor at his domicile; or treat the mortgagee's interest in the land as real estate, to be taxed to him, like other real property, at its situs."

<sup>43</sup> 169 U. S. 421, 427 (1898), disapproving a *dictum* to the contrary effect in *State Tax on Foreign-Held Bonds*, 15 Wall. (U. S.) 300 (1872).

<sup>44</sup> *Mumford v. Sewall*, 11 Ore. 67, 4 Pac. 585 (1883); *Dundee Mortgage Co. v. School District*, 10 Sawyer (U. S.) 52 (1884); *Crawford v. Linn County*, 11 Ore. 482, 5 Pac. 738 (1884); *Dundee Mortgage Co. v. Parrish*, 11 Sawy. (U. S.) 92 (1885); *Poppleton v. Yamhill County*, 18 Ore. 377, 23 Pac. 253 (1890); *Savings & Loan Society v. Multnomah County*, 60 Fed. 31 (1894).

In many other cases cited by the appellant there was no statute expressly taxing mortgages at the situs of the land; and although the opinions in some of them took a wider range, the only question in judgment in any of them was one of the construction, not of the constitutionality, of a statute — of the intention, not of the power, of the legislature.

Since in taxing the mortgage the state is taxing an interest in the land, it seems clear that the mortgagor's tax can only cover the value of the equity of redemption; the sum of the taxes assessed against the interests of the two cannot exceed the amount of the tax on the land itself. This is in most of the cases insisted upon as a condition of validity;<sup>45</sup> and a contrary intimation<sup>46</sup> must be regarded as unsound.

### III. TAX ON CHATTELS

A sovereign has jurisdiction over every chattel situated within his territory, and may therefore lay a tax upon it although the owner is not domiciled within the territory,<sup>47</sup> and even though it is in the hands of a lessee.<sup>48</sup> The jurisdiction is based on the power over the *res*; and though it may as a matter of form be assessed "to the owner" it is collectible only out of the assets,<sup>49</sup> and will not support a personal action against the nonresident owner.

A few states do not, unless a statute expressly so provide, tax the chattels of a nonresident owner.<sup>50</sup> On the other hand, a few

<sup>45</sup> *Savings & Loan Society v. Multnomah County*, 169 U. S. 421 (1898); *Kinney v. Treasurer & Receiver General*, 207 Mass. 368, 93 N. E. 586 (1911); *Common Council of Detroit v. Assessors*, 91 Mich. 78, 51 N. W. 787 (1892).

<sup>46</sup> *In Allen v. National State Bank*, 92 Md. 509, 48 Atl. 78 (1901).

<sup>47</sup> *Coe v. Errol*, 116 U. S. 517 (1886); *McCutchen v. Rice County*, 2 McCrary (U. S.) 337, 7 Fed. 558 (1881); *Mills v. Thornton*, 26 Ill. 300 (1861); *Rieman v. Shepard*, 27 Ind. 288 (1866); *Hudson v. Miller*, 10 Kan. App. 532, 63 Pac. 21 (1900); *Hull v. Johnson*, 10 Kan. App. 565, 63 Pac. 455 (1901); *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 44 La. Ann. 760, 11 So. 91 (1892); *Scollard v. American Felt Co.*, 194 Mass. 127, 80 N. E. 233 (1907); *Tobey v. Kip*, 214 Mass. 477, 101 N. E. 998 (1913); *McCormick v. Fitch*, 14 Minn. 252 (1869); *State v. William Deering Co.*, 56 Minn. 24, 57 N. W. 313 (1893); *Winkley v. Newton*, 67 N. H. 80, 36 Atl. 610 (1891); *John Hancock Ice Co. v. Rose*, 67 N. J. L. 86, 50 Atl. 364 (1901); *Matter of King*, 30 N. Y. Misc. 575, 63 N. Y. Supp. 1100 (1900); *People v. Dunckel*, 69 N. Y. Misc. 361, 125 N. Y. Supp. 385 (1910).

<sup>48</sup> *Lamson C. S. S. Co. v. Boston*, 170 Mass. 354, 49 N. E. 630 (1898).

<sup>49</sup> *Scollard v. American Felt Co.*, 194 Mass. 127, 80 N. E. 233 (1907).

<sup>50</sup> *Phelps v. Thurston*, 47 Conn. 477 (1880); *Leonard v. New Bedford*, 16 Gray

states, at common law, refuse to tax chattels in other states belonging to residents, but confine taxation of chattels to those actually situated within the state.<sup>51</sup>

Not every chattel which happens to be within the limits of the sovereign's territory can be regarded as *situated* there. A chattel merely temporarily within those limits is not, at common law, subject to the ordinary property tax, nor can one of the United States by statute subject such a chattel to taxation, since to do so would contravene due process of law.

The leading case is *Hays v. Pacific Mail S. S. Co.*,<sup>52</sup> where it was held that a vessel, found at a port of call in California on the taxing-day but registered outside the state, was not subject to taxation. This principle has been extended to all kinds of chattels passing through a state.<sup>53</sup>

The reason is clear. The tax is levied in return for a year's protection; it is known that this particular chattel will require protection only for a short time. To exact a tax based on a year's protection would be unfair; no other tax is provided for by the law. If there were provision for a daily tax this could lawfully be exacted even from property temporarily within the state, for such property is of course within the jurisdiction of the sovereign. Any method provided by statute for exacting a really fair tax from such property is constitutional.<sup>54</sup>

Promissory notes and bonds, being things of value in themselves, salable in the market and passing freely from hand to hand, have a real situs, and are taxable in any state in which they are permanently located,<sup>55</sup> and are not taxable elsewhere in a

(Mass.) 292 (1860); *Tobey v. Kip*, 214 Mass. 477, 101 N. E. 998 (1913) (*semble*); *Commonwealth v. Pennsylvania Coal Co.*, 197 Pa. 551, 47 Atl. 740 (1901).

<sup>51</sup> *Colbert v. Board of Supervisors*, 60 Miss. 142 (1882); *State v. Rahway*, 24 N. J. L. (4 Zab.) 56 (1853); *Hoyt v. Commissioners of Taxes*, 23 N. Y. 224 (1861).

<sup>52</sup> 17 How. (U. S.) 596 (1854).

<sup>53</sup> For a full collection of the cases on this point see an article by the author in the current volume of the YALE LAW JOURNAL.

<sup>54</sup> *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U. S. 18 (1890).

<sup>55</sup> *Bonaparte v. Tax Court*, 104 U. S. 592 (1881); *New Orleans v. Stempel*, 175 U. S. 309 (1899); *Blackstone v. Miller*, 188 U. S. 189 (1903), 23 Sup. Ct. Rep. 277, 439; *Buck v. Miller*, 147 Ind. 586, 45 N. E. 647, 47 N. E. 8 (1897); *Callahan v. Woodbridge*, 171 Mass. 595, 51 N. E. 176 (1898); *State v. St. Louis County Court*, 47 Mo. 594 (1871); *People v. Ogdensburgh*, 48 N. Y. 390 (1872); *Matter of Gibbs*, 60 N. Y. Misc. 645, 113 N. Y. Supp. 939 (1908); *People v. Roberts*, 25 App. Div. 16, 49 N. Y. Supp. 10 (1898); *Matter of Tiffany*, 143 App. Div. 327, 128 N. Y. Supp. 106

state which does not tax tangible property at the owner's domicile.<sup>56</sup> So where by statute a foreign insurance company is required to deposit bonds with the State as a condition of doing business, the bonds are taxable where deposited.<sup>57</sup> Here, as everywhere, however, bonds or notes situated only temporarily within the state are not taxable.<sup>58</sup>

There is no little recent authority holding that a certificate of stock is in the same class as a bond, and is taxable where it is found, though both the stockholder and corporation are non-resident. "They may be treated as property from the function they perform and the use that is made of them."<sup>59</sup>

Mr. Justice Wright in *Stern v. Queen*<sup>60</sup> said in such a case:

"There is in this country . . . a document the existence of which vouches and is necessary for vouching the title of some one to the foreign share, so that in the absence of that document no one at all could establish a title to the share. It is found by the case that the certificates are currently marketable here as securities for that share, and the dividends payable on that share; it is found, in fact, that the delivery of the certificate in this country ipso facto affects the title in a sense that it entitles the transferee to all the transferor's rights. It follows that the certificate itself has some operative power here, and it seems to me not to be within the ancient rule that a simple contract debt or mere evidences of a simple contract debt are supposed to exist only at the place of the debtor's residence. It being a marketable security operative, though not completely operative, to pass the title, and having a marketable value here, I think that it is itself a document which is a document of value."

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(1911); *Hall v. Miller*, 102 Texas, 289, 115 S. W. 1168 (1909), affirming 110 S. W. 165 (Tex. Civ. App.) (1908). *Contra*, *Howell v. Gordon*, 127 Mich. 517, 86 N. W. 1042 (1901); *Jack v. Walker*, 79 Fed. 138 (1897); *Myers v. Seaberger*, 45 Ohio St. 232, 12 N. E. 796 (1887).

<sup>56</sup> *Wilcox v. Ellis*, 14 Kan. 588 (1875); *Mayor of Baltimore v. Hussey*, 67 Md. 112, 9 Atl. 19 (1887); *State v. Howard County Court*, 69 Mo. 454 (1879); *Leavell v. Blades*, 237 Mo. 695, 141 S. W. 893 (1911).

<sup>57</sup> *Western Assurance Co. v. Halliday*, 110 Fed. 259 (1901), 127 Fed. 830 (1903); *People v. Home Insurance Co.* 29 Cal. 533 (1866); *British C. L. Ins. Co. v. Commissioners*, 31 N. Y. 32 (1865); *State v. Fidelity & Deposit Co.*, 35 Tex. App. 214, 80 S. W. 544 (1904).

<sup>58</sup> *Herron v. Keeran*, 59 Ind. 472 (1877); *Matter of Gibbes*, 84 App. Div. 510, 83 N. Y. Supp. 53 (1903), affirmed 176 N. Y. 565, 68 N. E. 1117 (1903).

<sup>59</sup> *People v. Reardon*, 184 N. Y. 431, 77 N. E. 970 (1906); *Stern v. Queen*, [1896] 1 Q. B. 211.

<sup>60</sup> [1896] 1 Q. B. 211, 218.

See also cases collected showing the tendency to regard a certificate of stock as tangible property in *Bellows Falls Power Co. v. Commonwealth*.<sup>61</sup>

It is sometimes urged that to tax both the capital stock of the corporation and the shares is double taxation; and on this ground it has sometimes been held that the shares of a corporation which has already paid a tax upon its property cannot be taxed where the stockholder is a resident,<sup>62</sup> or even where he is non-resident.<sup>63</sup> But in most cases the distinction between the shares of stock and the property of the company is recognized, and it is held that both may be taxed, each in the proper place.<sup>64</sup>

A policy of insurance is not yet recognized as a chattel in mercantile usage, so as to make it taxable at the place where it is found.<sup>65</sup>

#### IV. TAXATION OF INTANGIBLE PROPERTY

Intangible property has usually no actual situs, and therefore cannot be taxed by any sovereign because of his territorial power over it; it is usually included in the personal tax levied upon the owner of it at his domicile. Indeed, it has been held that no kind of intangible property of a nonresident can be taxed, at least without the aid of a statute specially providing for such a tax.<sup>66</sup>

Certain kinds of intangible property may, however, be taxed locally. A seat in a stock exchange, for instance, is a valuable

<sup>61</sup> 222 Mass. 51, 109 N. E. 891 (1915).

<sup>62</sup> *Strob v. Detroit*, 131 Mich. 109, 90 N. W. 1029 (1902).

<sup>63</sup> *Kintzing v. Hutchinson*, 7 W. N. C. 226, Fed. Cas. No. 7,834 (1877); *San Francisco v. Mackay*, 10 Sawy. (U. S.) 431, 21 Fed. 539, affirmed 22 Fed. 602 (1884); *North Carolina R. R. v. Commissioners*, 91 N. C. 454 (1884); *Union Bank v. State*, 9 Yerg. (Tenn.) 490 (1836). So of bonds: *In re Fair*, 128 Cal. 607, 61 Pac. 184 (1900); *Germania Trust Co. v. San Francisco*, 128 Cal. 589, 61 Pac. 178 (1900).

<sup>64</sup> *Bank of Commerce v. Tennessee*, 161 U. S. 134 (1895); *Jefferson County Sav. Bank v. Hewitt*, 112 Ala. 546, 20 So. 926 (1896); *State v. Travelers' Ins. Co.*, 70 Conn. 590, 40 Atl. 465 (1898); *Illinois Nat. Bank v. Kinsella*, 201 Ill. 31, 66 N. E. 338 (1903); *Cook v. Burlington*, 59 Ia. 251, 13 N. W. 113; *Home Insurance Co. v. Assessors*, 42 La. Ann. 1131, 8 So. 481 (1890); *Welch v. Burrill*, 223 Mass. 87, 111 N. E. 774 (1916); *Bellows Falls Power Co. v. Commonwealth*, 222 Mass. 51, 109 N. E. 891 (1915); *Bradley v. Bauder*, 36 Ohio St. 28 (1880); *Providence & W. R. R. v. Wright*, 2 R. I. 459 (1853); *State v. Bank of Commerce*, 95 Tenn. 221, 31 S. W. 993 (1895); *Commonwealth v. Charlottesville P. B. & L. Co.*, 90 Va. 790, 20 S. E. 364 (1894); *Second Ward Sav. Bank v. Milwaukee*, 94 Wis. 587, 69 N. W. 359 (1896).

<sup>65</sup> *Matter of Horn*, 39 N. Y. Misc. 133, 78 N. Y. Supp. 979 (1902).

<sup>66</sup> *Callahan v. Singer Mfg. Co.*, 29 Ky. L. Rep. 123, 92 S. W. 581 (1906).



thing, and is capable of taxation at the place where the exchange is, though owned by a nonresident;<sup>67</sup> and the same thing is true of membership in a produce exchange.<sup>68</sup> Goodwill also may be taxed at the place of business,<sup>69</sup> unless it is held that the tax act excludes it from taxation.<sup>70</sup>

There would seem to be sufficient reason for assigning an actual situs to a judgment. For though the obligation of a judgment is a mere chose in action, the judgment itself, out of which the obligation arises, is physically enrolled upon the books of the court which rendered it, is solely within control of the court, and seems to have a fixed habitation. In two cases where the judgment creditor lived within the state where the judgment was rendered, it was held that the judgment should be taxed at the creditor's residence; the ground given is that a judgment "is merely the highest evidence of a debt," and that the debt remains the same after the judgment is rendered.<sup>71</sup> This older notion of a judgment has now been abandoned in favor of the more correct view that the judgment is a new right which supersedes the old.<sup>72</sup> In *Board of Commissioners v. Leonard*,<sup>73</sup> where an attempt was made to tax a domestic judgment in favor of a nonresident creditor, the court held that no provision had been made in the statutes for taxing such a judgment; but the court said that it "perceived no valid objection to the power of the legislature to tax all judgments by domestic courts, and remaining unsatisfied, whether owned by citizens of this state, or other states, or foreign countries." The same question came up in a later case in the same state, but went off on another point.<sup>74</sup>

It thus appears that there is no sufficient weight of authority to conclude the question; and the opinion expressed above may still be entertained without qualification.

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<sup>67</sup> *Matter of Glendinning*, 68 App. Div. 125, 74 N. Y. Supp. 190 (1902).

<sup>68</sup> *Rogers v. Hennepin County*, 240 U. S. 184 (1916).

<sup>69</sup> *Adams Express Co. v. Ohio*, 165 U. S. 194 (1896); *People v. Roberts*, 159 N. Y. 70, 53 N. E. 685 (1899); *People v. Kelsey*, 105 App. Div. 132, 93 N. Y. Supp. 971 (1905).

<sup>70</sup> *Hart v. Smith*, 159 Ind. 182, 64 N. E. 661 (1902).

<sup>71</sup> *People v. Eastman*, 25 Cal. 601 (1864); *Meyer v. Pleasant*, 41 La. Ann. 645, 6 So. 258 (1889).

<sup>72</sup> See the modern cases collected in *Hilton v. Guyott*, 42 Fed. 249 (1890).

<sup>73</sup> 57 Kan. 531, 46 Pac. 960 (1896).

<sup>74</sup> *Hamilton v. Wilson*, 61 Kan. 511, 59 Pac. 1069 (1900).

The true nature of a share of stock in a corporation is its conferring of membership in the corporation itself. The stock is a creature of the law that created the corporation, and its ownership depends solely upon the provisions of that law. The right of the owner of the stock is therefore, although intangible, a right especially created and guarded by the law of one state, is always within the power of that law, and must be regarded as within its taxing power. This, says the Supreme Court of the United States, is "the law of the property."<sup>75</sup> It is accordingly held that a state which charters a corporation may tax the shares of its capital stock, even though owned by a nonresident.<sup>76</sup>

Judge Baldwin, in *State v. Travelers Insurance Co.*,<sup>77</sup> thus expressed the reason for the rule:

"There is nothing in the objection urged in the demurrer to the complaint, that the law in question 'attempts to impose a tax upon personal property outside the jurisdiction and beyond the territory of the State.' Each non-resident shareholder participates in the enjoyment of a franchise granted by this State, and has an equitable interest in property which is protected by this State, and whose legal owner (the defendant) is one of its own citizens. The sovereign power which gave his shares a being could also give them a *situs* within its territory for purposes of taxation."

A few states do not permit this tax; but the cases must be supported on the ground that the statute of the state does not permit it, and not on any lack of power in the state to tax.<sup>78</sup>

In the case of a corporation which is incorporated in more than one state, with one set of shares covering the entire stock, it may be necessary to divide the entire value of each share among the states. Each state which has issued a charter has a right, to be

<sup>75</sup> *Tappan v. Merchants' Bank*, 19 Wall. (U. S.) 490 (1873).

<sup>76</sup> *Ibid.*; *State v. Travelers' Ins. Co.*, 70 Conn. 590, 40 Atl. 465 (1898); *People v. Griffith*, 245 Ill. 532, 92 N. E. 313 (1910); *Faxton v. McCosh*, 12 Ia. 527 (1861); *American Coal Co. v. Allegany County*, 59 Md. 185 (1882); *Matter of Bronson*, 150 N. Y. 1, 44 N. E. 707 (1896); *Matter of Palmer*, 183 N. Y. 238, 76 N. E. 16 (1905); *People v. Commissioners*, 5 Hun (N. Y.) 200 (1875), affirmed 64 N. Y. 541 (1876); *Street R. R. v. Morrow*, 87 Tenn. 406, 11 S. W. 348 (1889); *St. Albans v. National Car Co.*, 57 Vt. 68 (1884); *Spiller v. Turner*, [1897] 1 Ch. 911.

<sup>77</sup> 70 Conn. 590, 40 Atl. 465 (1898).

<sup>78</sup> *Varner v. Calhoun*, 48 Ala. 178 (1872); *State v. Lesser*, 237 Mo. 310, 141 S. W. 888 (1911).

sure, to tax the stock, and this right is not conditioned upon a rigidly accurate valuation;<sup>79</sup> nor would the fact that a certain portion of the capital stock was used outside the state affect the power of the state of charter to tax.<sup>80</sup> In the case of an interstate railroad, however, each charter state should tax that part of the capital stock only which is proportional to the length of line within the state.<sup>81</sup>

As has been seen, a debt has, properly speaking, no real situs; least of all is it situated with the debtor. To tax the debtor on the debt is taxing a vacuum. The debtor must of course pay a tax upon the borrowed money, or that which represents it in his hands; to tax him again upon the debt is either taxing the same property twice, or taxing a nonexistent thing.<sup>82</sup> In a few authorities this principle has been ignored,<sup>83</sup> notably in a decision of Mr. Justice Holmes in the Supreme Court of the United States.<sup>84</sup>

This was an inheritance tax upon the property of an Illinois decedent; the bulk of the property involved was a deposit in a New York bank, the small remainder a debt due the deceased from a New York debtor. The court held that the inheritance of these debts was taxable in New York "not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor"; the analogy of the garnishment case of *Chicago, Rock Island, & Pacific Ry. v. Sturm*<sup>85</sup> was cited. Mr. Justice Holmes continued:

"What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter

<sup>79</sup> *Welch v. Burrill*, 223 Mass. 87, 111 N. E. 774 (1916); *Moody v. Shaw*, 173 Mass. 375, 53 N. E. 891 (1899).

<sup>80</sup> *Matter of Palmer*, 183 N. Y. 238, 76 N. E. 16 (1905).

<sup>81</sup> *Kingsbury v. Chapin*, 196 Mass. 533, 82 N. E. 700 (1907); *Welch v. Burrill*, 223 Mass. 87, 111 N. E. 774 (1916); *Matter of Cooley*, 186 N. Y. 220, 78 N. E. 939 (1906).

<sup>82</sup> *State Tax on Foreign-Held Bonds*, 15 Wall. (U. S.) 300 (1872); *New York L. E. & W. R. R. v. Pennsylvania*, 153 U. S. 628 (1894).

<sup>83</sup> *Bank of United States v. State*, 12 Sm. & M. (Miss.) 456 (1849); *Ankeny v. Multnomah County*, 3 Ore. 386 (1872); *Maltby v. Reading & C. R. R.*, 52 Pa. 140 (1866); *Re Joylin*, 76 Vt. 88, 56 Atl. 281 (1902). And see *Commissioner of Stamps v. Hope*, [1891] A. C. 476.

<sup>84</sup> *Blackstone v. Miller*, 188 U. S. 189, 205 (1903).

<sup>85</sup> 174 U. S. 710 (1898).

to the taxpayer; and the taxation of property without such an equivalent is a taking of property without due process of law. No property can be taxed which is not within the territorial jurisdiction of the taxing power. The most familiar example is that of land; and no legislature has assumed to place a tax on foreign land. But the argument against taxing foreign property applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing state, but does not and cannot receive protection under its laws. There is an obvious difference between tangible and intangible property, in the fact that the latter is held secretly; there is no method by which its existence or ownership can be ascertained in the state of its situs; and if the owner be discovered, there is no way in which he can be reached there by process. Tangible property is visible.

Mr. Justice Holmes, in a dissenting opinion, said:

"It seems to me that the result reached by the court probably is a desirable one, but I hardly understand how it can be deduced from the Fourteenth Amendment."

It is indeed difficult to prove that a practice which had prevailed in half the states of the Union for a century was contrary to due process of law. The few authorities cited by the court as supporting the decision are easily distinguishable. The court did not even notice the true nature of the tax, as a personal tax, not a tax on property, and in the actual case a tax on an artificial person, owing its very existence and its right to hold its property to the taxing state.

It was soon held that the doctrine of this case does not apply to a chattel having no taxable situs elsewhere, like a vessel<sup>25</sup> or a freight car,<sup>26</sup> which, though having no situs within the owner's domicile, is never permanently enough in any other state to be taxed there; and by the very terms of *Union Refrigerator Transit Co. v. Kentucky* it does not apply to intangible property.<sup>27</sup> The ground of distinction between cases where a tax upon the owner could, and where it could not, take into account personal property

<sup>25</sup> *Southern Pacific Co. v. Kentucky*, 222 U. S. 63 (1911).

<sup>26</sup> *New York Central R. R. v. Miller*, 202 U. S. 584 (1906).

<sup>27</sup> "There is an obvious distinction between the tangible and intangible property. . . . The latter . . . may be taxed at the domicil of the owner," per Brown, J.

view in another part of this opinion. The decision in *State Tax on Foreign-Held Bonds* had not been modified by the cases cited upon the point in question, since *Savings & Loan Society v. Multnomah County* merely disapproved a dictum in the case with regard to the taxation of mortgaged land, while *New Orleans v. Stempel* rested upon the doctrine of a business situs. The argument in support of the view taken proves too much. It is true that the state of the debtor's domicile enforces the debt; so does the law of every other state into which the debtor comes or has property. If one state may therefore tax the debt, so should the other; indeed each state which allows a suit on the debt taxes that privilege, by the fees of court. This fact is recognized in a later garnishment case, *Harris v. Balk*,<sup>88</sup> which allows an action of garnishment in any state in which the garnishee can be found, thus depriving the cited case of *Chicago, Rock Island, & Pacific Ry. v. Sturm* of its efficacy in the instant decision. It is also true that the state which created the contract created also its power of surviving; that was done at the time the contract was created, and might then have been paid for by an excise tax had the Constitution of the United States not forbidden; but there is no necessary connection between the domicile of the debtor and the place where the debt was created. It is also true that the state of the debtor's domicile permits the debt to be collected by an administrator of its appointment; so does every state in which an administrator is appointed.

Such decisions are, however, only sporadic. By the great weight of authority it is agreed that a debt has no territorial situs, and can be taxed only as part of the personal tax of the creditor. A creditor may be taxed in the state of his domicile upon all debts and choses in action due to him;<sup>89</sup> but the state of the debtor cannot tax a debt due to a nonresident creditor.<sup>90</sup>

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<sup>88</sup> 198 U. S. 215 (1905).

<sup>89</sup> *Scripps v. Board of Review*, 183 Ill. 278, 55 N. E. 700 (1899); *Wilcox v. Ellis*, 14 Kan. 588 (1875); *Fisher v. Rush County*, 19 Kan. 414 (1877); *Thomas v. Mason County Court*, 4 Bush (Ky.) 135 (1868); *State v. Bentley*, 23 N. J. L. 532 (3 Zab.) (1852); *State v. Darcy*, 51 N. J. L. 140, 16 Atl. 160 (1888); *Conner v. Wilson*, 6 Ohio Dec. (Repr.) 941, 9 Am. L. Rec. 1 (1880); *McKeen v. County of Northampton*, 49 Pa. 519 (1865); *Commonwealth v. Pennsylvania Coal Co.*, 197 Pa. 551, 47 Atl. 740 (1901); *Grundy County v. Tennessee Coal I. & R. Co.*, 94 Tenn. 295, 29 S. W. 116 (1895).

<sup>90</sup> *San Francisco v. Mackay*, 10 Sawy. 431, 22 Fed. 602 (1884); *Jack v. Walker*,

Nowhere is the reason for this doctrine better and more forcibly expressed than by Judge Robertson in *Thomas v. Mason County Court*.<sup>91</sup> In that case a debt was due from an Ohio debtor to a minor ward in Kentucky, and a tax had been laid by Kentucky on the amount of the debt. It was objected that the debtor had already paid taxes in Ohio upon the property represented by the debt; but the Kentucky tax was upheld by the court, which said:

"Borrowed capital in Ohio is taxable as the borrower's property there, and the debt due to the lender in Kentucky is taxable here as her property. In this case, the ward's right to the money in Ohio is a portion of the wealth of Kentucky and ought to contribute to the burthens of the government which protects her; and if it could escape contribution by lending it in Ohio, a knowledge of that fact would encourage the exhausting deportation of the money of Kentucky to augment the wealth of some other State."

The older cases, as well as some recent cases, regard notes, bonds, certificates of stock, and other commercial securities as mere evidences of debt or obligation, and as taxable therefore to the owner at his domicile as part of his personal estate. Thus a bond is taxable at the domicile of the owner,<sup>92</sup> though it may be actually situated outside the state;<sup>93</sup> and a note may be taxed at the residence of the holder,<sup>94</sup> though it is kept elsewhere.<sup>95</sup> On the same principle, stock in a foreign corporation is taxable at the

79 Fed. 138 (1897); *Collins v. Miller*, 43 Ga. 336 (1871); *Williams v. Mandell*, 44 Ga. 26 (1871); *Foresman v. Byrns*, 68 Ind. 247 (1879); *McCartney v. Caskey*, 66 Kan. 412, 71 Pac. 832 (1903); *Barber Asphalt Paving Co. v. New Orleans*, 41 La. Ann. 1015, 6 So. 794 (1889); *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 44 La. Ann. 760, 11 So. 91 (1892); *Railey v. Board of Assessors*, 44 La. Ann. 765, 11 So. 93 (1892); *Howell v. Gordon*, 127 Mich. 517, 86 N. W. 1042 (1901); *St. Paul v. Merritt*, 7 Minn. 258 (1862); *Matter of Bentley*, 31 N. Y. Misc. 656, 66 N. Y. Supp. 95 (1900); *Matter of Abbett*, 29 N. Y. Misc. 567, 61 N. Y. Supp. 1067 (1899); *Myers v. Seaberger*, 45 Ohio St. 232, 12 N. E. 796 (1887).

<sup>91</sup> 4 Bush (Ky.) 135 (1868).

<sup>92</sup> *State Tax on Foreign-Held Bonds*, 15 Wall. (U. S.) 300, 324 (1872); *Kirtland v. Hotchkiss*, 100 U. S. 491 (1879); *Mackay v. San Francisco*, 113 Cal. 392, 45 Pac. 696 (1896); *Augusta v. Dunbar*, 50 Ga. 387 (1873); *Street R. R. v. Morrow*, 87 Tenn. 406, 11 S. W. 348 (1889) (*semble*).

<sup>93</sup> *Crosby v. Charlestown* (N. H.), 95 Atl. 1043 (1915); *Commonwealth v. Williams*, 102 Va. 778, 47 S. E. 867 (1904). Even though pledged there: *Commonwealth v. Buffalo & L. E. T. Co.*, 233 Pa. 79, 81 Atl. 932 (1911).

<sup>94</sup> *Collins v. Miller*, 43 Ga. 336 (1871).

<sup>95</sup> *Hunter v. Board of Supervisors*, 33 Ia. 376 (1871); *Crosby v. Charlestown* (N. H.), 95 Atl. 1043 (1915).

residence of the owner,<sup>96</sup> though the certificate of stock is kept outside the state,<sup>97</sup> and even though it may be held by a trustee in another state in pledge;<sup>98</sup> but stock in a foreign corporation owned by a nonresident is not taxable.<sup>99</sup>

A bank deposit is, strictly speaking, a mere debt, due from the bank to the depositor; as a mere chose in action it is without actual situs, and in accordance with general principles it should be included in the tax paid by the depositor at his domicile. This has often been held;<sup>100</sup> and the state where the bank is situated has for the same reason refused to tax the deposit.<sup>101</sup>

The opposite doctrine was, however, laid down in New York. In *Matter of Houdayer*<sup>102</sup> a bank account of a nonresident was taxed; either because it was property there situated, or because it was an intangible especially protected there. Judge Vann in the course of his argument said:

"While the relation of debtor and creditor technically existed, practically he had his money in the bank, and could come and get it when he wanted it. It was an investment in this state, subject to attachment by creditors. If not voluntarily repaid, he could compel payment through the courts of this state. The depositary was a resident corporation, and the receiving and retaining of the money were corporate acts in this state. Its repayment would be a corporate act in this state. Every right springing from the deposit was created by the laws

<sup>96</sup> *Wright v. Louisville & N. R. R.*, 195 U. S. 219 (1904); *San Francisco v. Flood*, 64 Cal. 504, 2 Pac. 264 (1884); *Lockwood v. Weston*, 61 Conn. 211, 23 Atl. 9 (1891); *Greenleaf v. Board of Review*, 184 Ill. 226, 56 N. E. 295 (1900); *Seward v. Rising Sun*, 79 Ind. 351 (1881); *Morril v. Bentley*, 150 Ia. 677, 130 N. W. 734 (1911); *Bellows Falls Power Co. v. Commonwealth*, 222 Mass. 51, 109 N. E. 891 (1915); *Bacon v. State Tax Commissioners*, 126 Mich. 22, 85 N. W. 307 (1901); *Worthington v. Sebastian*, 25 Ohio St. (1874); *Bradley v. Bauder*, 36 Ohio St. 28 (1880); *Dupuy v. Johns (Pa.)*, 104 Atl. 565 (1918). *Contra*, *People v. Commissioners*, 5 Hun (N. Y.) 200 (1875); affirmed 64 N. Y. 541 (1876).

<sup>97</sup> *Stanford v. San Francisco*, 131 Cal. 34, 63 Pac. 134 (1900); *Crosby v. Charlestown (N. H.)*, 95 Atl. 1043 (1915); *Commonwealth v. Williams*, 102 Va. 778, 47 S. E. 867 (1904).

<sup>98</sup> *Central of Georgia Ry. v. Wright*, 166 Fed. 153 (1908); appeal dismissed, 215 U. S. 617 (1909).

<sup>99</sup> *Matter of James*, 144 N. Y. 6, 38 N. E. 961 (1894); *Matter of Bishop*, 82 App. Div. 112, 81 N. Y. Supp. 474 (1903).

<sup>100</sup> *Hunt v. Turner*, 54 Fla. 654, 45 So. 509 (1907); *Horne v. Greene*, 52 Miss. 452 (1876).

<sup>101</sup> *Pyle v. Brenneman*, 122 Fed. 787 (1903); *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944 (1911); *Pendleton v. Commonwealth*, 110 Va. 229, 65 S. E. 536 (1909).

<sup>102</sup> 150 N. Y. 37, 40, 44 N. E. 718 (1896).

of this state. Every act out of which those rights arose was done in this state. In order to enforce those rights, it was necessary for him to come into this state. Conceding that the deposit was a debt, conceding that it was intangible, still it was property in this state, for all practical purposes, and in every reasonable sense within the meaning of the Transfer Tax Act."

This case was followed in New York<sup>103</sup> and in other jurisdictions.<sup>104</sup>

In the New Hampshire case of *Berry v. Windham*<sup>105</sup> a different reason was given for holding the deposit taxable where the bank was situated, and refusing to permit a tax at the domicile of the depositor. A resident of New Hampshire deposited money in a savings bank in Lawrence, Massachusetts, and it was held that no tax could be levied in New Hampshire. Judge Stanley said:

"When the plaintiff deposited his money in the Lawrence savings-bank, the division of the title thereby into legal and equitable ownership did not multiply its capacity for taxation. The division of the title did not increase the amount of taxable property, nor did it subject the property, the title to which was thus divided, to the liability to be twice taxed."

These somewhat questionable methods of justifying taxation at the bank need, however, not be supported; for the Supreme Court of the United States has placed the doctrine on a much more satisfactory ground;<sup>106</sup> although the argument used by the New York courts was given some weight also. "There is no doubt," said Mr. Justice Holmes, "that courts in New York and elsewhere have been loath to recognize a distinction for taxing purposes between what commonly is called money in the bank and actual coin in the pocket. The practical similarity more or less has obliterated the legal difference." This is characteristic of the modern attitude toward the legal problems of taxation; which are treated in a practical rather than a technical way by the courts.

A bank account which is only temporarily within the state cannot be taxed; as, for instance, where it is deposited merely for the

<sup>103</sup> *Matter of Clark*, 9 N. Y. Supp. 444, 2 Connolly Surr. 183 (1890); *Matter of Burr*, 16 N. Y. Misc. 89, 38 N. Y. Supp. 811 (1895).

<sup>104</sup> *New York Life Ins. Co. v. Orleans Board of Assessors*, 158 Fed. 462 (1908); *Schmidt v. Failey*, 148 Ind. 150, 47 N. E. 326 (1897); *Marshall Wells Hardware Co. v. Multnomah County*, 58 Ore. 469, 115 Pac. 150 (1911).

<sup>105</sup> 59 N. H. 288, 290 (1879).

<sup>106</sup> *Blackstone v. Miller*, 188 U. S. 189 (1903).



purpose of being transmitted by check to the owner. So in *Matter of Leopold*,<sup>107</sup> money of a non-resident was on deposit in a New York bank for the purpose of making a particular immediate investment; the depositor died before the investment could be made. The deposit was held not to have a permanent situs in New York for the purpose of an inheritance tax. In the case of *Blackstone v. Miller*,<sup>108</sup> however, where a sum of money was deposited in a New York bank by a resident of Illinois, and had so remained for more than a year, presumably awaiting investment, but with no particular investment in mind, the deposit was held to have a taxable situs in the state, and not to be merely *in transitu*.

#### V. TAXATION OF BUSINESS CAPITAL AND INCOME

A piece of property may consist of an aggregate mass made up of units which from time to time vary. A typical example of such an aggregate is the stock in trade of a business which is constantly being diminished by sales and increased by purchases, yet at all times constituting a single stock and, roughly speaking, having a tolerably constant value. In spite of the fact that the units are constantly changing and that it may not be possible to fix a situs for any one unit in the mass, it is quite possible that the entire mass regarded as an entity should be assigned to a situs. Upon this ground it has been held that a merchant's stock in trade is taxable at its assessed value in the place where the business is being carried on, though the owner may be a nonresident,<sup>109</sup> because it is "permanently located" there. In the language of Boyd, J., "the articles are changing from day to day, but the stock, which represents the aggregate of the goods and chattels remains about the same."<sup>110</sup> For the same reason accounts receivable for business carried on are taxable at the place of the business.<sup>111</sup> Thus where a fraternal organization carried on its business in Fulton, but its

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<sup>107</sup> 35 N. Y. Misc. 369, 71 N. Y. Supp. 1032 (1901).

<sup>108</sup> 188 U. S. 189 (1903).

<sup>109</sup> *People v. Roberts*, 171 U. S. 658 (1898); *Shaw v. Hartford*, 56 Conn. 351, 15 Atl. 742 (1888); *Leonard v. New Bedford*, 16 Gray (Mass.) 292 (1860); *Hilliard v. Fells Ice Co.*, 200 Mass. 331, 86 N. E. 773 (1900); *People v. Barker*, 141 N. Y. 118, 36 N. E. 1073 (1894); *People v. Roberts*, 151 N. Y. 652, 46 N. E. 1150 (1897).

<sup>110</sup> *Hopkins v. Baker*, 78 Md. 363, 28 Atl. 284 (1894).

<sup>111</sup> *People v. Barker*, 157 N. Y. 159, 51 N. E. 1043 (1898).

funds were held by its treasurer in Ottawa, it was held that it was taxable on its "funds and credits" in Fulton.<sup>112</sup>

So it is with profits or proceeds of the business in the form of accounts due to the business; they are taxable where the business is carried on. Thus where a foreign corporation carried on a warehouse in Kentucky, storage charges due to the corporation are taxable in Kentucky.<sup>113</sup>

The commonest application of this principle is the case where a fund is invested in a foreign state, through an agent, in local loans, new investments being constantly made as income is received from the fund or as old investments are paid. The leading case on this point is the case of *Catlin v. Hull*.<sup>114</sup> In that case one Hammond, a resident of New York, who owned a large number of promissory notes against residents of the town of Orwell, in Vermont, placed these notes in the hands of a resident of Orwell as his agent. The agent was to manage the business of collecting and reloaning interest and principal in the interest of the owner. A tax was imposed upon the notes. It was argued that the tax was invalid on the ground that the debts being personal property had no situs, apart from the domicile of the owner. The court, however, held that where the property in fact was, the law had power to tax it. The court did not discuss at length the question of whether the notes really had a situs in the state, assuming that question. The case was at once generally followed.<sup>115</sup>

<sup>112</sup> *People v. Mystic Workers of the World*, 270 Ill. 496, 110 N. E. 907 (1915).

<sup>113</sup> *Commonwealth v. Kentucky D. & W. Co.*, 143 Ky. 314, 136 S. W. 1032 (1911).

<sup>114</sup> 21 Vt. 152 (1849).

<sup>115</sup> *Bristol v. Washington County*, 177 U. S. 133 (1899); *M'Cutcheon v. Rice County*, 7 Fed. 558 (1881); *Walker v. Jack*, 88 Fed. 576 (1898); *Battle v. Mobile*, 9 Ala. 234, (1846); *People v. Home Ins. Co.*, 29 Cal. 533 (1866); *Board of Supervisors v. Davenport*, 40 Ill. 197 (1866); *Goldgart v. People*, 106 Ill. 25 (1883); *People v. Davis*, 112 Ill. 272 (1884); *Hayward v. Board of Review*, 189 Ill. 234, 59 N. E. 601 (1901); *New Albany v. Meekin*, 3 Ind. 481 (1852); *Foresman v. Byrns*, 68 Ind. 247 (1879) (*semble*); *Hathaway v. Edwards*, 42 Ind. App. 22, 85 N. E. 28 (1908); *Hunter v. Board of Supervisors*, 33 Ia. 376 (1871) (*semble*); *Hutchinson v. Board of Supervisors*, 66 Ia. 35, 23 N. W. 249 (1885); *Buck v. Miami County (Kan.)*, 173 Pac. 344 (1918); *Wilcox v. Ellis*, 14 Kan. 588 (1875); *Fisher v. Rush County*, 19 Kan. 414 (1877); *In re Jefferson*, 35 Minn. 215, 28 N. W. 256 (1886); *State v. London & N. W. A. Mtg. Co.*, 80 Minn. 277, 83 N. W. 339 (1900); *State v. St. Louis County Court*, 47 Mo. 594 (1871) (*semble*); *Finch v. York County*, 19 Neb. 50, 26 N. W. 589 (1886); *Bowman v. Boyd*, 21 Nev. 281, 30 Pac. 823 (1892); *People v. Gardner*, 51 Barb. (N. Y.) 352 (1868); *Williams v. Wayne County*, 78 N. Y. 561 (1879); *Boardman v. Tompkins County*, 85 N. Y. 359 (1881); *Redmond v. Commissioners*, 87 N. C. 122 (1882); *Poppleton v. Yamhill County*,

The decisions with regard to the taxation of notes and other securities in the hands of a local agent were sometimes based upon the theory that the securities had an actual physical situs within the state.<sup>116</sup> But these cases are exceptional; the power cannot be rested solely upon this ground, since it is almost universally applied as well to debts and other intangible property as to notes and bonds. Credits acquired in the course of business are taxable as business capital, situated at the place of business.<sup>117</sup> The received doctrine is well stated by Chief Justice Whitfield in *Adams v. Colonial & United States Mortgage Co.*<sup>118</sup>

"Wherever the money of a lender in one state is by the principal intrusted to the control of an agent in another state for the purpose of being kept in the latter state, and loaned out, collected, and reloaned, or habitually kept on deposit, for safety merely, . . . so as thus to remain, through a course of dealing, so long as to become localized as a part of the whole mass of personal property in the latter state, such money acquires what is known as a 'business situs' for the purpose of taxation."

The assets constitute, as it were, the subject matter or stock in trade of such business.<sup>119</sup> Thus, in *Metropolitan Life Insurance Co. v. New Orleans* <sup>120</sup> Mr. Justice Moody said:

"We are not dealing here merely with a single credit or a series of separate credits, but with a business. The insurance company chose to enter into the business of lending money within the State of Louisiana, and employed a local agent to conduct that business. It was conducted under the laws of the State. The State undertook to tax the capital employed in the business precisely as it taxed the capital of its own citizens in like situation. For the purpose of arriving at the amount of capital actually employed, it caused the credits arising out of the business to be assessed. We think the State had the power to do this, and that the foreigner doing business cannot escape taxation upon his capital

18 Ore. 377, 23 Pac. 253 (1890); *Billinghurst v. Spink County*, 5 S. D. 84, 58 N. W. 272 (1894).

<sup>116</sup> *New Orleans v. Stempel*, 175 U. S. 309 (1889).

<sup>117</sup> See most of the cases cited above, note 115, as well as the following: *People v. Willis*, 133 N. Y. 383, 31 N. E. 225 (1892); *People v. Barker*, 157 N. Y. 159, 51 N. E. 1043 (1898); *Matter of McMahon*, 66 How. Pr. (N. Y.) 190 (1883); *Marshall-Wells Hardware Co. v. Multnomah County*, 58 Ore. 469, 115 Pac. 150 (1911).

<sup>118</sup> 82 Miss. 263, 392, 34 So. 482 (1903).

<sup>119</sup> *Boggs, J.*, in *Matzenbaugh v. People*, 194 Ill. 108, 116, 62 N. E. 546 (1902).

<sup>120</sup> 205 U. S. 395, 402 (1907).

by removing temporarily from the State evidence of credits in the form of notes. Under such circumstances, they have a taxable situs in the State of their origin."

It will be noticed that in the case just quoted the notes were from time to time sent by the agent to the owner to be held by him. The court regarded this as a mere temporary absence from the place where they were really and constantly in use, that is, the place where the business was carried on. This fact, of course, accentuates the position taken by the court that the notes were taxable as part of a stock in trade.

The general doctrine is illustrated by a series of decisions in Louisiana, in which legislation has been especially directed to the taxation of business done within the state by nonresidents. In the first case a bank deposit made by a local agent of a non-resident was held not taxable. *Clason v. Board of Assessors*.<sup>121</sup> In *Bluefields Banana Co. v. Board of Assessors*,<sup>122</sup> this was distinguished as a temporary deposit, and a bank deposit permanently used in carrying on the business was held taxable. The case was followed in *Parker v. Strauss*.<sup>123</sup> These decisions were, however, soon discredited. In *Liverpool & London & Globe Insurance Co. v. Board of Assessors*,<sup>124</sup> it was held that bills receivable due to a foreign corporation arising out of business done within the state were not taxable; on the ground that debts in non-concrete form, *i. e.*, simple contract debts, have no situs, and can be taxed at the domicile of the creditor. A year later the court in the case of *Comptoir National v. Board of Assessors*<sup>125</sup> allowed a local tax upon notes received in the course of business by a foreign corporation, though the notes were not negotiable; and the same decision was reached as to due-bills received in the course of business in *Monongahela R. C. C. & C. Co. v. Board of Assessors*.<sup>126</sup>

Up to this time the power to tax in this sort of case seems to have been conditioned upon the presence of a concrete debt or specialty within the state. But in two well-reasoned cases, simultaneously decided, the court overruled the earlier case and held

<sup>121</sup> 46 La. Ann. 1, 14 So. 306 (1894).

<sup>122</sup> 49 La. Ann. 43, 21 So. 627 (1897).

<sup>123</sup> 49 La. Ann. 1173, 22 So. 329 (1897).

<sup>124</sup> 51 La. Ann. 1028, 25 So. 970 (1899).

<sup>125</sup> 52 La. Ann. 1319, 27 So. 801 (1900).

<sup>126</sup> 115 La. Ann. 564, 39 So. 601 (1905).

that the state might tax simple contract debts due to a nonresident, arising out of business done within the state. *National Fire Insurance Co. v. Board of Assessors*,<sup>127</sup> *General Electric Co. v. Board of Assessors*,<sup>128</sup> soon followed in *Travelers' Insurance Co. v. Board of Assessors*.<sup>129</sup> The general line of reasoning adopted in these cases is that the permanent employment of capital in the carrying on of business within the state gave to all portions of the capital an actual situs within the state, even though it might for the time being take an intangible form.

Several of the decisions of the Supreme Court of Louisiana were carried to the Supreme Court of the United States, and were there affirmed upon the reasoning indicated.<sup>130</sup>

While the weight of authority in favor of this doctrine is overwhelming, a few exceptional cases must be noted. Thus a statute of 1851 in New York expressly exempted from taxation foreign capital transmitted to agents for investment.<sup>131</sup> It was thereupon attempted to tax at the domicile of the owner in New York similar investments in the hands of an agent in another state. The court held, however, that such property had no situs in New York, and was therefore not taxable there under the New York law which, as has been seen, taxes tangible property only at its situs.<sup>132</sup> And in *State v. Gaylord*,<sup>133</sup> the court held that foreign investments of this sort could be taxed at the domicile of the owner. Of the numerous cases cited to sustain the contention that the investments were taxable in the state where the agent made them, Cassoday, J., said, "We decline to follow them."

The ordinary cases in this class must be carefully distinguished from a mere deposit of securities with an agent to hold, or even to collect. Neither the deposit of securities for safe keeping in the place nor sending them into that place for collection is enough to fix the situs of the securities there.<sup>134</sup> In a rather striking case

<sup>127</sup> 121 La. 108, 46 So. 117 (1908).

<sup>128</sup> 121 La. 116, 46 So. 122 (1908).

<sup>129</sup> 122 La. 129, 47 So. 439 (1908).

<sup>130</sup> *New Orleans v. Stempel*, 175 U. S. 309 (1899); *Board of Assessors v. Comptoir National*, 191 U. S. 388 (1903); *Metropolitan Life Insurance Co. v. New Orleans*, 205 U. S. 395 (1907); *Liverpool & London & Globe Insurance Co. v. Orleans Assessors*, 221 U. S. 346 (1911).

<sup>131</sup> *People v. Commissioners*, 59 N. Y. 40 (1874).

<sup>132</sup> *People v. Smith*, 88 N. Y. 576 (1882).

<sup>133</sup> 73 Wis. 316, 41 N. W. 521 (1889).

<sup>134</sup> *Reat v. People*, 201 Ill. 469, 66 N. E. 242 (1903); *Appeal of Borden*, 208 Ill. 369,

securities were deposited in a state as a guarantee for the performance of a contract there; it was held, nevertheless, that the securities had no such permanent location there that they could be said to have a situs.<sup>135</sup> So a bank deposit by a local agency, not to be drawn on for the expenses of the agency, but to be transmitted by check to the home office, has no permanent local situs.<sup>136</sup>

It would seem to make no difference whether the business is done through an agent or by the nonresident owner in person. It has, however, been intimated in one case that if the owner himself carries on business the capital cannot be taxed at its business situs.<sup>137</sup> And it is clear that if the lender himself receives applications and loans money outside the state, though all the borrowers are within the state, the capital cannot be taxed.<sup>138</sup>

The actual capital of a going concern may be much greater than the sum of its tangible assets. The gathering together of property into "organic unity," by which each piece of tangible property "is part of a system, and has its actual uses only in connection with other parts of the system," creates a new element of value, as a result of the added usefulness of each part. "The sleepers and rails of a railroad, or the posts and wires of a telegraph company, are worth more than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole."<sup>139</sup> Not only this new element of value exists in such a case; the employment of the entire property in business results, or may result, in another access of value, due to the goodwill of the business thus carried on. The business capital, therefore, includes these items of incorporeal but none the less actual wealth. In the case of business

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70 N. E. 310 (1904); *Channel v. Capen*, 46 Ill. App. 234 (1891); *Commonwealth v. Northwestern M. L. Ins. Co.*, 32 Ky. L. Rep. 796, 107 S. W. 233 (1908). *Contra*, *Hall v. Miller*, 102 Tex. 289, 115 S. W. 1168 (1909).

<sup>135</sup> *Louisville & N. R. R. v. Wright*, 236 Fed. 148 (1916).

<sup>136</sup> *Board of Assessors v. New York L. I. Co.*, 216 U. S. 517 (1910); *Howell v. Gordon*, 127 Mich. 517, 86 N. W. 1042 (1901); *Metropolitan Life Ins. Co. v. Newark*, 62 N. J. L. 74, 40 Atl. 573 (1898); *Myers v. Seaberger*, 45 Ohio St. 232, 12 N. E. 796 (1887).

<sup>137</sup> *Theobald v. Clapp*, 43 Ind. App. 191, 87 N. E. 100 (1909).

<sup>138</sup> *Provident S. L. A. Soc. v. Kentucky*, 239 U. S. 103 (1915); *State v. Packard* (N. D.), 168 N. W. 673 (1918).

<sup>139</sup> The quotations are from the opinion of Mr. Justice Holmes in *Fargo v. Hart*, 193 U. S. 490, 499 (1904).

carried on by a corporation, as such business is usually carried on, this added intangible wealth goes by the name of the corporate excess.

Various ways have been tried to establish the amount of this excess; but they may all be reduced to one of two plans. One is the "capitalization-of-income plan," by which the net income of the business is capitalized at a reasonable rate, and the result taken as the value of the capital; and this is a recognized and permitted method.<sup>140</sup> The other is the stock-and-bond plan, by which the value of the stock is added to the amount of bonds outstanding, and the result is taken as the value of the capital.<sup>141</sup> If the latter method is adopted, its correctness must rest upon the theory that the stock represents the interest of the mortgagor corporation above the amount of the mortgage incumbrance represented by the bonds. The importance of the bonds is, therefore, that they represent the mortgage debt, and the par value of the bonds is the amount that should be added to the market value of the stock in order to get at the true value of the capital. If this course is taken, the result is a fair measure of the market value of the capital, which is in all ordinary cases the true value; a decision, therefore, which holds this method unfair appears to be unsound.<sup>142</sup> On the other hand, it would be unfair to add the market price of the bonds to that of the stock, as is sometimes done;<sup>143</sup> for the market value of the stock represents the value of the property over the funded debt, which is not the same thing as the market value of the bonds.

No one way can be regarded as essential. All elements of value may properly be considered by the assessing body.<sup>144</sup>

It may happen in the case of an interstate corporation that the tangible stock in trade, although in reality a single aggregate mass, is located in several states. The leading case on this point is *Pullman's Palace Car Co. v. Pennsylvania*.<sup>145</sup> In that case it appeared that the stock in trade of the corporation consisted chiefly in a considerable number of cars in constant use upon railroad

<sup>140</sup> *Louisville & Nashville R. R. v. Greene*, 244 U. S. 522 (1917).

<sup>141</sup> *State Railroad Tax Cases*, 92 U. S. 575 (1875).

<sup>142</sup> *Railroad & Telephone Companies v. Board of Equalizers*, 85 Fed. 302 (1897).

<sup>143</sup> *E. g.*, in *State Railroad Tax Cases*, 92 U. S. 575 (1875).

<sup>144</sup> *Great Northern Ry. v. Okanogan County*, 223 Fed. 198 (1915).

<sup>145</sup> 141 U. S. 18 (1888).

lines throughout the United States. An attempt was made by the state of Pennsylvania to tax a portion of this mass on the ground that this portion had a situs in Pennsylvania. The particular method taken of estimating Pennsylvania's share of the entire mass was to take that proportion of all the mass of cars which the miles of road on which the cars traveled within the state bore to the total mileage in the United States. The Supreme Court of the United States held that it was legally possible to divide the entire mass among the states and that the method of division adopted by the state of Pennsylvania was a reasonable one.

It will be seen, therefore, that wherever a mass of property is invested in interstate business it is not only possible to assign a situs at large to the entire mass wherever the business is carried on, but also to estimate the situs of any particular part of the mass by some reasonable method of aliquot division.

This method of determining the share of an interstate mass which may be regarded as situated in a particular state has been applied to lines of railroad,<sup>146</sup> to a fleet of steamships,<sup>147</sup> to a mass of railroad cars such as palace cars or refrigerator cars,<sup>148</sup> to the stock of express companies,<sup>149</sup> and to the property of telegraph and telephone companies.<sup>150</sup>

Not only is the tangible property of an interstate business to be thus divided; the intangible "corporate excess" is capable of the same reasonable division among the states within which business is done.<sup>151</sup>

<sup>146</sup> *Pittsburgh C. C. & S. L. Ry. v. Backus*, 154 U. S. 421 (1894); *Louisville & Nashville R. R. v. Greene*, 244 U. S. 522 (1917); *Atchison, T. & S. F. Ry. v. Sullivan*, 173 Fed. 456 (1909).

<sup>147</sup> *County Commissioners v. Old Dominion S. S. Co.*, 128 N. C. 558, 39 S. E. 558 (1901), affirmed.

<sup>148</sup> *Pullman's P. C. Co. v. Pennsylvania*, 141 U. S. 18 (1888); *American R. T. Co. v. Hall*, 174 U. S. 70 (1899); *Pullman's P. C. Co. v. Twombly*, 29 Fed. 658 (1887); *Board of Assessors v. Pullman's P. C. Co.*, 60 Fed. 37 (1894); *Morrell R. C. Co. v. Commonwealth (Ky.)*, 32 Ky. L. Rep. 1383, 108 S. W. 926 (1908).

<sup>149</sup> *Adams Express Co. v. Ohio*, 165 U. S. 194 (1896); *Adams Express Co. v. Kentucky*, 166 U. S. 171, 17 Sup. Ct. Rep. 527 (1897); *Fargo v. Hart*, 193 U. S. 490 (1904); *Wells Fargo & Co.'s Express v. Crawford County*, 63 Ark. 576, 40 S. W. 710 (1897); *Southern Express Co. v. Patterson*, 122 Tenn. 279, 123 S. W. 353 (1909).

<sup>150</sup> *Massachusetts v. Western U. T. Co.*, 141 U. S. 40 (1890); *Western U. T. Co. v. Taggart*, 163 U. S. 1 (1896) (affirming s. c. 141 Ind. 281, 40 N. E. 105 (1894)); *Western U. T. Co. v. Poe*, 64 Fed. 9 (1894); *State v. Western U. T. Co.*, 165 Mo. 502, 65 S. W. 775 (1901).

<sup>151</sup> *Adams Express Co. v. Ohio*, 165 U. S. 194 (1897); *Pullman Co. v. Trapp*, 186



This doctrine is clearly set forth by Mr. Justice Brewer in *Adams Express Co. v. Ohio State Auditor*:<sup>152</sup>

"The burden of the contention of the express companies is that they have within the limits of the State certain tangible property, such as horses, wagons, etc.; that this tangible property is their only property within the State; that it must be valued as other like property, and upon such valuation alone can taxes be assessed and levied against them.

"But this contention practically ignores the existence of intangible property, or at least denies its liability for taxation. In the complex civilization of today a large portion of the wealth of a community consists in intangible property. . . . It matters not in what this intangible property consists — whether privileges, corporate franchises, contracts, or obligations. It is enough that it is property which though intangible exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country. Now, whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property must be excluded from the tax lists, and the only property placed thereon be the separate pieces of tangible property? . . .

"According to its figures this intangible property, its franchises, privileges, etc., is of the value of \$12,000,000, and its tangible property of only \$4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the State which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter. . . . That this is true is obvious from the result that would follow if all the States other than the one which created the corporation could and should withhold from it the right to transact express business within their limits. It might continue to own all its tangible property within each of those States, but unable to transact the express business within their limits, that \$12,000,000

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Fed. 126 (1911); *Wells Fargo & Co.'s Express v. Crawford County*, 63 Ark. 576, 40 S. W. 710 (1897).

<sup>152</sup> 166 U. S. 185, 218-19, 223 (1897).

of value attributable to its intangible property would shrivel to a mere trifle."

It is obvious, as Mr. Justice Holmes remarks,<sup>153</sup> that "this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the state, under the name of enhanced value or good will, if it is not closely confined to its true meaning." Before distributing the "corporate excess" among the states it is first necessary to arrive at its value by first deducting from the entire value of the capital stock the value of all real estate, whether situated within the state or outside,<sup>154</sup> and of all machinery and other tangible personal property.<sup>155</sup> Intangible investments of the company not in any way used in the business, such as undivided profits represented by investment securities, must also be deducted, since they do not affect the value for use of the business.<sup>156</sup> The result of this subtraction is the corporate excess, which may be divided among the states ratably by the method already considered.

It has been held that a state may vary this method by dividing the entire capital; ratably, and then making a proper allowance for property in other states that would disturb the ratio.<sup>157</sup> But though permissible this method is most inexact, and seems open to the objection to such loose calculations quoted above from Mr. Justice Holmes.

The whole doctrine has elsewhere been summarized by the author.<sup>158</sup> Whenever a business enterprise exists, in which property situated in several states is used, and the business is carried on in several states, the whole value of the business includes or may include more than the aggregate of the several articles of property used in it; and this excess may properly be referred not to any one state, but to all the states in which the business is done. But that part of the value which may be divided among the states

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<sup>153</sup> *Fargo v. Hart*, 193 U. S. 490 (1904).

<sup>154</sup> *Pittsburgh, C. C. & St. L. R. R. v. Backus*, 154 U. S. 421, 431 (1894); *Western U. T. Co. v. Taggart*, 163 U. S. 1 (1896).

<sup>155</sup> *Western U. T. Co. v. Taggart*, 163 U. S. 1 (1896); *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194 (1897), 166 U. S. 185, 222, 223, 17 Sup. Ct. Rep. 604.

<sup>156</sup> *Fargo v. Hart*, 193 U. S. 490 (1904); *Coulter v. Weir*, 127 Fed. 897 (1904).

<sup>157</sup> *Louisville & Nashville R. R. v. Greene*, 244 U. S. 522 (1917).

<sup>158</sup> BEALE, *FOREIGN CORPORATIONS*, § 507.

is that only which is equally applicable to all. Fixed tangible property, being referable only to the state in which it is situated, should be deducted from the whole value of the business before dividing the excess; though tangible property which is used throughout the business may be divided with the excess. In the same way if good-will is greater in one state than in another, it should be subtracted and separately taxed. The balance, the corporate excess, may properly be divided among the states in proportion to the amount of business done or capital invested in each.

## VI. TAXATION OF PROPERTY HELD BY FIDUCIARY

Where the legal title, or any other legal interest in property, is in the hands of a fiduciary, two special problems arise: first, may the property be taxed as if it were the ordinary property of the fiduciary; second, may a tax be levied upon the beneficiary. The different classes of fiduciaries require somewhat different treatment, and will be considered separately.

In the case of real estate, as has been seen, each interest may be taxed separately or all together in the name of the paramount owner. This is true as well of legal and beneficiary interests as of distinct legal interests; the place of taxation always being the situs of the land. Thus, the situs of land held by a trustee to secure an issue of bonds might tax the land in the name of the trustee.<sup>159</sup> The beneficiary, on the other hand, might be taxed on his equitable interest; thus a nonresident member of a real estate trust which held land in Massachusetts might be taxed in Massachusetts upon his equitable interest in the land.<sup>160</sup>

The trustee of personal property being the complete legal owner of it, it would naturally be expected that the property should be taxed exactly as if it were his own. It has accordingly been held that a trustee of personal property is taxable on it at his domicile,<sup>161</sup> although the property may be situated outside the state,<sup>162</sup> or although the beneficiaries be nonresident.<sup>163</sup> Thus stock in a

<sup>159</sup> *Frankfort v. Fidelity T. & S. V. Co.*, 111 Ky. 667, 64 S. W. 470 (1901) (*semble*). Kentucky had no statute allowing the taxation of a mortgage interest.

<sup>160</sup> *Kinney v. Treasurer*, 207 Mass. 368, 93 N. E. 586 (1911).

<sup>161</sup> *Higgins v. Commonwealth*, 126 Ky. 211, 103 S. W. 306 (1907); *Walla Walla v. Moore*, 16 Wash. 339, 47 Pac. 753 (1897).

<sup>162</sup> *Guthrie v. Pittsburgh C. & S. L. Ry.*, 158 Pa. 433, 27 Atl. 1052 (1893).

<sup>163</sup> *Price v. Hunter*, 34 Fed. 355 (1888); *Davis v. Macy*, 124 Mass. 193 (1878);

New York corporation, standing in the name of a New York broker who holds the certificate for a nonresident owner, is taxable in New York.<sup>164</sup> In New York and a few other states, however, where both the property and the beneficiaries are outside the state, a resident trustee will not be taxed; though the power of the legislature by a change in the law to tax him is not doubted.<sup>165</sup>

The power of the state of his residence to tax the beneficiary of a trust cannot be doubted,<sup>166</sup> though in some states it has been held that without the aid of a statute it will not be done.<sup>167</sup> In Kentucky it has been held that property held in trust cannot be taxed where the trustee resides, but only at the domicile of the beneficial owner.<sup>168</sup>

There seems to be no ground for distinguishing a testamentary trust from any other; and it has been held in a well-reasoned decision in Maine that nonresident trustees for nonresident beneficiaries, appointed in a will of a resident decedent, after they had removed the property outside the state, were not taxable, notwithstanding the origin of the trust.<sup>169</sup> In a Pennsylvania case,<sup>170</sup> however, a trustee under the will of a deceased resident of New York changed his domicile to Pennsylvania, taking the trust property with him. He changed an investment after his removal. The court held that he was taxable upon the investment made in Pennsylvania, but not upon the trust property which had come into his hands in New York; the remarkable ground for the distinction being, that as to the latter property he was not a trustee under the Pennsylvania law. He assuredly was owner of the property, though he held it, to be sure, in trust; and it would seem that the origin of his title was immaterial.

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*Detroit v. Lewis*, 109 Mich. 155, 66 N. W. 958 (1896); *Carlisle v. Marshall*, 36 Pa. 397 (1860).

<sup>164</sup> *Matter of Newcomb*, 71 App. Div. 606, 76 N. Y. Supp. 222 (1902) (affirmed 172 N. Y. 608, 64 N. E. 1123) (1902).

<sup>165</sup> *People v. Tax Commissioners*, 21 Abb. N. C. (N. Y.) 168 (1888); *Goodsite v. Lane*, 139 Fed. 593 (1905).

<sup>166</sup> *Keeney v. New York*, 222 U. S. 525 (1912); *Augusta v. Kimball*, 91 Me. 605, 40 Atl. 666 (1898) (*semble*); *Hunt v. Perry*, 165 Mass. 287, 43 N. E. 103 (1896); *Selden v. Brooke*, 104 Va. 832, 52 S. E. 632 (1906); *Wise v. Commonwealth (Va.)*, 95 S. E. 632 (1918); *Brooklyn Trust Co. v. Booker (Va.)*, 95 S. E. 664 (1918).

<sup>167</sup> *Anthony v. Caswell*, 15 R. I. 159, 1 Atl. 290 (1885).

<sup>168</sup> *Boske v. Security T. & S. V. Co.* 22 Ky. L. Rep. 181, 56 S. W. 524 (1900).

<sup>169</sup> *Augusta v. Kimball*, 91 Me. 605, 40 Atl. 666 (1898).

<sup>170</sup> *Lewis v. Chester County*, 60 Pa. 325 (1869).

Ownership of tangible property by a trustee does not, of course, prevent its taxation at its situs.<sup>171</sup>

The case of the executor or administrator is more complicated than that of the trustee, in that he holds his title as an officer of the court. It is therefore necessary to decide between two places of taxation: his domicile, and the jurisdiction of the appointing court. The domicile of a beneficiary is of course immaterial.<sup>172</sup>

For the reason indicated, the courts usually hold the situs of the estate to be in the court which appointed the executor or administrator who holds it; in case of principal administration, the domicile of the deceased,<sup>173</sup> and in case of ancillary administration the state of appointment,<sup>174</sup> even though the domicile of the executor or administrator is elsewhere.<sup>175</sup>

Under the Massachusetts statutes it appears to be held, contrary to the general rule, that the state of administration can tax the property only if the executor or administrator is domiciled there; if he is domiciled elsewhere, and the property is not actually situated within the state, it cannot be taxed.<sup>176</sup> It is not necessary, however, to invoke any peculiar doctrine of this nature to support the case of *Putnam v. Middleborough*.<sup>177</sup> In that case a Massachusetts decedent had left personal property both in Massachusetts and in California, and named as executor a resident of California, who was appointed both in Massachusetts and in California. He was held not taxable in Massachusetts on the California property. This conclusion must have been reached in any state, since the California property was held by the executor not by reason of any action of the Massachusetts court, but because of his ancillary appointment in California.

<sup>171</sup> *Swarts v. Hammer*, 194 U. S. 441 (1904).

<sup>172</sup> *Baldwin v. Shine*, 84 Ky. 502, 2 S. W. 164 (1886); *Boske v. Security T. & S. V. Co.* 22 Ky. L. Rep. 181, 56 S. W. 524 (1900); *Tafel v. Lewis*, 75 Ohio St. 182, 78 N. E. 1003 (1906).

<sup>173</sup> *In re Miller*, 116 Ia. 446, 90 N. W. 89 (1902); *Commonwealth v. Peebles*, 134 Ky. 121, 119 S. W. 774 (1909); *Bonaparte v. State*, 63 Md. 465 (1885); *People v. Commissioners of Taxes*, 38 Hun (N. Y.) 536 (1886); *Tafel v. Lewis*, 75 Ohio St. 182, 78 N. E. 1003 (1906).

<sup>174</sup> *Dorris v. Miller*, 105 Ia. 564, 75 N. W. 482 (1898); *Baldwin v. Shine*, 84 Ky. 502, 2 S. W. 164 (1886); *In re Thourot's Estate*, 172 Pac. 697 (Utah) (1918).

<sup>175</sup> *Gallup v. Schmidt*, 154 Ind. 196, 56 N. E. 443 (1900); *Bonaparte v. State*, 63 Md. 465 (1885).

<sup>176</sup> *Dallinger v. Rapello*, 14 Fed. 32 (1882).

<sup>177</sup> 209 Mass. 456, 95 N. E. 749 (1911).

Suppose an administrator carries the property away from the state of his appointment into another state, may the property be taxed there? It has been held not;<sup>178</sup> and this decision seems correct, even in the case of tangible property. The administrator is answerable to his court for the disposition of the property, and for this reason it is submitted that the property would acquire no more than a temporary place in the state into which it is taken.

The case of the guardian is usually regarded as the same as that of the executor or administrator; property held by him is taxable in the state of his appointment, although he lives in another state and so does the ward.<sup>179</sup> In accordance with this principle it has been held that property of a resident ward in the hands of a foreign-appointed guardian is not taxable.<sup>180</sup> In Kentucky, however, it has been held that such property is taxable at the domicile of the ward, the beneficial owner.<sup>181</sup>

For the reasons already given in the case of the executor or administrator, property in the hands of a receiver is taxable in the court where the receiver holds it; the fact that it is in the control of the court protecting it from taxation no more in the one case than in the other, even though the court be a federal court, and the tax assessed by the state.<sup>182</sup> Thus where property formerly held by an ancillary receiver is transmitted to the principal receiver it is taxable in the state which appointed him, though there are many foreign distributees.<sup>183</sup>

Where there are joint owners of property, each is taxable for his interest; and the same thing is true of joint trustees.<sup>184</sup> If, however, there are joint trustees, some of them nonresidents, and the nonresidents have possession of the trust *res* outside the state, the resident trustee is not taxable on any part of the estate,

<sup>178</sup> *Weaver v. State*, 110 Ia. 328, 81 N. W. 603 (1900).

<sup>179</sup> *Baldwin v. Washington County*, 85 Md. 145, 36 Atl. 764 (1897); *Baldwin v. State*, 89 Md. 587, 43 Atl. 857 (1899).

<sup>180</sup> *Kinehart v. Howard*, 90 Md. 1, 44 Atl. 1040 (1899).

<sup>181</sup> *Boske v. Security T. & S. V. Co.*, 22 Ky. L. Rep. 181, 56 S. W. 524 (1900).

<sup>182</sup> *Stevens v. New York & O. M. R. R.*, 13 Blatch. (U. S.) 104 (1875); *Ex parte Chamberlain*, 55 Fed. 704 (1893); *Walters v. Western & A. R. R.*, 68 Fed. 1002 (1895); *Hamilton v. David C. Beggs Co.*, 171 Fed. 157 (1909); *Midland G. & T. Co. v. Douglas County*, 217 Fed. 358 (1914); *Coy v. Title G. & T. Co.*, 220 Fed. 90 (1915).

<sup>183</sup> *Schmidt v. Failey*, 148 Ind. 150, 47 N. E. 326 (1897).

<sup>184</sup> *People v. Feitner*, 168 N. Y. 360, 61 N. E. 1132 (1901).

at least in New York, where a domiciled owner is not taxable on absent property.<sup>185</sup>

An estate held by joint executors is taxable at the domicile of the deceased, though some of them are nonresidents.<sup>186</sup>

## VII. EXCISE TAX

Not only persons and property may be taxed, but also the privilege of acting within the state, or of taking any benefit from the law of the state. In short, whatever the state may refuse or forbid, it may grant or allow only upon the payment of a fee to the state in return for the privilege: a license fee, or excise tax.<sup>187</sup>

In *People v. Reardon*<sup>188</sup> the state had laid a transfer tax upon the transfer within the state of shares in a foreign corporation belonging to a nonresident. The power of the state to tax was questioned, on the ground that neither the person nor the property was taxable by the state; the court, however, held the tax valid as a privilege tax. Judge Vann said:

"The tax, however, is not on property, but on the sale of property, or on a particular kind of contract when made within this state. The certificate, itself, is not liable for the tax, but the person selling it is. The tax is not a lien on certificates, nor on shares, which may be owned to any extent throughout the state, free from any claim under the statute in question. It is the sale alone that gives rise to the tax, which is imposed through the command of the law to the seller to pay the tax when the contract to sell is made, and it is enforced not by levy and sale, but by civil and penal remedies against the person of the seller. While this tax, the same as all other taxes, must ultimately come out of the property of the seller, it cannot be enforced against the certificate sold as distinguished from his other property. . . .

"Jurisdiction over the persons who make the contract does not depend on their residence, but on their presence within the state when the contract is made. . . . Both they and their contract are subject to its laws, and they are not only entitled to the protection thereof, but are

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<sup>185</sup> *People v. Coleman*, 119 N. Y. 137, 23 N. E. 488 (1890); *People v. Barker*, 135 N. Y. 656, 32 N. E. 252 (1892); *People v. Tax Commissioners*, 17 N. Y. Supp. 923 (1891).

<sup>186</sup> *People v. Commissioners of Taxes*, 38 Hun (N. Y.) 536 (1886); *Hawk v. Bonn*, 6 Ohio Circ. Ct. 452, 3 Ohio Circ. 535, December (1892).

<sup>187</sup> *Nathan v. Louisiana*, 8 How. (U. S.), 73 (1850); *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365 (1882); *Williams v. Fears*, 179 U. S. 270 (1900).

<sup>188</sup> 184 N. Y. 436, 449, 77 N. E. 970 (1906).

under the same obligation to obey as if they were citizens. Such a contract is valid or invalid as our laws declare. When the law commands that if they, or any other persons, whether residents or not, make a certain contract here they must pay a certain tax for the privilege, the command is personal, addressed to them as persons then within the state."

Jurisdiction to exact a license fee, therefore, depends upon the place where the licensed act is done. Thus a license fee may be exacted from a foreigner for making a sale within the state;<sup>189</sup> for operating a railroad within the state;<sup>190</sup> or for using sleeping-cars within the state.<sup>191</sup> So an excise tax may be laid upon the payment of a dividend to a nonresident shareholder,<sup>192</sup> or upon the receipt of insurance premiums from residents of the state;<sup>193</sup> and such a tax may be laid upon the performance within the state of a contract of sale made in another state.<sup>194</sup>

Though the international jurisdiction of a state to levy an excise tax is complete, its exercise may often be limited by the Constitution of the United States.<sup>195</sup> A consideration of such limitations is, however, beyond the scope of the present article.

### VIII. INHERITANCE TAX

One of the most important privileges granted by the law is that of succeeding to the property of a deceased person. Since at the moment before death the successor has no interest whatever in the property, and the moment after death an interest has vested in him, there must have been the creation or shifting of a legal interest, not the continuance of a preëxisting one; and this requires an act of the law. For furnishing this law of succession, the sovereign may levy an excise tax, or, as it is often called, a death duty.<sup>196</sup>

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<sup>189</sup> *Harrison v. Vicksburg*, 3 Sm. & M. (Miss.) 581 (1844); *People v. Reardon*, 184 N. Y. 431, 77 N. E. 970 (1906).

<sup>190</sup> *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217 (1891).

<sup>191</sup> *Pullman Southern Car Co. v. Gaines*, 3 Tenn. Ch. 587 (1877).

<sup>192</sup> *Oliver v. Washington Mills*, 11 Allen (Mass.) 268 (1865).

<sup>193</sup> *Equitable Life Society v. Pennsylvania*, 238 U. S. 143 (1915).

<sup>194</sup> *Shriver v. Pittsburg*, 66 Pa. 446 (1870).

<sup>195</sup> See, for instance, *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (1885); *Sault Ste. Marie v. International Transit Co.*, 234 U. S. 333 (1914).

<sup>196</sup> *Kochersperger v. Drake*, 167 Ill. 122, 47 N. E. 321 (1897).



In England,<sup>197</sup> these taxes are of two sorts. There is a duty laid upon the succession, called in one act a legacy duty, in the later act a succession duty. There is also a duty laid upon the administration of the estate, called formerly a probate duty, and in the later act an estate duty.

In America, in general, there is no duty laid upon administration of estates; but the succession is very generally taxed, usually under the name of an inheritance tax, but sometimes, as in New York, under the name of a transfer tax.

The inheritance of land passes and can only pass in accordance with the law of the situs; and the sovereign of the situs alone performs a service for which an excise tax may be exacted. It is therefore universally held that no inheritance tax can be laid upon the transfer of land outside the territorial limits of the taxing state.<sup>198</sup> On all immovable property within the state the inheritance tax may be laid,<sup>199</sup> including equitable interests in such property.<sup>200</sup> In the case of mortgaged land, a tax may be laid upon the transfer of interest of either mortgagor or mortgagee, assessed at the value of the interest only.<sup>201</sup>

For the purpose of this discussion "land" means immovables, irrespective of the view taken of them by the land law of the situs; and includes a chattel real. Thus where an estate for joint lives in English land passed to the executor, upon the death of the foreign owner, legacy duty was held to be due upon it in England.<sup>202</sup>

Where a will directs that land be sold and the proceeds held as a trust fund, equity for some purposes regards the land as converted into personalty. Where a will contains such a direction as to foreign land, may the inheritance be taxed at the domicile,

<sup>197</sup> For an admirable monograph on the English law on this topic, see DICEY, *CONFLICT OF LAWS*, 2 ed., 746-71.

<sup>198</sup> *Westerfeldt's Succession*, 122 La. 836, 48 So. 281 (1909); *In re Swift*, 137 N. Y. 77, 32 N. E. 1096 (1893); *Lorillard v. People*, 6 Dem. (N. Y.) 268 (1887); *Commonwealth v. Coleman*, 52 Pa. 468 (1866); *Drayton's Appeal*, 61 Pa. 172 (1869); *Bittinger's Estate*, 129 Pa. 338, 18 Atl. 132 (1889).

<sup>199</sup> *McCurdy v. McCurdy*, 197 Mass. 248, 83 N. E. 881 (1908); *Matter of Burden*, 47 Misc. 329, 95 N. Y. Supp. 972 (1905).

<sup>200</sup> *Kinney v. Treasurer & Receiver General*, 207 Mass. 368, 93 N. E. 586 (1911).

<sup>201</sup> *McCurdy v. McCurdy*, 197 Mass. 248, 83 N. E. 881 (1908); *Kinney v. Treasurer & Receiver General*, 207 Mass. 368, 93 N. E. 586 (1911). But in *Hatfield's Estate*, 43 Pa. Co. Ct. 510 (1915), it was held that an inheritance tax cannot be levied on a mortgage of land within the state belonging to a nonresident.

<sup>202</sup> *Chatfield v. Berchtoldt*, L. R. 7 Ch. 192 (1872).

on the ground that as personalty it passes by the law of the domicile? In most jurisdictions it is held that no tax may be laid on the land; the reason usually given being that the doctrine of equitable conversion prevails only in equity, while the levying of a tax is a legal, not an equitable, process.<sup>203</sup> This reason is perhaps sufficient; but it would be enough to say that the doctrine of equitable conversion, though it treats the land as personalty, does not and cannot make it any the less immovable, and does not and cannot in any way affect its transfer by the law of the situs.

In Pennsylvania, however, a different view has been taken. The equitable conversion of foreign land of a Pennsylvania decedent by a direction that the executor sell and pay over the proceeds makes the inheritance taxable in Pennsylvania.<sup>204</sup> While a mere power given to the executor to sell the foreign land does not equitably convert it, so as to make it liable to tax at the domicile,<sup>205</sup> if the executor is directed to sell the land and out of the proceeds to pay debts or legacies, it is held that an inheritance tax may be exacted at the domicile of the decedent<sup>206</sup> unless it becomes unnecessary to exercise the power because the personal property is sufficient.<sup>207</sup> Conversely where such directions as to Pennsylvania land are given in a foreign will no inheritance tax can be collected in Pennsylvania.<sup>208</sup> No satisfactory reason for this exceptional doctrine has been offered.

Even in Pennsylvania this doctrine is confined to cases where the sale was directed for the payment of debts or legacies, or at least for some use within the state. When the will directed the executor to sell foreign land and invest the proceeds in another state, to be held as a trust fund, the court held that the transfer could not be taxed in Pennsylvania.<sup>209</sup>

<sup>203</sup> *Connell v. Crosby*, 210 Ill. 380, 71 N. E. 350 (1904); *McCurdy v. McCurdy*, 197 Mass. 248, 83 N. E. 881 (1908); *Matter of Swift*, 137 N. Y. 77, 32 N. E. 1096 (1893).

<sup>204</sup> *Miller's Estate*, 182 Pa. 157, 37 Atl. 1000 (1897); *Dalrymple's Estate*, 215 Pa. 367, 64 Atl. 554 (1906).

<sup>205</sup> *Drayton's Appeal*, 61 Pa. 172 (1869).

<sup>206</sup> *Miller v. Commonwealth*, 111 Pa. 321, 2 Atl. 492 (1885); *Williamson's Estate*, 153 Pa. 508, 26 Atl. 246 (1893); *Vanuxern's Estate*, 212 Pa. 315, 61 Atl. 876 (1905).

<sup>207</sup> *Marr's Estate*, 240 Pa. 38, 87 Atl. 621 (1913); *Crozer's Estate*, 253 Pa. 15, 101 Atl. 801 (1916).

<sup>208</sup> *In re Shoenberger*, 221 Pa. 112, 70 Atl. 579 (1908); *Lamberton's Estate*, 40 Pa. Super. Ct. 548 (1909).

<sup>209</sup> *Hale's Estate*, 161 Pa. 181, 28 Atl. 1071 (1894).

In the case of inheritance from a partner, the transferred interest in land held by the firm is regarded as personalty; the inheritance is therefore taxable at the domicile of the deceased partner, although the land is in another jurisdiction.<sup>210</sup> This is not, properly speaking, a case of equitable conversion. The legal ownership of the land is really held on a dry trust for the unincorporated association; and the real interest of the partner is to an unascertained balance, which is in truth a personal interest.

It is within the power of a sovereign to tax the succession to chattels within his territory, and this is done by most of the inheritance tax laws in this country; the succession to chattels within the state is taxable although the deceased died domiciled elsewhere.<sup>211</sup> And this is true also of the English succession duty.<sup>212</sup> In order for the succession to pass by the law of the situs the property must be within the jurisdiction at the moment of the owner's death; property of a decedent domiciled abroad which is brought into the state and there, for whatever reason, given to the executor after the death cannot be taxed.<sup>213</sup>

The principles already examined as to the situs of things apply to the inheritance tax; thus bonds, notes, and deposits of money within the state, belonging to a foreign decedent, are taxable.<sup>214</sup> Stock in corporations chartered in the state,<sup>215</sup> and of national

<sup>210</sup> *Forbes v. Steven*, L. R. 10 Eq. 178 (1870); *Re Stokes*, 62 L. T. R. 176 (1890).

<sup>211</sup> *Western Assurance Co. v. Halliday*, 127 Fed. 830 (1903); *People v. Griffith*, 245 Ill. 532, 92 N. E. 313 (1910); *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82 (1889); *Dixon v. Russell*, 78 N. J. L. 296, 73 Atl. 51 (1909). See, however, under an earlier act, *Neilson v. Russell*, 76 N. J. L. 655, 71 Atl. 286 (1908); *Matter of Swift*, 137 N. Y. 77, 32 N. E. 1096 (1893); *Matter of Romaine*, 127 N. Y. 80, 27 N. E. 759 (1891). See, however, under an earlier act, *Matter of Euston*, 113 N. Y. 174, 21 N. E. 87 (1889); *Matter of Embury*, 19 App. Div. 214, 45 N. Y. Supp. 881 (1897); *Alvany v. Powell*, 2 Jones Eq. (55 N. C.) 51 (1854); *In re Speers*, 4 Ohio N. P. 238 (1897); *Commonwealth v. Smith*, 5 Pa. St. 142 (1847); *Lewis's Estate*, 203 Pa. 211, 52 Atl. 205 (1902). "Not a convincing authority." Brown, J., in *Schoenberger's Estate*, 221 Pa. 112, 70 Atl. 579 (1908).

<sup>212</sup> *Attorney-General v. Campbell*, L. R. 5 H. L. 524 (1872).

<sup>213</sup> *McCurdy v. McCurdy*, 197 Mass. 248, 83 N. E. 881 (1908); *Attorney-General v. Forbes*, 2 Cl. & F. 48 (1834); *Hay v. Fairlie*, 1 Russ. 117 (1826); *Arnold v. Arnold*, 2 Myl. & Cr. 256 (1836).

<sup>214</sup> *Hoyt v. Keegan*, 167 N. W. 521 (Ia.) (1918); *In re Rogers*, 149 Mich. 305, 112 N. W. 931 (1907); *Matter of Houdayer*, 150 N. Y. 37, 44 N. E. 718 (1896); *Matter of Burden*, 47 N. Y. Misc. 329, 95 N. Y. Supp. 972 (1905).

<sup>215</sup> *People v. Griffith*, 245 Ill. 532, 92 N. E. 313 (1910); *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372 (1899); *Gardiner v. Carter*, 74 N. H. 507, 69 Atl. 939 (1908); *Dixon*

banks located in the state,<sup>216</sup> are taxable, though the decedent was nonresident; and a tax on a share of a deceased nonresident partner may be levied where the business was carried on, that being its business situs.<sup>217</sup> On the other hand, where a seat in the stock exchange is regarded as intangible property having a business situs, a seat in the New York exchange belonging to a nonresident who at the time of his death had ceased to carry on business in New York was held not taxable.<sup>218</sup> Stock in a foreign corporation, however, belonging to a nonresident decedent is not taxable, though the certificate was in the state at the owner's death.<sup>219</sup>

For this purpose a chose in action is regarded as situated with the creditor; and a debt due from a resident debtor to a nonresident decedent is therefore not subject to the inheritance tax.<sup>220</sup>

While the power to levy the tax at the situs of the property is clear, the legislature does not necessarily impose a tax which would lie upon all property within the jurisdiction. The English legacy duty (differing in this respect from the later succession duty) was held not to be payable out of property within the jurisdiction belonging to a nonresident decedent,<sup>221</sup> and the same interpretation has been placed upon the federal inheritance tax.<sup>222</sup>

While, as has been said, the sovereign of the situs has entire

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v. Russell, 78 N. J. L. 296, 73 Atl. 51 (1909); *Matter of Bronson*, 150 N. Y. 1, 44 N. E. 707 (1896); *Matter of Fitch*, 39 App. Div. 609, 57 N. Y. Supp. 786 (1899); *Matter of Leavitt*, 4 N. Y. Supp. 179 (1889); *Small's Estate*, 151 Pa. 1, 25 Atl. 23 (1892).

<sup>216</sup> *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372 (1899); *Matter of Cushing*, 40 N. Y. Misc. 505, 82 N. Y. Supp. 795 (1903).

<sup>217</sup> *Stamp Duties Commissioner v. Salting*, [1907] A. C. 449.

<sup>218</sup> *In re Ogden's Estate* (Misc.), 170 N. Y. Supp. 630 (1918).

<sup>219</sup> *Matter of James*, 144 N. Y. 6, 38 N. E. 961 (1894); and see *People v. Griffith*, 245 Ill. 532, 92 N. E. 313 (1910).

<sup>220</sup> *Allen v. Philadelphia Sav. Fund Soc.*, 1 Fed. Cas. 234, 14 Phila. 408, 7 W. N. C. 231 (1879); *Kintzing v. Hutchinson*, Fed. Cas. No. 7,834, 7 W. N. C. 226 (1877); *Gilbertson v. Oliver*, 129 Ia. 568, 105 N. W. 1002 (1906); *Matter of Gordon*, 186 N. Y. 471, 79 N. E. 722 (1906); *Matter of Horn*, 39 N. Y. Misc. 133, 78 N. Y. Supp. 979 (1902); *Orcutt's Appeal*, 97 Pa. 179 (1881); *Del Busto's Estate*, 6 Pa. Co. Ct. 289 (1888). See, however, *Alexander's Estate*, 3 Clark (Pa.), 87, 4 Pa. L. J. 448 (1845). *Contra*, *In re Commercial Bank*, L. R. 5 Ch. 314 (1870); *Attorney-General v. Newman*, 1 Ont. L. R. 511 (1901).

<sup>221</sup> *Thomson v. Advocate-General*, 12 Cl. & F. 1 (1842); *Wallace v. Attorney-General*, L. R. 1 Ch. 1 (1865); *In re Bruce*, 2 Cr. & J. 436 (1832).

<sup>222</sup> *Eidman v. Martinez*, 184 U. S. 578 (1902); *Ruckgaber v. Moore*, 104 Fed. 947 (1900).

control over personal property as well as land there, and extends the privilege of succession to it, nevertheless, as will be seen, almost every common-law state does in fact regulate the succession of personal property situated within it by the rules of succession which prevail at the domicile of the decedent. The sovereign of the domicile, therefore, as well as the sovereign of situs extends to the successor the privilege of taking the property, since in order to take he must secure a provision to that effect in the laws of the domicile. As was said by Mr. Justice Holmes in *Bullen v. Wisconsin*:<sup>223</sup>

"The power to tax is not limited in the same way as the power to affect the transfer of property. If this fund had passed by intestate succession it would be recognized that by the traditions of our law the property is regarded as a *universitas* the succession to which is incident to the succession to the *persona* of the deceased. As the States where the property is situated, if governed by the common law, generally recognize the law of the domicile as determining the succession, it may be said that, in a practical sense at least, the law of the domicile is needed to establish the inheritance. Therefore the inheritance may be taxed at the place of domicile."

It follows that the succession to all personal property, wherever situated, may be taxed at the domicile of the decedent;<sup>224</sup> and this is usually done.<sup>225</sup> This includes the taxation there of all debts due to the deceased, even those secured by mortgage of foreign land.<sup>226</sup>

In a few states it is held that the act does not extend to the taxation of foreign chattels; the operation of the act being re-

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<sup>223</sup> 240 U. S. 625, 631 (1916).

<sup>224</sup> *Keeney v. New York*, 222 U. S. 525 (1912).

<sup>225</sup> *Carpenter v. Pennsylvania*, 17 How. (U. S.) 456 (1854); *Eidman v. Martinez*, 184 U. S. 578 (1902); *Gallup's Appeal*, 76 Conn. 617, 57 Atl. 699 (1904); *Hopkins' Appeal*, 77 Conn. 644, 60 Atl. 657 (1905); *Frothingham v. Shaw*, 175 Mass. 59, 55 N. E. 623 (1899); *Mann v. Carter*, 74 N. H. 345, 68 Atl. 130 (1907); *Hartman's Case*, 70 N. J. Eq. 664, 62 Atl. 560 (1905); *Matter of Swift*, 137 N. Y. 77, 32 N. E. 1096 (1893); *Matter of Merriam*, 141 N. Y. 479, 36 N. E. 505 (1894); *Matter of Dingman*, 66 App. Div. 228, 72 N. Y. Supp. 694 (1901); *In re Short's Estate*, 16 Pa. 63 (1851); *Stanton's Estate*, 3 Pa. Dist. 371 (1894); *Estate of Bullen*, 143 Wis. 512, 128 N. W. 109 (1910); *In re Ewin*, 1 Cr. & J. 151 (1830); *In re Coales*, 7 M. & W. 390 (1841); *Attorney-General v. Napier*, 6 Ex. 217 (1851).

<sup>226</sup> *Matter of Corning*, 3 N. Y. Misc. 160, 23 N. Y. Supp. 285 (1893); *Stanton's Estate*, 3 Pa. Dist. 371 (1894); *In re Howard*, 80 Vt. 489, 68 Atl. 513 (1907).

stricted to the chattels of the deceased resident situated within the state, together with his intangible property.<sup>227</sup>

Whatever view may be taken of a transfer by inheritance, other kinds of taxable transfers cannot be taxed outside the state of situs. Thus, a transfer by a gift *causa mortis*, which is commonly covered by an inheritance tax law, is governed, as will be seen, by the law of the situs; and there is no possible ground for taxing the transfer at the domicile of the decedent. The same thing would be true in the case of an appointment by will under a power which derives no force from the inheritance law of the person exercising the power. Thus in *Matter of Fearing*,<sup>228</sup> where a power of appointment over property outside New York was exercised by a New York will, the appointment was held not to be taxable in New York. In that case the power was created in a New York will, and the transfer under that will might therefore have been taxable in New York but for the fact that the creation of the power antedated the first inheritance tax law.

It would seem that a tax could not be imposed at the domicile upon chattels situated in a state which does not accept the common-law doctrine, but disposes of all chattels situated in the state, upon the death of the owner, according to its own inheritance laws. As to such chattels the law of the domicile grants no privilege to the successor, and it must therefore be beyond the power of the domicile to exact a tax from him.

This principle was applied in a slightly different case. In *Matter of Cummings*<sup>229</sup> a decedent left personal property in New York and in California. The California court of probate found the deceased domiciled in that state, and distributed the assets found there according to the California law. The New York court found that the deceased died domiciled in New York; but in assessing the New York inheritance tax it was held that the California assets could not be included. The reason is obvious; that in obtaining those assets the distributees had derived no help from the law of New York.

Since an inheritance tax may be laid upon all tangible and much

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<sup>227</sup> *Weaver v. State*, 110 Ia. 328, 81 N. W. 603 (1900); *State v. Brevard*, Phil. Eq. (62 N. C.) 141 (1867); *Re Joyslin*, 76 Vt. 88, 56 Atl. 281 (1903).

<sup>228</sup> 200 N. Y. 340, 90 N. E. 956 (1911).

<sup>229</sup> 63 N. Y. Misc. 621, 118 N. Y. Supp. 684 (1909).

intangible property in two states, the result is a double burden of taxation; to which is now added an additional federal tax. This triple burden is, however, quite within the law.<sup>230</sup> The burden is often ameliorated by allowing a deduction of debts and of other taxes, and by a marshalling of assets so as to diminish one of the taxes; but such provisions are beyond the scope of this article.<sup>231</sup>

A state which is neither the domicile of the decedent nor the situs of any of his property extends no privilege to the successor, and cannot tax the succession.<sup>232</sup>

It has already been seen that an estate under administration is situated in the court by which it is being administered. If a beneficiary of such an estate should die pending its administration, an inheritance tax upon his succession is leviable in the state where the estate is being administered;<sup>233</sup> and on the other hand such a tax is not assessable at the domicile of the decedent beneficiary,<sup>234</sup> except in a state which lays the tax upon the foreign property of a domiciled decedent.<sup>235</sup> Nor will the presence of *bona notabilia* within a state suffice to support a tax on the succession to a legatee; for the interest of the beneficiary of the estate is not an interest in specific chattels, but in the distribution of the balance after the payment of debts and charges.<sup>236</sup>

Where a trust estate has its situs within a certain jurisdiction, and a beneficial interest in the estate is transferred at the death of an owner of it, an inheritance tax is payable at the place of administration of the trust.<sup>237</sup> To use the language of Jessel, M. R.,

<sup>230</sup> *Frothingham v. Shaw*, 175 Mass. 59, 55 N. E. 623 (1899).

<sup>231</sup> For examples of such proceedings, see *Tilford v. Dickinson*, 79 N. J. L. 302, 75 Atl. 574 (1910); *Matter of Ramsdill*, 190 N. Y. 492, 83 N. E. 584 (1908); *Matter of McEwan*, 51 N. Y. Misc. 455, 101 N. Y. Supp. 733 (1906); *Matter of Grosvenor*, 124 App. Div. 331, 108 N. Y. Supp. 926 (1908).

<sup>232</sup> *Matter of Bentley*, 31 N. Y. Misc. 656, 66 N. Y. Supp. 95 (1900); *Matter of Bishop*, 82 App. Div. 112, 81 N. Y. Supp. 474 (1903); *Matter of Hillman*, 116 App. Div. 186, 101 N. Y. Supp. 640 (1906); *State v. Brim*, 4 Jones Eq. (57 N. C.) 300 (1858); *Hood's Estate*, 21 Pa. 106 (1853).

<sup>233</sup> *Matter of Clinch*, 180 N. Y. 300, 73 N. E. 35 (1905); *Weaver's Estate*, 4 Pa. Dist. 260 (1895).

<sup>234</sup> *Matter of Thomas*, 3 N. Y. Misc. 388, 24 N. Y. Supp. 713 (1893).

<sup>235</sup> *Milliken's Estate*, 206 Pa. 149, 55 Atl. 853 (1903).

<sup>236</sup> *Matter of Lord*, 111 App. Div. 152, 97 N. Y. Supp. 553 (1906), affirmed 186 N. Y. 549, 79 N. E. 1110 (1906); *Lyall v. Lyall*, L. R. 15 Eq. 1 (1872).

<sup>237</sup> *Matter of Lord*, 111 App. Div. 152, 97 N. Y. Supp. 553 (1906), affirmed 186 N. Y. 549, 79 N. E. 1110 (1906); *Commonwealth v. Kuhn*, 18 Phila. 403, 2 Pa. Co. Ct.

in *In re Cigala*,<sup>238</sup> this is because "you cannot get it . . . except by an action in England. That is the true test; in order to recover the property you must come to England." The proper place to claim an interest in trust property is at the seat of the trust. Just what is meant by the seat of the trust cannot here be considered. It is not necessarily the domicile of the trustee.<sup>239</sup>

That the interest in the trust fund was transferred as the result of the exercise of a power of appointment does not alter the case; the transfer is taxable at the seat of the trust.<sup>240</sup>

In a state which levies an inheritance at the domicile of the decedent upon all personal property, the interest of a domiciled decedent in a foreign trust fund is of course taxable.<sup>241</sup>

The British probate duty was levied upon all property which should come to an English court to be administered. The right of administration depends upon the situation of the property within the jurisdiction at the moment of the decedent's death; no probate duty could be levied upon property brought into the jurisdiction after the death, even though it was brought in to be administered there.<sup>242</sup> Probate duty was, however, due on everything within the jurisdiction at the death of the decedent which should be administered there. This covers not only ordinary chattels, but bonds of foreign governments<sup>243</sup> and certificates of stock in foreign corporations,<sup>244</sup> since they are marketable securities within the kingdom, transferable there; shares in English companies;<sup>245</sup> and an undivided share in the residue of an English estate not yet administered, though that estate consisted largely of foreign property.<sup>246</sup> Furthermore, since administration may be granted

248 (1886); *Attorney-General v. Campbell*, L. R. 5 H. L. 524 (1872); *In re Cigala*, 7 Ch. D. 351 (1878); *In re Badart's Trusts*, L. R. 10 Eq. 288 (1870); *Lyall v. Lyall*, L. R. 15 Eq. 1 (1872); *Re Smith's Trusts*, 10 L. T. R. 598 (1864).

<sup>238</sup> 7 Ch. D. 351 (1878).

<sup>239</sup> *Douglas County v. Kountze*, 84 Neb. 506, 121 N. W. 593 (1909).

<sup>240</sup> *Matter of Lord*, 111 App. Div. 152, 97 N. Y. Supp. 553 (1906), affirmed 186 N. Y. 549, 79 N. E. 1110 (1906); *Re Wallop's Trusts*, 1 De G., J. & S. 656 (1864); *In re Lovelace*, 4 De G. & J. 340 (1859).

<sup>241</sup> *Lines's Estate*, 155 Pa. 378, 26 Atl. 728 (1893).

<sup>242</sup> *Attorney-General v. Hope*, 2 Cl. & F. 84 (1834); *Attorney-General v. Dimond*, 1 Cr. & J. 356 (1831).

<sup>243</sup> *Attorney-General v. Bouwens*, 4 M. & W. 171 (1838).

<sup>244</sup> *Stern v. Queen*, [1896] 1 Q. B. 211.

<sup>245</sup> *New York Breweries Co. v. Attorney-General*, [1899] A. C. 62.

<sup>246</sup> *Sudeley v. Attorney-General*, [1897] A. C. 11.



at the domicile of a debtor to the deceased, probate duty is due if a debtor to the deceased is domiciled within the kingdom.<sup>247</sup>

The British Estate Duty, created by a later act, covers all cases where a probate duty may be exacted, and other cases where a succession duty may be levied. In its former quality its jurisdiction is identical with that of the probate duty.

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<sup>247</sup> *Commissioners of Stamps v. Hope*, [1891] A. C. 476.

## INDIRECT ENCROACHMENT ON FEDERAL AUTHORITY BY THE TAXING POWERS OF THE STATES.<sup>1</sup> VII

### II. REGULATIONS OF INTERSTATE COMMERCE (*concluded*)

#### 2. *Taxes not Discriminating Against Interstate Commerce* (*concluded*)

#### C. TAXES ON ACTS, OCCUPATIONS OR INCOME (*concluded*)

#### II. *Taxes on Net Income "As Such"*

IT has already been disclosed that at the October, 1917, Term the Supreme Court in *United States Glue Co. v. Oak Creek*<sup>2</sup> sanctioned the inclusion of income from interstate commerce in a general state income tax measured by net income from all sources. The difference "between a tax measured by gross receipts and one measured by net income" was said to afford "a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental."<sup>3</sup>

The United States Glue Company was a domestic corporation; and in propounding and answering the question to be decided, Mr. Justice Pitney included that fact. After summarizing the provisions of the statute and their application to the plaintiff, he said:

"Stated concisely, the question is whether a State, in levying a general income tax upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce without contravening the commerce clause of the Constitution of the United States."<sup>4</sup>

And the answer is stated as follows:

"And so we hold that the Wisconsin income tax law, as applied to the plaintiff in the case before us, cannot be deemed to be so direct a

<sup>1</sup> For preceding instalments of this discussion see 31 HARV. L. REV. 321-72 (January, 1918); *Ibid.*, 572-618 (February, 1918); *Ibid.*, 721-78 (March, 1918); *Ibid.*, 932-53 (May, 1918); 32 HARV. L. REV. 234-65 (January, 1919); and *Ibid.*, 374-416 (February, 1919).

<sup>2</sup> 247 U. S. 321, 38 Sup. Ct. Rep. 499 (1918).

<sup>3</sup> 247 U. S. 321, 328, 38 Sup. Ct. Rep. 499 (1918).

<sup>4</sup> *Ibid.*, 326.

burden upon plaintiff's interstate business as to amount to an unconstitutional interference with or regulation of commerce among the States. It was measured not by the gross receipts, but by the net proceeds from this part of plaintiff's business, along with a like imposition upon its income derived from other sources, and in the same way that other corporations doing business within the State are taxed upon that proportion of their income derived from business transacted and property located within the State, whatever the nature of their business."<sup>5</sup>

These portions of the opinion, taken alone, would confine the decision to the point that a domestic corporation, engaged in both local and interstate commerce, cannot exclude interstate income from a tax on net income from all kinds of business which is imposed equally on other corporations doing business in the state. This was as far as the court had to go to dispose of the controversy before it. It was not called upon to say whether the result would have been the same in the case of an individual, a partnership or a foreign corporation or of a business that was exclusively interstate. It might, however, have narrowed its decision still further, as we shall see later.<sup>6</sup>

While the decision involved a domestic corporation and the court confined the case to such a corporation, there is no intimation in the opinion that an individual or partnership or foreign corporation would have occupied a more favorable position. Indeed, there are hints to the contrary. It is thought important to mention that the plaintiff was taxed "in the same way that other corporations doing business within the State are taxed, . . . whatever the nature of their business."<sup>7</sup> The incidence of a similar burden on other corporations is one of the reasons why this corporation cannot complain. The reasonable inference is that the court, in seeming in part of the opinion to confine the decision to the kind

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<sup>5</sup> 247 U. S. 321, 328, 38 Sup. Ct. Rep. 329 (1918).

<sup>6</sup> *Infra*, page 643-45.

<sup>7</sup> 247 U. S. 321, 329, 38 Sup. Ct. Rep. 499 (1918). This statement as to other corporations is not literally true, for, as we have seen from *Northwestern Life Insurance Co. v. Wisconsin*, 247 U. S. 132, 38 Sup. Ct. Rep. 444 (1918), 32 HARV. L. REV. 408 ff., a gross receipts tax was levied on insurance companies in lieu of all other taxes except those on real estate. Public utilities are also excluded from the provisions of the income tax law and subjected to *ad valorem* assessment (note 34, *infra*). These exceptions, however, do not appear important, since the other methods of assessment are regarded as imposing burdens substantially equivalent to those which would result from subjection to the income tax.

of corporation that was before it, does not mean to suggest any such distinction between foreign and domestic corporations as appears to be made in dealing with excises measured by total capital stock.<sup>8</sup> And that the opinion is not confined to corporations is apparent from another paragraph in which reference is made to "persons." After distinguishing a tax on gross receipts from one on net income, Mr. Justice Pitney says of the latter:

"Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States."<sup>9</sup>

The qualifying phrase "otherwise subject to the jurisdiction of the state" opens the door to the inquiry whether a foreign corporation engaged exclusively in interstate commerce could be taxed on its net income earned within the state. Such corporations are "subject to the jurisdiction of the state" from the standpoint of service of judicial process,<sup>10</sup> and taxation of property.<sup>11</sup> But they

<sup>8</sup> Compare *Looney v. Crane Co.*, 245 U. S. 178, 38 Sup. Ct. Rep. 85 (1917), 31 HARV. L. REV. 600-18, with *Kansas City, M. & B. R. R. Co. v. Stiles*, 242 U. S. 111, 37 Sup. Ct. Rep. 58 (1916), 31 HARV. L. REV. 599-600. See also 33 POLITICAL SCIENCE QUARTERLY, 557, note 1.

<sup>9</sup> 247 U. S. 321, 329, 38 Sup. Ct. Rep. 499 (1918).

<sup>10</sup> *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 Sup. Ct. Rep. 944 (1914).

<sup>11</sup> This does not appear to have been established by explicit decision, but the many cases holding that foreign corporations engaged partly in interstate commerce are not entitled to exemption from property taxation convey no hint that the result would be different if the business in which the property was employed was exclusively interstate. In *St. Louis v. Wiggins Ferry Co.*, 11 Wall. (78 U. S.) 423 (1871), the only reason given for holding that the property of a foreign corporation engaged exclusively in interstate commerce was not taxable in St. Louis was that the property had no taxable situs there. In *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Sup. Ct. Rep. 532 (1897), in which Kentucky was allowed to tax the Kentucky part of an interstate bridge owned by a Kentucky corporation, it appeared from the statement of facts that Illinois had assessed that part of the bridge which lay within its borders. In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 206, 5 Sup. Ct. Rep. 826 (1885), Mr. Justice Field declared: "It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations

are not subject to the jurisdiction so as to be liable to a privilege tax on the conduct of their business,<sup>12</sup> or to certain police requirements set forth as a condition on bringing suit in the state courts.<sup>13</sup> Are they so subject to the jurisdiction as to be liable to a tax on their net income? Mr. Justice Pitney plainly intimates that they are. A tax on net income, he says, is "like a tax upon property, or upon franchises treated as property." It is "but a method of distributing the cost of government"; it "constitutes one of the ordinary and general burdens of government." If the property of those engaged exclusively in interstate commerce is not exempt from state taxation, there is no reason to accord them immunity from a tax on their net income, which is "but a method of distributing the cost of government, like a tax upon property." The important thing in the mind of the court seems to be the generality of the burden, with the consequent impossibility of discrimination against interstate commerce.

The result of this venture at mind-reading coincides with the analysis previously given of state taxes on property assessed by capitalizing the income earned from its use. To repeat Mr. Carter's concession in his brief for the companies in the Ohio Express cases:

"Inasmuch as the existence of the States is necessary to the existence of interstate commerce, that ordinary system of taxation which is

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engaged in other business, is subject to State taxation, provided always it be within the jurisdiction of the State." As the case before the court involved a foreign corporation engaged exclusively in interstate commerce, it is fair to presume that the *dictum* above quoted was uttered with such a corporation in mind. In *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299, 25 Sup. Ct. Rep. 686 (1905), the inference from the statement of facts is that the tug "Germania," which was one of the vessels of a foreign corporation held taxable in Virginia, was engaged exclusively in interstate commerce, though this fact is not mentioned in the opinion. Property owned by a foreign corporation and employed exclusively in work for the United States government is taxable. *Gromer v. Standard Dredging Co.*, 224 U. S. 362, 32 Sup. Ct. Rep. 499 (1912). The conclusion is irresistible that the many declarations that property is not exempt from state taxation because it is employed in interstate commerce are intended to apply to property of foreign corporations engaged exclusively in that commerce.

<sup>12</sup> *Cheney Brothers Co. v. Massachusetts*, 246 U. S. 147, 38 Sup. Ct. Rep. 295 (1918); *York Manufacturing Co. v. Colley*, 247 U. S. 21, 38 Sup. Ct. Rep. 430 (1918).

<sup>13</sup> *International Text Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. Rep. 481 (1910); *International Text Book Co. v. Lynch*, 218 U. S. 664, 31 Sup. Ct. Rep. 225 (1910); *Buck Stove Co. v. Vickers*, 226 U. S. 205, 33 Sup. Ct. Rep. 41 (1912); *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 35 Sup. Ct. Rep. 57 (1914).

necessary to the existence of the States, namely, taxation upon all property within them, must be permitted, and the property employed in interstate commerce is not to be exempted. . . . Were it not subject to taxation in this form the effect would be to confer upon it an affirmative advantage equivalent to a pecuniary bounty equal to the amount of the tax from which it is exempted."<sup>14</sup>

With the advent of general state-wide income taxes, the "ordinary system of taxation which is necessary to the existence of the states" is no longer confined to property taxation. The income tax has come to constitute one of the "ordinary and general" burdens of government. Reason and psychology combine to warrant the expectation that the Supreme Court will not exclude foreign corporations engaged exclusively in interstate commerce from the "corporations otherwise subject to the jurisdiction of the states" with respect to taxes on net incomes.<sup>15</sup>

It seems safe, therefore, to state the principle of the Oak Creek case by saying that a general state-wide tax on net income is not "an unconstitutional interference with or regulation of commerce among the states" by reason of the inclusion of net income from

<sup>14</sup> This passage is quoted more at length in 32 HARV. L. REV. 261.

<sup>15</sup> This position is taken by the supreme court of Wisconsin in *Superior v. Allouez Bay Dock Co.*, 166 Wis. 76, 80, 164 N. W. 362 (1917), in which Chief Justice Winslow says:

"It must be admitted that the defendant's income arose entirely from interstate commerce business. . . . Is the levying of an income tax measured by the income so derived a burden upon interstate commerce?

"The question is not free from difficulty, but we think it must be answered in the negative. Income taxation is not taxation of property, but is more nearly akin to taxes levied upon privileges or occupations. Its amount may be measured by the receipts of the business, but it is not in any true sense a tax upon the business itself. The subject is covered, as it seems to us, by the decisions of this court in *United States Glue Co. v. Oak Creek*, 161 Wis. 211, 153 N. W. 241, and *Northwestern Mud. L. Ins. Co. v. State*, 163 Wis. 484, 155 N. W. 609, 158 N. W. 328, and the cases therein cited."

The cases relied on do not involve concerns whose business was exclusively interstate, so the declaration in the Superior case is no more than the assertion that this does not seem material to the court. Moreover, the decision in the Superior case that those engaged exclusively in interstate commerce may be constitutionally subjected to a tax on their net income was a declaration on a moot point, because the case held that the defendant was exempted from income taxation, for the reason that the property from which the income was derived was railroad property, and the complainant was therefore entitled to the benefit of the provision in the Income Tax Law which exempts "incomes derived from property and privileges by persons now required by law to pay taxes or license fees directly into the treasury of the state in lieu of taxes" (166 Wis. 76, 81).

interstate commerce. The court emphasizes the point that, in the absence of discrimination, the effect of such a tax on interstate commerce is "indirect" and therefore constitutionally innocuous. It regards this effect as identical with the effect on exports of the federal net income tax on income from an exporting business. Two weeks earlier in *Peck & Co. v. Lowe*<sup>16</sup> the court had held that it was not a tax on exports to tax the net income of an exporting business. In the opinion Mr. Justice Van Devanter had said:

"The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation, or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. . . . It is both nominally and actually a general tax. . . . There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed — the net income — is as far removed from the exportation as are articles intended for export before the exportation begins." <sup>17</sup>

This passage was paraphrased by Mr. Justice Pitney in the *Oak Creek* case, prefatory to pointing out the distinction between the measures of gross and of net income and to minimizing the deterrent effect on interstate commerce of the latter, since a tax on net profits "does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large." <sup>18</sup>

We may take it for granted, then, that the legal character of the recipient and the nature of the business in which the recipient is engaged are immaterial elements in considering the constitutionality of a state-wide, all-inclusive general tax on net income from business done within the state. The recipient may be an individual, a partnership, a domestic or a foreign corporation. The business may be exclusively interstate. But the tax must be general, and the measure must probably be net, and not gross, income, with the possible qualification that some latitude will be allowed the states in prescribing what are permissible deductions by way

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<sup>16</sup> 247 U. S. 165, 38 Sup. Ct. Rep. 432 (1918).

<sup>17</sup> 247 U. S. 165, 174-75, 38 Sup. Ct. Rep. 432 (1918).

<sup>18</sup> 247 U. S. 321, 329, 38 Sup. Ct. Rep. 499 (1918).

of interest on indebtedness, expenses, etc., in assessing the taxable net income. The statement that the legal character of the recipient and the source of the income are not significant is not meant to preclude further inquiry into the taxability of income from extra-state business or from interest or other compensation paid by the national government. In determining the constitutionality of state taxation of such income, the legal status of the recipient is likely to be of controlling importance.<sup>19</sup>

It is doubtless a wholly moot question whether a general state tax on gross income would pass muster with the Supreme Court. No such tax is likely to be levied. It would bear most unequally on different individuals and different enterprises. This consideration will probably always receive more weight from legislators than that which will be given to the opposing element that in some instances volume of transactions bears a closer relation to the cost of governmental supervision than does the balance at the end of the fiscal year. Such exceptional instances may be taken care of by gross-income taxes in lieu of other taxes. If, however, a state should seek to impose a general tax on gross income, it will have to reckon with Mr. Justice Pitney's opinion in the Oak Creek case, which plainly discountenances the inclusion of receipts from interstate commerce in such a tax. No actual decision, however, precludes such inclusion. All of the gross income taxes that have been declared unconstitutional have been levies on selected enterprises. So far as words go, a general tax on gross income can be called "but a method of distributing the cost of government," as readily as can a general tax on net income. And there is an indication in Mr. Justice Bradley's opinion in *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*<sup>20</sup> that in 1887 the Supreme Court was inclined to think that a general state income tax could levy on receipts from interstate commerce, even though the measure of the tax was gross, rather than net, income.

This opinion is referred to by Mr. Justice Pitney in the Oak Creek case, in which he quotes Mr. Justice Bradley as saying:

"The corporate franchises, the property, the business, the income of corporations created by a state may undoubtedly be taxed by the state; but in imposing such taxes care should be taken not to interfere

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<sup>19</sup> See *infra*, pages 649 ff.

<sup>20</sup> 122 U. S. 326, 7 Sup. Ct. Rep. 1118 (1887).



with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government.”<sup>21</sup>

Previously Mr. Justice Pitney says that the subject of consideration in the Philadelphia case was “the distinction between direct and indirect burdens, with particular reference to a comparison between a tax upon the gross returns of carriers in interstate commerce and a general income tax imposed upon all inhabitants incidentally affecting carriers engaged in such commerce. . . .”<sup>22</sup> From this Mr. Justice Pitney proceeds to point out “the correct line of distinction,” as illustrated in *Crew Levick Co. v. Pennsylvania*<sup>23</sup> and *Peck & Co. v. Lowe*.<sup>24</sup>

Between these two cases there was a double distinction. One involved a tax on gross receipts imposed on selected enterprises; the other, a tax on net income imposed generally on all enterprises and individuals. When Mr. Justice Bradley made “particular reference to a comparison between a tax upon the gross returns of carriers engaged in interstate commerce and a general income tax imposed on all inhabitants,”<sup>25</sup> he appears to have had in mind only the distinction between generality and partiality. There is no indication that he thought it material whether a general income tax was on gross, or on net, income. The pertinent paragraph of his opinion is the one immediately preceding that from which Mr. Justice Pitney quotes. After saying that “there is another point, however, which may properly deserve some consideration,” Mr. Justice Bradley continues:

“Can the tax in this case be regarded as an income tax? And, if it can, does that make any difference as to its constitutionality? We do not think that it can properly be regarded as an income tax. It is not a general tax on the incomes of all the inhabitants of the state, but a special tax on transportation companies. Conceding, however, that an income tax may be imposed on certain classes in the community, distinguished by the character of their occupations, this is not an income tax on the class to which it refers, but a tax on their receipts for trans-

<sup>21</sup> 122 U. S. 326, 345, 7 Sup. Ct. Rep. 1118 (1887); quoted in 247 U. S. 321, 327, 38 Sup. Ct. Rep. 499 (1918).

<sup>22</sup> 247 U. S. 321, 327, 38 Sup. Ct. Rep. 499 (1918).

<sup>23</sup> 245 U. S. 292, 38 Sup. Ct. Rep. 126 (1917), 32 HARV. L. REV. 409 ff.

<sup>24</sup> Note 16, *supra*.

<sup>25</sup> Note 23, *supra*.

portation only. Many of the companies included in it may, and undoubtedly do, have incomes from other sources, such as rents of houses, wharves, stores, and water power, and interest on moneyed investments. . . . It is unnecessary, therefore, to discuss the question which would arise if the tax were properly a tax on income. It is clearly not such, but a tax on transportation only."<sup>26</sup>

Here obviously Mr. Justice Bradley regards generality as the only essential of a tax "properly a tax on income." He lays no foundation for the distinction between gross and net income relied on by Mr. Justice Pitney in sustaining the Wisconsin income tax. Nor was it necessary to draw such a distinction in the Oak Creek case, since the generality of the tax there involved would have differentiated it from all taxes previously declared invalid. Had the court been inclined to narrow its decision as much as possible, the opinion might easily have declared that, since the Wisconsin tax was both general and measured by net income, there was no bar against its application to income from interstate commerce, thereby explicitly leaving open for future determination the question whether either of these qualifications in the absence of the other would entitle the law to the same approval. But, in so far as the opinion rather than the decision is to be looked at as expressing the law for which the case stands, it seems necessary to conclude that a general income tax on gross receipts cannot take toll from interstate commerce.

Such gross receipts from interstate as well as local commerce may, as we have seen,<sup>27</sup> be the measure of a tax in lieu of a property tax, provided the burden thereby imposed is not substantially heavier than what would be laid by the ordinary property tax. If this is true of gross-receipts taxes on selected corporations or enterprises, it must also be true of a general tax on gross receipts in lieu of a property tax. But such a tax is not likely to be adopted east or west of Russia. One may with safety follow Henry George far enough to disapprove of relieving real estate from *ad valorem* taxes in order to take only a percentage of the realized gross returns. And though we may anticipate that, in many states, income taxes will soon be substituted for other demands on chattels as well as on intangibles, it is inconceivable that such income taxes will be

<sup>26</sup> 122 U. S. 326, 344-45, 7 Sup. Ct. Rep. 1118 (1887).

<sup>27</sup> 32 HARV. L. REV. 377-416.

guilty of the inequalities of burden that would ensue from allowing to no one any deduction from gross receipts.

This brings us to the element in the Wisconsin income tax that the Supreme Court did not mention. Nothing was said in the opinion in the Oak Creek case about the extent to which the tax was in lieu of other demands. There is no hint that a state has to exempt property of any kind in order to include receipts from interstate commerce in a general tax on net incomes. Yet the Supreme Court was undoubtedly aware of the fact that the Wisconsin tax was one substantially in lieu of all other taxes on chattels and intangibles. In *Northwestern Mutual Life Insurance Co. v. Wisconsin*<sup>28</sup> the opinion of Mr. Justice Day quoted a statement from the Wisconsin supreme court to the effect that the Income Tax Law "marked the abandonment of the attempt to levy personal property taxes upon" securities and credits.<sup>29</sup> Whether it was called to the attention of the Supreme Court that Wisconsin also allowed taxes on chattels to be deducted from the assessment of the income tax does not appear; but such was the case,<sup>30</sup> and the Supreme Court would hardly have neglected to inquire about it had it been regarded as important. The general nature of the Wisconsin tax was thus summarized by Chief Justice Winslow of the Wisconsin supreme court in an opinion rendered in 1912:

"By the present law it is quite clear that personal property taxation is for all practical purposes becoming a thing of the past. The specific exemptions of all money and credits and the great bulk of stocks and bonds, as well as of all farm machinery, tools, wearing apparel, and household furniture in actual use, regardless of value, goes far to eliminate taxation of personal property; while the provision that he who pays personal property taxes may have the amount so paid credited on his income tax for the year seems to put an end to any effective taxation of personal property. That taxation of such property has proven a practical failure will be admitted by all who have given any attention to the subject. Doubtless this was one of the main arguments in the legislative mind for the passage of the present act. By this act the legislature has, in substance, declared that the state's system of taxation shall be changed from a system of uniform taxation of property (which so far as personal property is concerned has proven a failure) to

<sup>28</sup> 247 U. S. 132, 38 Sup. Ct. Rep. 444 (1918).

<sup>29</sup> 247 U. S. 132, 136, 38 Sup. Ct. Rep. 444 (1918).

<sup>30</sup> WISCONSIN STAT. (1915), chap. 48 a, § 1087 m-26.

a system which shall be a combination of two ideas, namely, taxation of persons progressively, according to ability to pay, and taxation of real property uniformly, according to value."<sup>21</sup>

Thus the Wisconsin tax was substantially one in lieu of all other taxes except those on real estate. Unlike the gross-receipts tax on insurance companies sustained in *Northwestern Mutual Life Insurance Co. v. Wisconsin*,<sup>22</sup> the net-income tax included the income from real estate,<sup>23</sup> so that the economic interest in land was taxed twice. Such a double burden might conceivably have raised a question under the commerce clause in the case of railroads had they been subject to the income tax. If the assessment of their real estate took account of the value contributed by the use to which it was put, and the value of that use was again tapped by an income tax, there would be some basis for a contention that the state had created a tax system whereby interstate carriers were taxed more heavily than many kinds of local business. In Wisconsin, however, railroads are not subject to the income tax, but are assessed by the *ad valorem* method which in practice gets at the "intangible" value contributed by the income.<sup>24</sup> And chattels and intangibles pay but one tax. The Supreme Court, however, did not mention this element in the situation before it. It would seem, then, that it means to allow a general state tax on net incomes to take toll from interstate commerce, even though the tax is in addition to familiar and customary levies on chattels and choses in action. This, however, is the inference from silence and neglect, and not from anything vocal. Explicit consideration may move the court to a different conclusion.

If we may assume that a state is determined that state and local governments are to get a definite amount of revenue, the question whether a general income tax is in lieu of other demands does not seem of great importance. Such an income tax is *pro tanto* in lieu of other demands, whether specific property is exempted or not, since it necessarily reduces the assessment or the rate of levy on other sources of revenue. Our assumption that some predeter-

<sup>21</sup> *Income Tax Cases*, 148 Wis. 456, 505-06, 134 N. W. 673 (1912).

<sup>22</sup> Note 28, *supra*. See page 135 of the opinion. See also WISCONSIN STAT. (1915), chap. 51, § 51.32 (1) (page 867).

<sup>23</sup> WISCONSIN STAT. (1915), chap. 48 a, § 1087 m-2. 2 (a).

<sup>24</sup> See *Superior v. Allouez Bay Dock Co.*, note 15, *supra*. See also WISCONSIN STAT. (1915), chap. 48 a, § 1087 m-5 (2), and chap. 51.

mined amount is certain to be raised by the state, whatever the methods adopted, is of course open to question. The actual situation may be one in which an income tax is not a substitute for other demands, but is the only feasible method of obtaining additional revenue. But even so, if the income tax does not bear more heavily on interstate business than on local business, there seems to be no controlling reason why the interstate business should be held inviolate, whether the income tax is supplementary to, or in lieu of, other taxes.

The opinion of the Supreme Court in *United States Glue Co. v. Oak Creek*<sup>36</sup> shakes the criticism heretofore<sup>36</sup> passed upon *Baldwin Tool Works v. Blue*,<sup>37</sup> in which the federal district court for the northern district of West Virginia sustained the West Virginia excise on corporations. Judge Pritchard supported the inclusion of net receipts from interstate commerce on the authority of the decisions approving the assessment of railroad property by capitalizing net earnings,<sup>38</sup> and sanctioning a gross-receipts tax in lieu of others.<sup>39</sup> He appears to minimize the issue unduly when he says:

"While the statute imposes a special tax in addition to other license taxes, ascertained in some instances by the income that may arise in interstate transactions, nevertheless this is not a tax upon interstate commerce, nor can we conceive of any theory upon which it may be properly said to be a burden upon interstate commerce."<sup>40</sup>

Judge Pritchard evidently proceeds upon the familiar and somewhat exploded distinction between the subject and the measure of the tax, when he argues that "the fact that the measure of that tax may be determined partly from the business of an interstate character could not be said to be such an interference with interstate commerce as to render the act unconstitutional."<sup>41</sup> He does not mention *Galveston, H. & S. A. Ry. Co. v. Texas*,<sup>42</sup> nor indicate

<sup>36</sup> Note 2, *supra*.

<sup>37</sup> 31 HARV. L. REV. 760-75. In making this criticism, the writer proceeded on the assumption that there was no distinction between an excise measured by net earnings and one measured by gross receipts.

<sup>38</sup> 240 Fed. 202 (1916).

<sup>39</sup> *Cleveland, C., C. & St. L. Ry. Co. v. Backus*, 154 U. S. 439, 14 Sup. Ct. Rep. 1122 (1894).

<sup>40</sup> *United States Express Co. v. Minnesota*, 223 U. S. 335, 32 Sup. Ct. Rep. 211 (1912).

<sup>41</sup> 240 Fed. 202, 205 (1916).

<sup>42</sup> *Ibid.*, 206.

<sup>43</sup> 210 U. S. 217, 28 Sup. Ct. Rep. 638 (1908), 32 HARV. L. REV. 385 ff.

that he would have decided differently had the tax been measured by gross, rather than by net, income. But the distinction between the two, elaborated and relied on by the Supreme Court in the Oak Creek case, may be found sufficient to support the West Virginia excise, even though it falls only on corporations and is in addition to other demands.

As to corporations engaged partly in local business, there is no question of taxability, and the measure of the tax may be forgiven on the ground of its indirect effect on interstate commerce and the remnant of arbitrary power over domestic corporations and over the local business of foreign corporations. Where this arbitrary power has thus far been curbed, the complaint was against the extra-territorial incidence of the tax.<sup>43</sup> In view of the decision in the Oak Creek case that a general tax on net income does not regulate interstate commerce by including income from that commerce, an excise on all corporations may be deemed to have sufficient generality to be accorded similar recognition. Some weight, however, should be given to the probability that the exemption of farmers, merchants and others conducting business as individuals from burdens borne by corporations will tend to relieve a considerable proportion of local business from demands that few engaged in interstate commerce will escape. Here is a fighting chance for the contention that an income tax applicable only to corporations must by and large bear more heavily on interstate business than on local business, and therefore amounts to an unconstitutional regulation of interstate commerce.

Foreign corporations engaged exclusively in interstate commerce have still a stronger ground on which to resist the West Virginia tax. For anything thus far decided, such corporations would seem still to have the shield that they are not subject to an excise tax, no matter how it is measured. The subject selected for taxation has long been regarded as immune from the jurisdiction of the state. If the Cheney Brothers Company<sup>44</sup> and the York Manufacturing Company<sup>45</sup> were permitted to disregard the corporation laws of Massachusetts and of Texas respectively, because they

<sup>43</sup> See 32 HARV. L. REV. 384-417. See also Henderson, "The Position of Foreign Corporations in American Constitutional Law," 2 HARVARD STUDIES IN JURISPRUDENCE, chapters VII, VIII, and IX.

<sup>44</sup> Cheney Brothers Co. v. Massachusetts, note 12, *supra*.

<sup>45</sup> York Manufacturing Co. v. Colley, note 12, *supra*.

were foreign corporations engaged exclusively in interstate commerce, it would seem to follow that they and those like them are similarly immune from West Virginia's excise on corporations. It cannot be said of this tax, as Mr. Justice Pitney said of the Wisconsin income tax, that "such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property."<sup>46</sup> The subject taxed is not income, but doing business in corporate form. The tax does not fall on "net incomes from whatever source arising," but only on net incomes arising from the exercise of corporate functions. When those functions are exclusively interstate commerce, and the corporation is foreign rather than domestic, a tax on the exercise of those functions is called a tax "on interstate commerce itself," and therefore without the fold of state power.

There can be no question that this is a correct statement of the law to be induced from the Supreme Court decisions to date. Whether the law will continue as it now is does not admit of the same confident assertion. If we assume that foreign corporations engaged exclusively in interstate commerce may be subjected to a general state tax on net income,<sup>47</sup> and that foreign corporations engaged in combined local and interstate commerce cannot exclude interstate income from a state excise on all corporations measured by their net income from all business within the state,<sup>48</sup> there seems no reason in sense or in economics why a foreign corporation engaged exclusively in interstate commerce should be relieved from an excise imposed equally on all corporations. Their interstate income should be no more sacrosanct than is that of the foreign corporations which are fortunate or unfortunate enough to enjoy some local income in addition. But the West Virginia statute calls its exactions on corporations "an annual special excise tax for the privilege of carrying on or doing business in the state";<sup>49</sup> and under all the law that we know from existing cases the privilege of carrying on interstate commerce alone or the doing of interstate business alone is not a taxable subject. West Virginia does not impose its tax "on net income" received by corporations, but "on

<sup>46</sup> *Cit. supra*, note 9.

<sup>47</sup> See *supra*, pages 636-39.

<sup>48</sup> See *supra*, pages 645-46.

<sup>49</sup> The West Virginia statute is quoted more at length in 31 HARV. L. REV. 761.

the privilege of carrying on . . . business." The net income is the "measure," and not the "subject," of the tax. Granting *arguendo* that the net income of all corporations from whatever source derived is a proper subject of state taxation, that is not the legal *res* which West Virginia has named as the object of its desire. The Supreme Court must rewrite the West Virginia statute in order to escape from the decisions<sup>50</sup> which hold that interstate commerce, whether done by individuals or by corporations, is not a legitimate subject of state taxation.

The court has consistently declined to rewrite statutes or ordinances imposing specific taxes on the privilege of doing any business whatever,<sup>51</sup> even though the identical tax might be imposed on local business alone.<sup>52</sup> It has, however, held that the nominal subject of the tax was not the actual subject, when taxes purporting to be on the privilege of a foreign corporation to engage in local business have been discovered to be substantially taxes on extra-state property of the corporation because measured by total capital stock.<sup>53</sup> The developments since 1910 show the waning of the once controlling influence of the formal distinction between the subject and the measure of the tax. Unless the court is to be more zealous to discover vice than virtue, it may as easily hold that a tax in substance laid on the net income of all corporations will be dealt with as such a tax, in spite of the fact that it is called by the statute an annual special excise for the privilege of carrying on business.

Precedent for such action is not wanting. In *Postal Telegraph Cable Co. v. Adams*,<sup>54</sup> as we have seen, a tax described by the statute as a privilege tax was held to be a levy on the property of the company and therefore a valid demand. Similar courtesies have been shown to other taxes found to be in lieu of property taxes.<sup>55</sup> If a

<sup>50</sup> Some of these decisions are cited in 32 HARV. L. REV. 380, note 34.

<sup>51</sup> Cases cited in 32 HARV. L. REV. 411, note 146.

<sup>52</sup> *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. Rep. 214 (1897). See *infra*, pages 669-70.

<sup>53</sup> 31 HARV. L. REV. 584-618, considering the Western Union case and those following it.

<sup>54</sup> 155 U. S. 688, 15 Sup. Ct. Rep. 268 (1895); 32 HARV. L. REV. 249.

<sup>55</sup> See 32 HARV. L. REV. 389. For an instance of judicial rewriting of a statute to relieve a tax of the charge of being an imposition on an instrumentality of the federal government, see *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. Rep. 961 (1888), 32 HARV. L. REV. 239.



verbal defect was forgiven in these cases, there is no apparent common-sense reason why it should not be forgiven in West Virginia's excise on corporations. Once it is granted that a tax on the net income of all corporations need not lose its hold when it comes to income from interstate commerce, even though such income is all that a complaining foreign corporation receives, there is no substantial ground for sparing such income because the tax calls itself an excise on doing business rather than a tax "on net income received by corporations." It is to be anticipated, therefore, that the Supreme Court, if it determines to treat a tax on corporate income in the same way that it regarded Wisconsin's tax on all income, will find little difficulty in taking the further step that a tax, though formally on the business itself, is substantially on the net income from that business and is therefore entitled to the same consideration that would be bestowed on a tax designated as one on such net income.

There remains for consideration the bearing of the commerce clause on complaints of the vice of extra-territoriality in the assessment of an income tax. It has already been suggested that the legal status of the recipient of income may be a factor in cases where it is objected that a state has levied on income from extra-state sources or on income to which extra-state activities have contributed. In dealing with such complaints it will be necessary to determine what basis or bases of jurisdiction underlie the imposition of income taxes. The *Western Union* case and those following it establish that the taxation of foreign corporations engaged in interstate commerce by a method which takes account of extra-state values is an invalid regulation of interstate commerce as well as a denial of due process of law. This doctrine must apply to taxes on income or to taxes measured by income as forcibly as to taxes measured by property. Plainly foreign corporations engaged wholly or partly in interstate commerce can insist that extra-state income as well as extra-state property is beyond the reach of the state by direct or indirect action.

What can be done with foreign corporations engaged exclusively in local business does not fall strictly within the scope of this study, although the cases that have been reviewed are the ones which throw light on the problem. If *Horn Silver Mining Co. v. New York* <sup>56</sup>

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<sup>56</sup> 143 U. S. 305, 12 Sup. Ct. Rep. 403 (1892).

is still law, it would seem that such foreign corporations may be subjected to an excise measured by their total income as readily as to one measured by their total capital stock. The possibility of the early demise of the Horn case has already been suggested.<sup>57</sup> Mr. Henderson in his admirable study of *The Position of Foreign Corporations in American Constitutional Law*<sup>58</sup> argues forcibly for the view that the decision must be regarded as already abandoned.<sup>59</sup> This is a legitimate inference from the opinion of Mr. Justice Van Devanter in *International Paper Co. v. Massachusetts*,<sup>60</sup> in which the due-process objections to an excise measured by extra-territorial values appear to be treated as entirely independent of the commerce clause. The opinion of Mr. Justice Holmes in *Equitable Life Assurance Society v. Pennsylvania*<sup>61</sup> may also be taken as an implied obituary of the Horn case. This case sustained a tax on a foreign insurance company which included a percentage of premiums paid in other states on policies on the lives of residents of the taxing state, notwithstanding the ruling that such premiums, separately considered, afford no basis for a tax on a company that has ceased to solicit business or to collect premiums in the taxing state.<sup>62</sup> Though the Equitable case came within the doctrine of arbitrary power declared in the Horn case, it was not put on that ground by the court. Instead, Mr. Justice Holmes pointed out that many incidents of the contracts insuring the lives of residents were likely to be attended to in Pennsylvania, such as the payment of dividends and the adjustment of claims, and added: "It is not unnatural to take the policy holders residing in the State as a measure without going into nicer if not impracticable details. Taxation has to be determined by general principles, and it seems to us impossible to say that the rule adopted in Pennsylvania goes beyond what the Constitution allows." <sup>63</sup>

<sup>57</sup> 31 HARV. L. REV. 613, 758, 759.

<sup>58</sup> Henderson, "The Position of Foreign Corporations in American Constitutional Law," 2 HARVARD STUDIES IN JURISPRUDENCE, Cambridge, Harvard University Press, 1918.

<sup>59</sup> For a statement of Mr. Henderson's argument, and a presentation of considerations against its validity as an expression of the present state of the law, see 33 POLITICAL SCIENCE QUARTERLY, 558-65. <sup>60</sup> 246 U. S. 135, 38 Sup. Ct. Rep. 292 (1918).

<sup>61</sup> 238 U. S. 143, 35 Sup. Ct. Rep. 829 (1915).

<sup>62</sup> Provident Savings Life Assurance Society v. Kentucky, 239 U. S. 103, 36 Sup. Ct. Rep. 34 (1915).

<sup>63</sup> 238 U. S. 143, 147, 35 Sup. Ct. Rep. 829 (1915).

Here is a pretty plain implication that an excise measured by premiums which have no relation whatever to the taxing state would have gone beyond what the Constitution allows. The states, therefore, have had a clear warning of the risks they run in seeking to levy on the extra-state income of any foreign corporation.

Such taxation of extra-state income can be justified, if at all, only by the possession of some power over the recipient. The income, as such, is not taxable by a state which has no other relation towards it than that of covetousness. It is at best exceedingly doubtful whether the requisite power exists over any foreign corporation. As to domestic corporations the case is not so clear. Such corporations, whatever their business, may be subjected to any demand exacted as a price for the privilege of coming into being.<sup>64</sup> Through control over the corporate entity *en ventre sa mère*, the state may accomplish indirectly what it cannot attain directly. With reserved power to amend or repeal the corporate charter, this initial arbitrary power may possibly be transformed into a continuing one. But, if so, it must be exercised as an assertion of such arbitrary power, or else find adequate justification on independent grounds. This appears clearly from Mr. Justice Harlan's opinion in *Louisville & Jeffersonville Ferry Co. v. Kentucky*,<sup>65</sup> in which it was held a taking of property without due process of law to include in the valuation of the Kentucky franchise of an interstate ferry the value of the Indiana franchise of the same concern. After stating the conclusion that Kentucky cannot in effect tax the incorporeal hereditament which has its situs in another state, Mr. Justice Harlan continues:

"This view is not met by the suggestion that Kentucky can make it a condition of the exercise of corporate powers under its authority that

<sup>64</sup> *Railroad Co. v. Maryland*, 21 Wall. (U. S.) 456 (1874), 31 HARV. L. REV. 578; *Ashley v. Ryan*, 153 U. S. 436, 14 Sup. Ct. Rep. 865 (1894), 31 HARV. L. REV. 580; *Kansas City, M. & B. R. Co. v. Stiles*, 242 U. S. 111, 37 Sup. Ct. Rep. 58 (1916), 31 HARV. L. REV. 599. The same rule is assumed to apply to charter requirements of a police nature. *Louisville & N. R. R. Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. Rep. 714 (1896). But intimations that some or all of the justices have doubts as to whether charter provisions may inevitably be enforced under all future circumstances appear in *Interstate Consolidated Street Railway Co. v. Massachusetts*, 207 U. S. 79, 28 Sup. Ct. Rep. 26 (1907), *International & G. N. Ry. Co. v. Anderson County*, 246 U. S. 424, 38 Sup. Ct. Rep. 370 (1918), and *Detroit United Ry. Co. v. Detroit*, 39 Sup. Ct. Rep. 151 (1919).

<sup>65</sup> 188 U. S. 385, 23 Sup. Ct. Rep. 463 (1903).

the tax upon the franchise granted by it shall be measured by the value of all its property, wherever situated, of whatever nature, or from whatever source derived. It is a sufficient answer to this suggestion to say that no such condition was prescribed in the charter of the ferry company when it was granted and accepted. Nor does the taxing statute in question make it a condition of the ferry company's continuing to exercise its corporate powers that it shall pay a tax for its property having a *situs* in another State. There is no suggestion in the company's charter that the State would ever, in any form, tax its property having a *situs* in another State. We express no opinion as to the validity of such a condition if it had been inserted in the company's charter, or if it were now, in terms, prescribed by any statute. We decide nothing more than it is not competent for Kentucky, under the charter granted by it, and under the Constitution of the United States, to tax the franchise which its corporation, the ferry company, lawfully acquired from Indiana, and which franchise or incorporeal hereditament has its *situs*, for purposes of taxation, in Indiana."<sup>66</sup>

Owing to this disposition of the case, the court did not consider whether the tax complained of was an unlawful burden on interstate commerce.

Thus the court leaves open the question whether a state may tax domestic corporations as it pleases, provided it specifically bases its demand on its control over the continued existence of the corporation. This question was left open also by *Kansas City, M. & B. R. Co. v. Stiles*,<sup>67</sup> which was careful to adduce in support of an excise measured by total capital stock the fact that the law was in force when the corporation begged for birth.<sup>68</sup> The Supreme Court is still free to apply the doctrine of the *Western Union* case to domestic corporations which are not under some fairly clear contractual disability to object to the demand complained of. Whether it will do so is still uncertain. Whether it should do so is a question on which disagreement is not difficult. In the opinion of the writer, the less we have in our constitutional law of arbitrary power on the part of one state to deal as it will with affairs in other states, the better. If a tax is not constitutional by

<sup>66</sup> 188 U. S. 385, 23 Sup. Ct. Rep. 398 (1903).

<sup>67</sup> Note 64, *supra*.

<sup>68</sup> For example, the passage quoted in 31 HARV. L. REV. 599: "The railroads comprising this consolidation entered upon it with the Alabama statute before them and under its conditions, and, subject to constitutional objections as to its enforcement, they cannot be heard to complain of the terms under which they voluntarily invoked and received the grant of corporate existence from the state of Alabama."

reason of its own intrinsic merit or absence of sufficient demerit, there is something artificial and unwholesome in making it constitutional by endowing a state with a club which it may brandish at will. A tax on the extra-state income of a domestic corporation, if not good as an exercise of the taxing power, does not, as an original proposition, present a strong claim for recognition as an exercise of unlimited power over corporate creatures. It no longer fits the facts to treat the grant of a corporate charter as a bestowal of gracious favor by an act of high prerogative. In most instances it is today a mere record of a situation that by common consent is one demanded by the exigencies of normal business intercourse.<sup>69</sup>

Even if it is held that a state is subject to limitations in wielding the taxing power by way of the amendment of corporate charters, there still remains the question whether a tax on the total net income of a domestic corporation can not stand on its own legs. New York,<sup>70</sup> Wisconsin,<sup>71</sup> Montana,<sup>72</sup> Connecticut<sup>73</sup> and West Virginia<sup>74</sup> ask domestic corporations to pay only on the income earned from business within the state, or on the proportion of total income roughly estimated to have been earned within the state. Montana, *ex abundantia cautelae* or inspired by benevolence, excludes income from interstate commerce. Missouri<sup>75</sup> and Virginia,<sup>76</sup> however, take toll from all income no matter whence derived. As the profits from local or interstate commerce in other states increase, the revenues of the chartering state wax correspondingly. A historian might be reminded of a famous tea party, but we are thinking of the Constitution that followed after. Should the fact that the recipient of extra-state income is a domestic corporation justify a tax on that income? If such income is

<sup>69</sup> For elaboration of this position, to which the writer acknowledges his indebtedness, see Gerard Carl Henderson, "The Position of Foreign Corporations in American Constitutional Law," 2 HARVARD STUDIES IN JURISPRUDENCE, chap. X. While Mr. Henderson is dealing primarily with foreign corporations, his analysis, it is submitted, applies in considerable degree to domestic corporations as well.

<sup>70</sup> LAWS OF NEW YORK (1917), chap. 726, § 214. See note 91, *infra*, for reference to later amendment.

<sup>71</sup> See note 91, *infra*.

<sup>72</sup> LAWS OF MONTANA (1917), chap. 79.

<sup>73</sup> ACTS OF 1915, chap. 292; GENERAL STATUTES OF CONNECTICUT (Revision of 1918), chap. 73, §§ 1391, 1394.

<sup>74</sup> ACTS OF WEST VIRGINIA, Second Extraordinary Session, 1915, chap. 3.

<sup>75</sup> LAWS OF MISSOURI, 1917, 528. S. B. 415, § 7.

<sup>76</sup> 4 VIRGINIA CODE ANNOTATED (Supplement, 1916), 552.

from interstate commerce, is a tax thereon a regulation of that commerce "in a constitutional sense"?

In considering the question, let us assume that an individual may be taxed at his domicile on all net income which comes to his coffers, for so the law is likely to be. It does not accord with traditional views of the law to declare that a state's power over artificial persons of its own creation is less than that over man that is born of woman. Nevertheless it is submitted that the Supreme Court would do well so to hold with respect to the matter now under consideration. A corporation does not send its children to school; it does not vote for governor; it does not make a will; it does not marry or give in marriage. It is a business mechanism, and nothing more. It is a medium by which income is made and distributed. In so far as the process is local to the taxing state, the fruits thereof should be taxed. But there are several reasons which justify taxing an individual on his total net gain at the place where he makes his permanent home, that do not apply to a similar tax on a corporation. The individual is the terminus of the income. The termini of corporate income are often individuals in other states. The assimilation of a corporation to a natural person may for many purposes be a convenient fancy, but it should not blind us to essential differences that ought for other purposes to be controlling. The crucial question is whether business, as business, should be taxed elsewhere than where it is carried on. It is agreed that it should be taxed there. If it is taxed elsewhere as well, the burden is cumulative. When the corporate income passes on to the individuals who are in reality the corporation, it may be taxed again. Granting that some double taxation is necessary, or even desirable, it is possible to have too much of it. No more feasible spot for elision of double taxation can be found than the extra-state income of a corporation. The majority of the states which have thus far imposed taxes on the net income of corporations have discovered this for themselves. While the constitutionality of such reaping where a state has not sown is still undetermined, the Supreme Court would do well to consider the problem in all of its practical bearings, and not follow blindly some metaphysical conceptions of the nature of the corporate entity and questionably broad declarations as to the power of a state over its mystical being.

It has already been recognized that natural persons stand in a different relation to the state of their choice than does a corporation. From domiciled individuals a state may with propriety exact tribute from all their gains. No serious question is likely to arise as to the taxation at the domicil of the recipient of income from intangibles which are relieved of other burdens. If the property is taxable to the owner on the principle of *mobilia sequuntur personam*,<sup>77</sup> the income therefrom should receive similar treatment. But income from extra-state realty and from extra-state business may conceivably stand on a different footing. A tax on the former is not likely to raise any question under the commerce clause, even when the recipient is engaged in interstate commerce. His interstate business is not less profitable because he gets less from other sources. The only complaint against a tax on income from extra-state realty would be based on the denial of due process of law. The argument would be that, as the source of the income is beyond the jurisdiction, the income is also. *Pollock v. Farmers' Loan & Trust Co.*<sup>78</sup> would naturally be relied on to support such a contention, but the issue in that case can be distinguished from that now under consideration. The source of income may determine whether a tax thereon is a direct or indirect tax within the meaning of the fourth clause of Article I, section 9, of the federal Constitution,<sup>79</sup> and still not determine whether there is state jurisdiction within the limitations of the Fourteenth Amendment. An expression of Mr. Justice Holmes in the latest case on the taxation of intangibles to their owner at his domicil has possibilities of application to the taxation of income:

"The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the State

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<sup>77</sup> *Kirtland v. Hotchkiss*, 100 U. S. 491 (1879), is the leading case. See Charles E. Carpenter, "Jurisdiction over Debts for the Purpose of Administration, Garnishment, and Taxation," 31 HARV. L. REV. 905, for the most recent review of the authorities.

<sup>78</sup> 158 U. S. 601, 15 Sup. Ct. Rep. 912 (1895). This case held that a tax on the income from land is the same as a tax on the land itself from the standpoint of the question whether the tax is direct or indirect.

<sup>79</sup> "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." This provision is modified, in so far as its application to taxes on income, by the Sixteenth Amendment.

so chooses, may be measured more or less by reference to the riches of the person taxed." <sup>80</sup>

To this is added:

"It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. *Flint v. Stone Tracy Co.*, 220 U. S. 107, 146, 162 *et seq.* Whichever this tax technically may be, the authorities show that it must be sustained." <sup>81</sup>

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<sup>80</sup> *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 58, 38 Sup. Ct. Rep. 40 (1917).

<sup>81</sup> *Ibid.*, 59. This passage was quoted by Chief Justice Rugg of the Massachusetts supreme court in *Maguire v. Tax Commissioner*, 230 Mass. 503, 510-11, 120 N. E. 162 (1918), which sustained the power of Massachusetts to tax income received by a Massachusetts *cestui* from a Pennsylvania trust. "That reasoning," said the Chief Justice, "appears to us to be equally applicable to the facts here disclosed. . . . It is of no consequence in this aspect whether the tax is levied on income in truth received by the resident taxpayer from intangible property held for his benefit by a trustee resident in a sister State or on intangible property owned by the taxpayer but all in fact kept by him in a sister State. There is not apparent to us any difference in principle between the two cases" (230 Mass. 503, 511).

It is interesting to note that the Massachusetts court calls the income tax a property tax and justifies it as such, and then adds further justification which seems to proceed on the notion that it is tax on the person rather than one on property. Evidently the nomenclature is not of controlling importance. Substantial considerations of public policy appear to be the basis on which the taxability of residents on income from extra-state sources is sustained. The pertinent paragraphs of the opinion are as follows: "The *cestui que trust* has important legal rights respecting the trust fund which are personal to her. They are rights in the nature of property. They cannot be taken away from her by arbitrary or irrational procedure. They attach to her person wherever she goes. One of these is the right to receive the income. That is a property right. The income when received is property. The tax here in question is a property tax. *Tax Commissioner v. Putnam*, 227 Mass. 522, 531, 532. Whether it be regarded as a tax on the right of the *cestui que trust* or a tax on the income as received, in either event a property tax is permissible. Of necessity a tax on income requires time as an element in its calculation. It must be levied on the income received during a period of time. It is not necessary that income be reinvested before it can be taxed. It may be spent as received and yet be subject to taxation. The contention of the petitioner in principle reaches much further than to the facts of the present case. In its logical application and extension it apparently would render invalid income from annuities, certificates in partnerships, associations and trusts, and perhaps other sources, originating in sister States, and not having a place of business in this Commonwealth. Of course, if the principle is sound, its disturbing effect is no argument against its recognition and adoption. But a contention which in its results would seriously cripple the practical operation of any comprehensive system of State income taxation has no presumption in its favor and ought not to be adopted except because of compelling considerations. We perceive no such requirement as to the tax here in controversy. Whatever may be the effect of *Pollock*



The Stone Tracy case sustained the federal corporation tax of 1909 and sanctioned the inclusion of income from municipal bonds and other securities not directly taxable by the federal government. The distinction between the subject and the measure of the tax was the magician's wand used to wave away crucial difficulties and avoid analysis of pertinent issues. Referring to *Galveston, H. & S. A. R. Co. v. Texas*<sup>82</sup> and *Western Union Telegraph Co. v. Kansas*<sup>83</sup> Mr. Justice Day declared authoritatively:

"There is nothing in these cases contrary, as we shall have occasion to see, to the former rulings of this court which hold that where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the State or Nation, the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself non-taxable. The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property."<sup>84</sup>

Whether this distinction survived the *Western Union* case in sound logic we need not pause to inquire. It is enough for our present purpose that it survived that case in the mind of the Supreme Court. It is still available as an ever-present help in time of logical trouble. It is quite as applicable to a state tax on the privilege of its citizens to be domiciled within the jurisdiction as to a federal tax on doing business in corporate form. If it seems wise to measure a personal income tax by all income, from whatever

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*v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 581; s. c. 158 U. S. 601, and *Brushaber v. Union Pacific Railroad*, 240 U. S. 1, 16, 17, upon the nature of the tax here in question under the Constitution of the United States, no binding decision appears to us to require that this tax be declared invalid. There is nothing inconsistent with the conclusion here reached in *Walker v. Treasurer & Receiver General*, 221 Mass. 600.

"The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. It is founded upon the protection afforded to the recipient of the income by the government of the Commonwealth of his residence in his person, in his right to receive the income, and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and in freedom and of being protected by law. It gives security to life, liberty, and the other privileges of dwelling in a civilized community. It exacts in return a contribution to the support of that government measured by and based upon the income, in the fruition of which it defends him from unjust interference" (*Ibid.* 512-13).

<sup>82</sup> 210 U. S. 217, 28 Sup. Ct. Rep. 638 (1908), 32 HARV. L. REV. 385 ff.

<sup>83</sup> 216 U. S. 1, 30 Sup. Ct. Rep. 190 (1910), 31 HARV. L. REV. 584 ff.

<sup>84</sup> 220 U. S. 107, 163-64, 31 Sup. Ct. Rep. 342 (1911).

source derived, the Supreme Court has at its right hand the necessary formula to support the exaction. If it seems unwise, the *Western Union* case and those following it are within easy reach of the left hand to find constitutional defects.

It is to be anticipated that the right hand will be chosen for dealing with income from extra-state realty. If the mortgagee of such realty may be taxed at his domicile on the obligation of the mortgagor,<sup>85</sup> it is hard to see why the owner should not make a contribution from his rent. A more serious question arises in respect to income from extra-state interstate commerce. Unless all signs fail, such income will be held taxable where the commerce is carried on.<sup>86</sup> Ought the same income from interstate commerce to be taxed by two states on different conceptions as to what is being taxed? It is too late to raise the general question whether bi-state double taxation should be allowed at all. The Supreme Court has not seen its way to declare that such double taxation is inconsistent with the Constitution.<sup>87</sup> But it has several times scotched double taxation of interstate commerce by a single state.<sup>88</sup> In these instances, however, the court was not dealing with taxation that fell on all business and all persons alike. It had before it the possibility or actuality of heavier burdens on interstate commerce than on other business. Where this possibility is foreclosed by general state taxation on all personal incomes received by citizens and on all business incomes from business within the territory, there is strong ground for the contention that interstate commerce should not be subsidized by exemption from burdens that other business must bear. Such a contention seems in substantial accord with the analysis of the results reviewed in this study.

Where power over the person is lacking, and an income tax must depend for its validity on power over the income itself, it is clear that extra-state income must be excluded from the computation.<sup>89</sup> Without doubt the Supreme Court will soon be called upon

<sup>85</sup> *Kirtland v. Hotchkiss*, note 67, *supra*.

<sup>86</sup> See *supra*, pages 635-40.

<sup>87</sup> The cases are reviewed in Mr. Carpenter's article cited in note 77, *supra*.

<sup>88</sup> *Fargo v. Michigan*, 121 U. S. 230, 7 Sup. Ct. Rep. 857 (1887); *Western Union Telegraph Co. v. Texas*, 105 U. S. 460 (1881); *Galveston, H. & S. A. Ry. Co. v. Texas*, 210 U. S. 217, 28 Sup. Ct. Rep. 638 (1908), 32 HARV. L. REV. 385 *ff.*; *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298, 32 Sup. Ct. Rep. 218 (1912).

<sup>89</sup> This is the rule as to chattels, even when there is power over the owner. *Union*

to solve some pretty problems with respect to the so-called "situs" of income. Nonresidents and foreign corporations will seek support from the Fourteenth Amendment and the commerce clause for complaints that states have allocated to themselves more income than belongs to them. When all the transactions out of which the income arises are in a single state, the disputes will not present great difficulty. But when the income-producing activities straddle two states, and the acts in neither alone would yield the income, there is room for perplexity. The importance of the problem justifies a review of two cases which bear upon it, though neither touches it precisely, since in one the taxpayer was a domestic corporation, and in the other there was no element of interstate commerce.

The first case is the decision of the Wisconsin supreme court in

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*Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 Sup. Ct. Rep. 36 (1905); *Delaware, L. & W. R. R. Co. v. Pennsylvania*, 198 U. S. 341, 25 Sup. Ct. Rep. 669 (1905). It is also the rule as to such an incorporeal hereditament as a franchise to run a ferry. *Louisville & Jeffersonville Ferry Co. v. Kentucky*, 188 U. S. 385, 23 Sup. Ct. Rep. 463 (1903). The opinion in the *Union Refrigerator* case says that it has always been understood that the rule is the same as to extra-state realty. In all of the cases sustaining the taxation of choses in action, there was either power over the creditor or over some economic value behind the chose in action, or over some incidents thereof.

The following excerpts from Mr. Justice Brown's opinion in the *Union Refrigerator* case are clearly applicable, *mutatis mutandis*, to income taxation:

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in addition to the value of such property, or in the creation and maintenance of public conveniences in which he shares. . . . If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law. . . .

"The argument against the taxability of land within the jurisdiction of another State applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing State, but does not and cannot receive protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever be the rights of the State with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived." 199 U. S. 194, 202-04.

There can be no doubt whatever that power over and protection of the recipient or the sources of income will be held essential to jurisdiction to levy an income tax.

*United States Glue Co. v. Oak Creek*<sup>90</sup> — the same controversy which presented the income-tax problem to the United States Supreme Court. The Wisconsin law aimed to tax no "business income" that was not earned within the state, whether received by residents or non-residents.<sup>91</sup> The United States Glue Company did not contest before the state court the taxability of its income from rentals and intangibles,<sup>92</sup> nor does the case state the sources from which such income was derived. The matter in controversy was the income from sales. With the contention that such income was not taxable because of the commerce clause, we are no

<sup>90</sup> 161 Wis. 211, 153 N. W. 241 (1915).

<sup>91</sup> WISCONSIN STATUTES (1915), chap. 48 a, § 1087 m-2 (3). "With respect to other income, persons engaged in business within and without the state shall be taxed only upon such income as is derived from business transacted and property located within the state, which may be determined by an allocation and separate accounting for such income when made in form and manner prescribed by the tax commission, but otherwise shall be determined in the manner specified in subsection (e) of subsection 7 of section 1770 b of the statutes, as far as applicable." The section referred to prescribed a form of "unit rule," which applied the ratio between the sum of the gross business in dollars plus the value of the property in dollars within the state to an aggregate of the same two elements in all the states in which business was done.

New York has a somewhat more complicated rule of apportionment for its corporate income tax. In getting its ratio it takes account of the aggregate of the average monthly value of real property, chattels, bills and accounts receivable, and stocks of other corporations within the state and the aggregate of the same elements in all the states. LAWS OF NEW YORK, 1918, chap. 417, § 214 (vol. 2, 1262); BIRDSEYE'S CONSOLIDATED LAWS OF NEW YORK, 1918 Supplement, 661.

In the Wisconsin cases which have been found, the ratio method was not employed. In the *Oak Creek* case, specific consideration was given to the income from various sources. In *State ex rel. Brenk v. Widule*, 161 Wis. 396, 154 N. W. 696 (1915), an inheritance of foreign realty was held to be from sources without the state, and therefore the court did not decide whether it was "income" within the meaning of the statute. In *State ex rel. Arpin v. Eberhardt*, 158 Wis. 20, 147 N. W. 1016 (1914), income received by a resident from a partnership whose business and property was wholly without the state was held not taxable under the statute. In commenting on the statute, Judge Barnes said:

"Certain considerations occur to us which might have induced the legislature to refrain from taxing income derived from sources without the state except as specified. It was no doubt the desire of the legislature to prevent the loan or investment of moneys without the state for the purpose of receiving a fixed return for the investment made so as to avoid the payment of a tax on this species of property. The property of this firm was taxable in the state where located. If incomes were taxed in that state, the income would also, in all probability, be taxed there. If the income were taxed here, it might be doubly taxed. Conceding the right to impose such double taxation, the legislature might well feel that it would not be just to do so. Other considerations might be mentioned, but those suggested should suffice." 158 Wis. 20, 23-24.

<sup>92</sup> 161 Wis. 211, 215 (1915).

longer concerned. Our present interest is in the objection that the income from some of these sales was not derived from business transacted and property located within the state, and so not within the terms of the Wisconsin statute.

The income covered by these objections included (1) that from goods sold and delivered from the Wisconsin factory to persons outside the state; (2) that from products of the Wisconsin factory shipped to extra-state branch houses and from there sold to customers outside Wisconsin; and (3) that from goods bought without the state, shipped to extra-state branches either directly or by way of the Wisconsin factory, and then sold and delivered from the extra-state branches to extra-state customers.<sup>83</sup> As to this last class of business the Wisconsin court held that the income therefrom was not from business or property within Wisconsin. But Wisconsin was declared to be the source of all income from sales of products of the Wisconsin factory including those of goods disposed of from the branch houses in other states. After saying that "the place of sale of such products does not change the place of business from this to the state where the goods are sold," <sup>84</sup> Judge Siebecker continued:

"The transactions involved in producing the products at the plant at Carrollville and disposing of them through intra-state or interstate transactions are in substance and effect transacting business in this state, and the shipping and delivery of such goods on sales made at home or abroad, from either the factory or branch houses to which they had been shipped before sale, are no more than incidents in transacting the business of supplying the articles to customers in their finished state. We cannot, in the light of the nature of the general conduct of the business, assent to the claim that the shipping and delivery of goods, manufactured at the plant, from branch houses are the controlling elements of such transactions and that they give such business a situs without the state. The manufacture, the management, and the conduct of the business at the home office are the controlling features in the process of disposing of the article produced at the factory and constitute the source out of which the income issues and give it a situs within the state under the Income Tax Law." <sup>85</sup>

This view of the "situs" of income invites examination. If the professed basis of the Wisconsin tax on business income is not

<sup>83</sup> 161 Wis. 213-14, 153 N. W. 241 (1915).

<sup>84</sup> *Ibid.*, 218.

<sup>85</sup> *Ibid.*

the subjection of the recipient to the power of Wisconsin, but the actual earning of the income in Wisconsin, Judge Siebecker dismisses too cavalierly the alleged importance of the transactions without the state. The sales in another state to customers in that state are taxable in that jurisdiction as intra-state sales.<sup>96</sup> If the United States Glue Company is a wholesaler in Chicago as well as a manufacturer at Carrollville, Wisconsin, it must be subject to an Illinois income tax on all its Illinois business, unless the Supreme Court is going to insist that power over the person is the only basis on which income taxes may be levied. Even such insistence would not forbid Illinois taxation of Illinois intra-state sales. And if income from interstate commerce carried on by non-residents or by foreign corporations may be included in a state-wide tax on business income, Illinois may lay a tax on income from sales by Illinois wholesalers to customers in other states, even though the sales are of goods manufactured by the wholesaler at a Wisconsin factory. Plainly enough the manufacture, the wholesale establishment and the work of securing customers and of collecting bills are all essential to the making of a profit. No one of these three elements in the combined enterprise is a mere incident. A portion of the net income is due to each element. If sufficiently exquisite book-keeping were possible, each state should take only that portion of the income which is contributed by the acts done within its own borders. Judge Siebecker considers only two extreme alternatives, both of which miss the ideal solution.

It may well be that the ideal solution is not attainable in practice. But this is no reason why it should be neglected in considering what is the best approximation that is feasible. Though manufacturing is for profit, the profit appears only in income from sales. The price which the product brings depends only in part on the excellence of raw materials and of shop management. The need or susceptibility of customers, the skill of the sales force, the wisdom in extending credit and energy in collecting accounts are not mere incidents, as Judge Siebecker would have us believe.<sup>97</sup> Indeed they may in many instances be "controlling" in the

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<sup>96</sup> *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411, 8 Sup. Ct. Rep. 1127 (1888).

<sup>97</sup> Judge Siebecker recognizes that these elements are of practical importance (161 Wis. 211, 217), but calls them but "incidents" from a legal standpoint.

sense that they are the factors that make the difference between profit and loss. These factors in interstate sales all occur outside the state of manufacture. The manufacture without the customer would be as vain as the customer without the goods to sell him. The state where the solicitation is done and where accounts must be collected offers to the business the protection of its police officials and its courts. If net income from interstate commerce is no longer to be exempt from state taxation, and if each state where income is earned is to be allowed to levy on that income irrespective of the domicil or legal character of the recipient, it is artificial to insist that either the manufacture or the securing of a customer is a mere "incident" or that either is "controlling," if controlling means of exclusive importance. Judge Siebecker's insistence that the extra-Wisconsin activities of the United States Glue Company were not entitled to legal consideration would have been more compelling if it had been based on the power of Wisconsin over its own corporate creatures. This ground, however, was not open to him under the Wisconsin statute. It does not appear to have been urged before the Supreme Court that the interpretation put upon the statute as to "situs" of the income in question raised an issue under the commerce clause. The Supreme Court might refuse to consider such a question in a case where state power over the recipient of income furnished sufficient justification for the result sanctioned by the state court. But it may be expected that other disputes will bring before the Supreme Court some important constitutional issues over the situs of income.

Another phase of this same problem appears in *Shaffer v. Howard*,<sup>98</sup> decided by the federal district court for the Eastern District of Oklahoma. The case involved the application of the Oklahoma income tax to the income of non-residents. Mr. Shaffer was domiciled in Chicago and owned and operated oil wells in Oklahoma. He contended that none of the income from these wells was taxable by Oklahoma, because the state had no power over him personally, and the income was "made up from two inseparable elements — the property and the owner's management and intelligence — and the latter of these is outside the state."<sup>99</sup> To this, Judge Cotteral answered:

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<sup>98</sup> 250 Fed. 873 (1918).

<sup>99</sup> 250 Fed. 873, 874 (1918).

"The element of personal ability or services in acquiring the income may be disregarded. It enters into all income and causes the returns from an occupation. But it has not been deemed important in the taxation of property, and need not be deducted from an assessment."<sup>100</sup>

Judge Stone considered the contention more at length. He concedes *arguendo* the contention of the complainant that "it is the recipient of the income that is taxed, not his property,"<sup>101</sup> and answers it by saying:

"It does not necessarily follow from this definition that the plaintiff is subject to income tax only in the state of his residence. It means, rather, that he is subject to income taxation only in those jurisdictions which protect him in the production, creation, receipt, and enjoyment of his income. If he lives in Illinois, and has in Oklahoma the property or the business from which his income flows, does not the latter state truly protect him in the privilege of producing, creating, receiving, and enjoying that income when it permits and protects his business from which the income flows? How is that affected by his residence?"<sup>102</sup>

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<sup>100</sup> 250 Fed. 883 (1918).

<sup>101</sup> 250 Fed. 873, 875 (1918). This statement of the complainant's contention is taken from a quotation in his brief from *State ex rel. Sallie F. Moon Co. v. Wisconsin Tax Commission*, 166 Wis. 287, 163 N. W. 639 (1917). Judge Campbell, in his dissenting opinion in *Shaffer v. Howard*, relies on this statement of the Wisconsin court and on another from the same tribunal in *Manitowoc Gas Co. v. Wisconsin Tax Commission*, 161 Wis. 111, 152 N. W. 848 (1915).

The Moon case held that income received by a resident stockholder after the effective date of the income tax law was taxable, although its economic source was a surplus in the hands of the corporation prior to that date.

The Manitowoc Gas case held that interest due a non-resident on bonds issued by a domestic corporation was not income "derived from sources within this state" within the meaning of the Wisconsin statute, since "the law levying an income tax upon nonresidents 'upon such income as is derived from sources within the state or within its jurisdiction' must be construed to mean such income as issues directly from property or business located within the state, and not income from loans made therein, though, as here, secured by a trust deed upon property situated within the state" (161 Wis. 111, 115). The inapplicability of the analysis of the Wisconsin tax in this opinion to the problem involved in *Shaffer v. Howard* is evident from an earlier statement of the Wisconsin court in the same case, which reads as follows: "If an income be taxed, the recipient thereof must have a domicile within the state or the property or business out of which the income issues must be situated within the state so that the income may be said to have a situs therein" (161 Wis. 111, 114-15). This deprives the contention of Mr. Shaffer against the Oklahoma tax of any support from the Wisconsin court's interpretation of the basis of the Wisconsin tax. That tax was partly on persons, and partly on income, irrespective of the recipient.

<sup>102</sup> 250 Fed. 873, 875-76 (1918).



In further elaboration of the problem of bi-state income, the learned judge continues:

"Both the property in Oklahoma and the intelligence in Illinois contributed to this income. Each was necessary to the result. Each had protection from the state in which it was. It is impossible to separate the two elements for taxation purposes. It is impossible, if material, to determine which was most potent in the result. Can either state be told it cannot be compensated for its protection of a necessary component element of this income, or that it cannot measure such compensation by that income? If, through accident or design, an individual dwells in one state, while his business is in part or wholly located in other states, so that he needs, commands, and receives the protection of several states, can his income therefrom escape imposition? It may be true that the state which protects the person of the one who creates, receives or enjoys an income may require of him therefor a tax measured by his ability to pay from his entire income. That is no reason why the state which protects the business which contributes to his income may not also demand, as pay for that protection, a tax measured by that part of his income which came from that business. If in the one case the state of residence can tax the right to create, receive, and enjoy an income, why cannot another state tax his right to create and receive an income from business within its borders?"<sup>103</sup>

This seems to be said by way of answer to the complainant's argument rather than as the analysis put upon an income tax by the writer of the opinion. For Judge Stone follows it with the paragraph:

"A tax upon an income of the instant character (from a business) is directed at neither the person who receives nor the property from which the income arises, but at the privilege of making, producing, creating, receiving, and enjoying the income itself. The right to lay such tax depends upon the protection of the person who receives or of the business which helps create that income."<sup>104</sup>

Here seems to be a dual conception of an income tax, though the writer insists that even upon the complainant's conception that the tax is on the recipient, there is jurisdiction over an absent recipient based on the protection of interests of the recipient even if these interests be not those of his body or his castle. It is pointed out that the statute does not seek to create a personal liability

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<sup>103</sup> 250 Fed. 876 (1918).

<sup>104</sup> *Ibid.*

against non-residents for the payment of the tax, but confines itself to creating a lien on the sources of the income taxed. But, to Judge Stone, direct power of compulsion over the person is not a prerequisite to the levy of a personal tax, provided other essentials are present. On this point he says:

"There is nothing new in this conception of a nonresident being taxed for rights or privileges he exercises under the protection of another state. Inheritance taxes are illustrations. *Mager v. Grima*, 8 How. 490, 12 L. Ed. 1168; *Scholey v. Rew*, 23 Wall. 331, 23 L. Ed. 99. Such a tax is levied against the nonresident as well as the resident because of his inheritance — the state protects him in that privilege. Occupation or business taxes are also illustrative. And this would be so because the state of Oklahoma permits him to carry on his business within the state, and protects him therein, irrespective of whether he lives within or without the state, or manages the business from within or without the state. When he can be properly taxed for the privilege of inheriting the property or carrying on a business within another state, why cannot he be taxed upon an income he derives from business within the state, when a tax upon such an income as this is a levy on the privilege of producing, creating, receiving and enjoying an income? It is true the tax on the income is not upon the business conducted, but it is also true that the income springs therefrom, and, following the situs thereof, as the child takes legally the residence of the parent, it carries the right of taxation with it."<sup>106</sup>

This says that a person is something more than a physical corpus. From the standpoint of legal relations, a person is the focus of many interests, and the person is *pro tanto* where any one of his interests is. It is with relations that the law has to deal, and the relations of a person may radiate to portions of the globe which his body never visits. Such a notion may be criticized as metaphysical, but it is not on that account an anomaly in the law. And, though metaphysical, it may well contain more of substantial realism than a view which sees in a person nothing but what is encased in a suit of clothes. Judge Stone does not rest with this justification for the assessment of income taxes on nonresidents. He uses it to meet Mr. Shaffer on his own ground, and then advances to another position. His analysis of the considerations that should control the legal concept of situs is well worth quoting:

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<sup>106</sup> 250 Fed. 876-77 (1918).

"Such an income of a nonresident is taxable not only because it fits in with the theory of the right of all taxation, *i. e.*, protection, but for another reason. The situs of things and choses in action and legal rights rests in many cases upon a legal fiction. The necessity of avoiding confusion, inconvenience or injustice arises in some instance, and the law settles upon a so-called situs. Familiar illustrations are: A married woman ordinarily partakes of her husband's nationality and domicile; the law of domicile controls the descent of personalty; and many others to be found in the realm of private international law. These questions arise where there are conflicting claims of jurisdiction. Their settlement depends often, if not usually, upon broad considerations of public policy and justice. One main test in determining the public policy and justice of a situation is to examine the possible or probable effect of a particular holding. If the above view of this tax taken by the court does not prevail, there will result the possibility of avoidance of state income taxes. This latter through the possibility of taking up residence in a state with little or no taxation of that sort. Income taxation is too valuable and important a method of exercising the sovereign power of taxation to risk any diminution through a choice of residence at the hands of the party taxed who at the same time maintains his property and business as before. The public good requires its preservation in its entirety."<sup>106</sup>

There can be little doubt that one or the other or both of these views of Judge Stone will prevail to the extent of furnishing sufficient justification for state taxation of income from business within its borders, irrespective of the domicil or character of the ultimate recipient of that income.<sup>107</sup> It is most unlikely that any non-

<sup>106</sup> 250 Fed. 877 (1918).

<sup>107</sup> This prophecy is ventured, notwithstanding the dissent of Judge Campbell in *Shaffer v. Howard*. Judge Campbell relies on the following statement of Mr. Justice Field in *State Tax on Foreign-Held Bonds*, 15 Wall. (82 U. S.) 300, 319 (1872):

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways."

On this as a premise, Judge Campbell insists that the Oklahoma income tax on residents is a tax on persons, and the tax on non-residents is either on persons, property or business. As a personal tax it cannot be sustained because there is no jurisdiction over the person of non-residents. As a tax on business or on property, it cannot be sustained because it selects for discrimination the property or the business of non-residents and thereby denies them the equal protection of the laws and the privileges and immunities of citizens of the several states.

resident will be given any deduction for the contribution of his intelligence to the creation of the income taxed. His intelligence is a factor only as it is applied, and it is applied where the business operations take place. Yet there still remains the inquiry whether extra-state operations should not, whenever feasible, be given weight in determining what portion of the result of bi-state activi-

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The weakness of the argument here is in the assertion that for the purpose of determining the validity of a tax on the property or business of nonresidents, "it must be considered as standing alone" (250 Fed. 873, 889). This is to say that it cannot be considered that residents are also taxed on their property and business within the state, when they are taxed on their income from that property and business and on other income besides. The argument is a flagrant example of the evil of reliance on differences in nomenclature to the disregard of similarity of substance.

Whether a state should tax nonresidents on other income than that from business within its borders is open to doubt. The economic values behind income from rentals, from interest on bonds and from dividends on stock are within the state and are taxable by the state through appropriate methods. As to land within the borders there has never been any question. As to bonds secured by property within the state, *State Tax on Foreign-Held Bonds*, *supra*, on which Judge Campbell relied, must be regarded as modified by *Savings & Loan Society v. Multnomah County*, note 109, *infra*, to the extent of permitting a state to declare that such bonds are an interest in the property by which they are secured and taxable as such an interest. So the stock of domestic corporations owned by nonresidents may be taxed. *Corry v. Baltimore*, 196 U. S. 466, 25 Sup. Ct. Rep. 297 (1905). On the other hand ordinary debts due from residents to nonresidents are not taxable except when there are special circumstances, as in *Metropolitan Life Insurance Co. v. New Orleans*, 205 U. S. 395, 27 Sup. Ct. Rep. 499 (1907), and cases therein cited.

In so far as a state tax on income is in lieu of actual or possible taxes on the sources of such income, there would seem to be no constitutional objection to a tax on income derived by nonresidents from such sources. When, however, such a tax on the income of nonresidents is in addition to taxes on the sources of such income, or is on income from non-taxable sources, a different question is presented. The *Manitowoc Gas* case, note 101, *supra*, shows the disinclination of the Wisconsin court to permit the taxation of income due nonresidents from bonds issued by a domestic corporation. The decision professes to be based on an interpretation of the statute, but the construction is strained, and the decision is plainly influenced by a notion that an interpretation permitting such taxation would make the statute unconstitutional. There can be little dispute that a state ought not to tax nonresidents on both the income and the sources of income or on income from non-taxable sources, with the possible exception of the case where the combined tax on the source and on the income is not greater than customary taxation on the source alone. Whether the considerations which should induce self-restraint on the part of the state are sufficiently compelling to warrant coercion on the part of the Supreme Court is more debatable, but in view of the fact that all income is likely to be held taxable to an owner at his domicile, there seems good reason to insist that other states from which such income is derived should be restrained from adding more than one additional tax. We cannot hope to avoid double taxation by the action of different states, but so far as practicable the line should be drawn at this point.

ties should be allocated to each of the two states. It does not seem wholly equitable that, when goods are manufactured in one state and sold in another, the state of origin should receive all the benefit and the state of destination none. Once it is recognized that net income from interstate commerce is a proper subject of state taxation, lawmakers should strive to devise some method of apportionment whereby income that is earned partly in one state and partly in another shall be fairly divided between the two.<sup>108</sup> Those who enjoy a market place other than the state of their domicil or of their manufacturing may reasonably be required to contribute to the governmental expenses of that market place, for some of those expenses are likely to redound to their benefit.

These considerations are doubtless more pertinent for legislators than for courts. Neither the Fourteenth Amendment nor the commerce clause prescribes a perfect system of taxation. No such system has thus far been evolved by the ingenuity of man. The courts can at best forbid only the most obvious inequities. Whatever rules of the apportionment of bi-state income may ultimately be sanctioned by the Supreme Court will operate in some particulars to the advantage of the state which suffers from their other effects. Each state is a state of origin of goods sold to its neighbors and a state of consumption of goods made by its neighbors. If Illinois is not allowed to get any of the proceeds of goods sold to her citizens from a factory in Wisconsin, she will be recompensed by not having to make deductions from the proceeds of goods sent from her factories to dwellers in Wisconsin. We can hardly look forward to an era when double taxation shall cease to be. The same hydra-headed conceptions which have permitted the economic value represented by intangibles to be reached by one state on one theory and by another state on another theory<sup>109</sup> will be likely to produce the same results in the taxation of income. The most we can aim for is the most satisfactory compromise and adjustment possible in a mundane world peopled and managed by finite individuals.

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<sup>108</sup> The various types of unit rule will tend to make such an apportionment when the business in the several states is manufacture and sales and each state in which business is done is a market place for goods from other states and a place of origin for goods sent to other states.

<sup>109</sup> Compare *Kirtland v. Hotchkiss*, note 77, *supra*, with *Savings & Loan Society v. Multnomah County*, 169 U. S. 421, 18 Sup. Ct. Rep. 392 (1898).

An important step in this adjustment has been taken by a committee of the National Tax Association, of which Professor Bullock of Harvard University is chairman. This committee has drafted a plan of a model system of state and local taxation<sup>110</sup> which, if adopted by all the states, would go far towards remedying many of the evils now incident to the haphazard and contradictory tax systems of the sister states. The recommendations concern us here only in so far as they apply to income taxation. In brief the proposal is to divide income taxation sharply into a personal income tax and a business tax. In the taxation of personal incomes, the source of the income is to be neglected except when the federal Constitution forbids, as it probably still does in the case of income from the national government.<sup>111</sup> In addition to the personal income tax, there shall be a business tax on the net income derived from business carried on within the jurisdiction. Extra-state income will thus be taxed only to the ultimate human recipient at his domicil. Business income, as such, will be taxed only where the income is earned. The business tax is to be in lieu of the various other demands now made on corporations by way of excises, franchise taxes and the like. For special reasons some other method of fixing the amount of the business tax may be substituted for the reference to the net income.

These proposals, it is evident, will not do away with double taxation; but they will greatly minimize its inequities and other evils. There must continue to be two conceptions underlying an income tax: the earning of the income, and the enjoyment of the fruits thereof; the business, and the person. These two conceptions must be driven together in harness and under harmonious, if not unified, control. Only by securing the adoption of substantially similar plans by all the states to which the business of the nation penetrates can we avoid the complexities and diversities which now beset us. The Supreme Court can only fix the outside limits of decency. Within those limits there is need for all the intelligence that the states can muster to substitute a reasonable degree of

<sup>110</sup> Pamphlet issued by National Tax Association, 195 Broadway, New York City. The pamphlet will be contained in the PROCEEDINGS of the Association for 1918.

<sup>111</sup> In the next and concluding instalment of this series, consideration will be given to the inferences to be drawn from the opinion of Mr. Justice Pitney in the *Oak Creek* case, note 2, *supra*, as to the possibility of an abandonment of the doctrine that a state income tax cannot include the income from the federal government.

harmony for the chaos that is now characteristic of the aggregate of the fiscal systems of the several states.

### III. *Taxes Not Measured by Income*

In his dissenting opinion in *Western Union Telegraph Co. v. Kansas*,<sup>112</sup> Mr. Justice Holmes remarked:

"If after this decision, the State of Kansas, without giving any reason, sees fit simply to prohibit the Western Union Telegraph Company from doing any more local business there or from doing local business until it has paid \$20,100, I shall be curious to see upon what ground that legislation will be assailed." <sup>113</sup>

This curiosity cannot be said to have been completely satisfied by any of the decisions rendered thus far. In no case has a specific tax on local business been held to be a regulation of interstate commerce or a denial of due process of law. Yet, on the whole, the cases appear to negative the existence of an unlimited power to impose specific taxes on the local business of a concern that is also engaged in interstate commerce.

There are, indeed, intimations to the contrary in the decisions prior to the Western Union case. In *Postal Telegraph Cable Co. v. Charleston*,<sup>114</sup> which sustained a municipal tax of \$500 on the local business of a telegraph company, Mr. Justice Shiras declared:

"If business done wholly within a State is within the taxing power of the State, the courts of the United States cannot review or correct the action of the State in the exercise of that power." <sup>115</sup>

In *Osborne v. Florida*,<sup>116</sup> which sanctioned a state statute imposing occupation taxes graded according to the number of inhabitants in the cities and towns in which the occupation was carried on, which statute the state court had construed as applicable only to local business, Mr. Justice Peckham observed:

"So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the state statute." <sup>117</sup>

<sup>112</sup> 216 U. S. 1, 30 Sup. Ct. Rep. 190 (1910).

<sup>113</sup> *Ibid.*, 54-55.

<sup>114</sup> 153 U. S. 692, 14 Sup. Ct. Rep. 1094 (1894).

<sup>115</sup> *Ibid.*, 699-700.

<sup>116</sup> 164 U. S. 650, 17 Sup. Ct. Rep. 214 (1897).

<sup>117</sup> *Ibid.*, 655.

*Pullman Co. v. Adams*<sup>118</sup> and *Allen v. Pullman's Palace Car Co.*<sup>119</sup> have already been reviewed in the section dealing with taxes on privileges.<sup>120</sup> The judges here appeared to be of the opinion that no tax on the local business could be a burden on the interstate business so long as the company was free to abandon the local business. These two cases were strongly relied on by the dissent in the *Western Union* case. Mr. Justice Harlan distinguished them on the ground that they involved no device to reach interstate commerce or property beyond the state in the guise of a tax on local business,<sup>121</sup> thereby implying that such a device would henceforth receive the disapprobation of the court.

Two other cases prior to the *Western Union* case call for consideration. *Kehrer v. Stewart*<sup>122</sup> approved of a state statute "which provided that there should be assessed and collected 'upon all agents of packing houses doing business in this State, two hundred dollars in each county where said business is carried on.'"<sup>123</sup> The State court had construed the statute to be applicable only to local business. It was conceded that most of the business was interstate in character, though the exact proportion of each was not shown. In *Osborne v. Florida*,<sup>124</sup> ninety-five percent of the business was interstate. This fact is referred to by Mr. Justice Brown in the *Kehrer* case and declared to be immaterial. The attitude of the court on the general question is expressed as follows:

"If the amount of the domestic business were purely nominal, as, for instance, if the consignee of a shipment made in Chicago upon an order filled there, refused the goods shipped, and the only way of disposing of them was by sales at Atlanta, this might be held to be strictly incidental to an interstate business, and in reality a part of it, as we held in *Crutcher v. Kentucky*, 141 U. S. 47; but if the agent carried on a definite, though a minor, part of his business in the State by sales of meat there, he would not escape the payment of the tax, since the greater or less magnitude of the business cuts no figure in the imposition of the tax. There could be no doubt whatever that, if the agent carried on his interstate and domestic business in two distinct establishments, one would be subject

<sup>118</sup> 189 U. S. 420, 23 Sup. Ct. Rep. 494 (1903).

<sup>119</sup> 191 U. S. 171, 24 Sup. Ct. Rep. 39 (1903).

<sup>120</sup> 31 HARV. L. REV. 582-83. See also 32 HARV. L. REV. 405-06.

<sup>121</sup> 31 HARV. L. REV. 592-93.

<sup>122</sup> 197 U. S. 60, 25 Sup. Ct. Rep. 403 (1905).

<sup>123</sup> *Ibid.*, 61.

<sup>124</sup> Note 116, *supra*.



and the other would not be subject to the tax, and in our view it makes no difference that the two branches of the business are carried on in the same establishment. The burden of proof was clearly upon the plaintiff to show that the domestic business was a mere incident to the interstate business."<sup>126</sup>

Later, in dismissing objections urged under the equal-protection clause, Mr. Justice Brown declared:

"What the necessity is for such a tax, and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the State legislature. So long as there is no discrimination against citizens of other States, the amount and necessity of the tax are not open to criticism here."<sup>126</sup>

The Kehrler case was followed in *Armour Packing Co. v. Lacy*,<sup>127</sup> in which the tax was \$100 in each county and the fact appeared that the company did a large local business.

These cases undoubtedly justify the curiosity betrayed by Mr. Justice Holmes in his Western Union dissent. The opportunity to satisfy that curiosity was presented to the Supreme Court in *Williams v. Talladega*,<sup>128</sup> but it was not grasped. A city ordinance imposing a tax of \$100 was held void because it fell indiscriminately on all intra-state business including that done for the federal government. With respect to the contention material to our present purpose, Mr. Justice Day declared:

"It is further contended that the tax is unreasonable and unjust because of its effect upon interstate business. The reasonableness of the ordinance, unless some Federal right set up and claimed is violated, is a matter for the State to determine. It is contended that the result of the tax upon the intra-state business conducted at a loss is to impose a burden upon the other business of the company, and is therefore void. The Supreme Court of Alabama, however, reached the conclusion that the attempted test for eleven months, showing a loss of eighty-six cents, is not a sufficiently accurate representation of the business of the company conducted at Talladega to render the tax void. With this view we agree, and we are not satisfied that the tax is such as to impose a burden upon interstate commerce, and therefore make it subject to attack as a denial of Federal right."<sup>129</sup>

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<sup>126</sup> 197 U. S. 60, 69, 25 Sup. Ct. Rep. 403 (1905).

<sup>128</sup> *Ibid.*, 70.

<sup>127</sup> 200 U. S. 226, 26 Sup. Ct. Rep. 232 (1906).

<sup>128</sup> 226 U. S. 404, 33 Sup. Ct. Rep. 116 (1912).

<sup>129</sup> *Ibid.*, 416-17.

Here is the possible implication that a tax on local business may be so large or so disproportionate to the business taxed as to be regarded as a device for reaching the interstate business. At any rate, the court had a chance to declare that the tax could not be a regulation of interstate commerce, whatever the facts might be as to the profitability of local business. By failing to do so, it invites other complainants to try again if they have a stronger case to support their claim. A similar invitation was extended in *Ohio Tax Cases*<sup>130</sup> considered in the preceding instalment of this discussion.<sup>131</sup>

The case which gives sufficient warrant for the belief that there is a limit to the power of the state to impose specific taxes on local business, when that business is united with an interstate business, is *General Railway Signal Co. v. Virginia*<sup>132</sup> decided in April a year ago. This case involved a writ of error from the Virginia decision considered in a previous section of this study.<sup>133</sup> The prophecy was there ventured that the Virginia decision would be reversed by the Supreme Court. This prophecy was founded on the assumption that the Virginia excise on foreign corporations was measured by total capital stock with no maximum limitation, since nothing to the contrary appeared in the opinion of the Virginia court. The assumption, however, was contrary to fact, as corporations having a capital of \$90,000,000 or more paid only \$5,000. Moreover, the amounts exacted of smaller corporations did not vary precisely with capital stock, except when the capital was between \$50,000 and \$1,000,000. One thousand dollars was demanded from every corporation with a capital between one and ten million dollars, \$1,250 from those whose capital is between ten and twenty million, with corresponding increases of \$250 for those in the higher classes. Thus the statute was like the hypothetical one suggested previously in this study,<sup>134</sup> in which, instead of a single maximum, there was a series of maxima graded roughly according to capital stock. In discussing such a statute, it was argued that if Massachusetts made its exaction proper by a \$2,000 maximum which was of value only to corporations with a capital in excess of \$10,000,000,

<sup>130</sup> 232 U. S. 576, 34 Sup. Ct. Rep. 372 (1914).

<sup>131</sup> 32 HARV. L. REV. 405-07.

<sup>132</sup> 246 U. S. 500, 38 Sup. Ct. Rep. 360 (1918).

<sup>133</sup> *General Railway Signal Co. v. Commonwealth*, 118 Va. 301, 87 S. E. 598 (1916),  
<sup>31</sup> HARV. L. REV. 756-60.

it would not transgress by adding lower maxima for smaller corporations.<sup>135</sup> A statute with a maximum, it was urged, should be regarded as one imposing a specific tax, with a sliding discount in favor of corporations whose moderate capitalization entitled them to it.<sup>136</sup>

This is in substance the Virginia statute. It imposes a specific \$5,000 fee and allows corporations having less than \$90,000,000 a deduction measured not precisely, but roughly, according to the amount by which their capital is less than \$90,000,000. Mr. Justice McReynolds appears to conceive it important that Virginia put the corporations into ten-million-dollar groups and did not vary the tax directly according to the capital, but it is hard to see how this is significant where there are fixed maxima. Moreover this does not describe the method of measuring the tax on corporations whose capital was between \$50,000 and \$1,000,000. The statute could hardly have been more palatable if all such corporations were charged the same amount, instead of a percentage of their actual capital. What is important is that there shall be a fair limit to any tax that may be imposed. It is apparent that the maximum or maxima must be reasonable, or the situation comes within the Western Union case rather than the Baltic Mining case.

Such is clearly the position taken by the court in *General Railway Signal Co. v. Virginia*.<sup>137</sup> The approval of the Virginia decision was accorded gingerly, Mr. Justice McReynolds saying:

"Inspection of the statute shows that prescribed fees do not vary in direct proportion to capital stock, and that a maximum is fixed. In the class to which plaintiff in error belongs the amount specified is one thousand dollars and, under all the circumstances, we cannot say that this is wholly arbitrary or unreasonable.

"Considering what we said in *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68; *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350; *Kansas City, Ft. Scott & Memphis Ry. Co. v. Botkin*, 240 U. S. 227; *Kansas City, Memphis & Birmingham R. R. Co. v. Stiles*, 242 U. S. 111, the two characteristics of the statute just referred to must be regarded as sufficient to save its validity. It seems proper, however, to add that the case is on the border line. See *Looney v. Crane Co.*, 245 U. S. 178;

<sup>134</sup> 31 HARV. L. REV. 738-39.

<sup>135</sup> *Ibid.*

<sup>136</sup> 31 HARV. L. REV. 777, 941-42.

<sup>137</sup> Note 132, *supra*.

*International Paper Co. v. Massachusetts*, 246 U. S. 135, and *Locomobile Co. v. Massachusetts*, 246 U. S. 146."<sup>138</sup>

Among the circumstances thus taken into consideration and previously detailed in the opinion was the fact that the company's contracts in Virginia called for a total consideration in excess of \$200,000. The caution that the case is on the border line and the mild approval of the tax as not wholly arbitrary or unreasonable show clearly that a maximum limit or series of limits to an excise measured or roughly graded in accordance with capital stock does not save the statute from sin unless the maximum is reasonable. Curiosity may still be piqued to discover what will be the test or tests of reasonableness, but we may now be satisfied that a flat charge on the local business of a company that also conducts interstate business is not immune from condemnation as a regulation of interstate commerce and a denial of due process of law. If this is true of an excise on the local business of a foreign corporation, it must also be true of specific taxes on acts or occupations, where we are relieved from any intrusion of the notion of an arbitrary power over the doings of a corporate entity.

There remains for consideration only the question of the proper test of reasonableness. *St. Louis, Southwestern R. Co. v. Arkansas*<sup>139</sup> declares that the basis of an excise on a foreign corporation engaged in combined local and interstate commerce may be that proportion of the total capital stock which represents the value of the property within the taxing district, though such property is used in interstate as well as local commerce. This excise measured by the property within the state was in addition to an ordinary property tax, but it appeared that the right to do business as a corporation was not included in the assessment of that ordinary property tax. Mr. Justice Pitney's opinion is flavored with the notion that this excise and the so-called ordinary property tax together did no more than to assess the total property at its value as a going concern, but it is not definitely stated that the propriety of measuring an excise on local business by the total property in the state is conditioned on the mode by which that property is assessed for ordinary taxation. It seems reasonable to assume that, in the

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<sup>138</sup> 246 U. S. 500, 511, 38 Sup. Ct. Rep. 360 (1918).

<sup>139</sup> 235 U. S. 350, 35 Sup. Ct. Rep. 99 (1914).

absence of special circumstances, an excise or occupation tax on a local business may be based on all the property used in that business even though that property is also used in interstate business and is also subjected to an *ad valorem* property tax.<sup>140</sup> But it may readily be conceived that special circumstances may make such a measure of an excise or occupation tax a very real burden on interstate commerce. It is apparent that when such taxes are imposed on specially selected enterprises, they may in fact constitute serious discriminations against interstate commerce. All the property may be used for local as well as interstate commerce and yet the latter constitute by far the greater part of the total business. If a state is allowed free range in prescribing the rate of levy on such a property base, it may do quite as serious an injury to interstate commerce as it could inflict by basing the tax on total capital stock. Though the court may as a general rule accept property employed in local business as the proper measure of an occupation tax on that business, it must always have at hand its doctrine that every case depends on its own circumstances and must be ready to find the special circumstances that take the case out of the general rule.

It must be impossible to lay down any general rule as to what is a proper amount to impose as a specific tax on a local business that is combined with an interstate business. All that can be said is that by and large the punishment must fit the crime. One thousand dollars may not have been too much for Virginia to demand of the Railway Signal Company in view of its contracts within the state. Yet the same sum based on the same capital stock might prevent it from bidding on small contracts within the state. Where the performance of the contract calls for interstate as well as local enterprise, a fee out of all proportion to the consideration for the contract may stand as an absolute bar to the particular interstate commerce. This is the vice of all occupation or business taxes that are not measured by the value of what is being taxed. The vice is particularly noxious in the case of corporations not regularly engaged in business within the state, but which merely enter to do occasional jobs. The vice does not seem to have manifested itself

<sup>140</sup> In *Amos v. Postal Telegraph-Cable Co. (Fla.)*, 80 So. 293 (1918), the supreme court of Florida held that a state license fee or occupational tax measured by property within the state should exclude from the computation property employed exclusively in interstate commerce. The opinion regarded the construction as necessary to save the tax from being an unconstitutional regulation of interstate commerce.

in any of the cases of specific taxes that have come before the court, including the excises of Massachusetts and Virginia on foreign corporations. But there is no telling what concerns have been prevented by those taxes from coming in to take small, isolated contracts. Now that the states are assured that they may tax the income from all business done within the state, whether that business is local commerce or interstate commerce, there is no further excuse for any form of specific taxes for a general fiscal purpose.

Through an income tax, the state may tax interstate as well as local commerce. This bears on the question of the reasonableness of specific taxes so long as the states choose to continue them. All that is subject to such a tax in strict legal theory is the local business. But we should not infer from this that the tax becomes an invalid regulation of interstate commerce as soon as it is disproportionate to the local business. The interstate commerce is taxable, if the state goes about it in the right way. It may reach it by valuing property by a capitalization of earnings from its use, by imposing a gross-receipts tax in lieu of other taxes, and by levying a tax on net incomes. So also it should be allowed to reach it by specific taxes on local business, provided those taxes are not otherwise improper. The test of the reasonableness of any form of specific tax should be the relation of the amount demanded, not to the legal *res* which is formally the subject of taxation, but to the economic interest which in the light of all the decisions is actually liable for its proportional contribution to the state fisc.

*(To be concluded.)*

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## IGNORANCE OF IMPOSSIBILITY AS AFFECTING CONSIDERATION

THERE seems to be considerable unanimity of opinion among courts and legal writers that if one of two parties to a bilateral agreement is *unaware* that the promise of the other is because of the law impossible of being carried out, or of even being seriously considered, the party so unaware, upon a breach of the promise, may sue in *contract*. It does not seem to the writer that this is a correct view to take of the matter, but that the true ground of recovery in such a case is estoppel, or if there has been fraud, that a tort action for deceit is the appropriate action to bring.<sup>1</sup>

In a well-known work on contracts<sup>2</sup> it is said, "When a positive rule of law renders the consideration impossible it will not support a contract." This thesis is then illustrated by three examples: (1) "As where a person being indebted to another agreed with the servant of his creditor that, in consideration of the servant discharging him for the debt, he would do certain work;"<sup>3</sup> (2) "a promise that another's land shall sell for a certain sum on a given day;"<sup>4</sup> (3) "a promise to marry by one already married and known so to be by the other."<sup>5</sup>

In the first of the cases quoted the inability of the servant to legally discharge his master's debt made the consideration impossible of rendition and the contract void. In the second the same reason holds, — the impossibility in law of compelling the sale of another's land within a certain time or for a certain price. But it is in the third example that the words occur to which I wish to direct attention — "*and known so to be by the other.*" Only here is the *state of mind of the promisee* toward the promise depicted as having any bearing on the character of the promise as consideration. It is no consideration (and therefore no contract) for A to promise to marry B under these circumstances, and for apparently

<sup>1</sup> ASHLEY, THE LAW OF CONTRACTS, § 47; HARRIMAN ON CONTRACTS, 2 ed., § 233; CLARK ON CONTRACTS, § 180. But see WALD'S POLLOCK ON CONTRACTS, 396, note "S."

<sup>2</sup> ELLIOTT ON CONTRACTS, § 226.

<sup>3</sup> Harvy v. Gibbons, 2 Lev. 161 (1674); WALD'S POLLOCK ON CONTRACTS, 524.

<sup>4</sup> Stevens v. Coon, 1 Pinney (Wis.), 356 (1843).

<sup>5</sup> Paddock v. Robinson, 63 Ill. 99 (1872).

two reasons: (1) A is already married, and (2) B *knows* that fact. One is, it appears, just as much a factor as the other. If regard were had solely to the matter of legal impossibility, one might rather naturally think the first of the given reasons amply sufficient by itself, and the second superfluous or irrelevant. In point of logic, at any rate, any given thing which *is* impossible in fact would seem not to be less so because of the belief or unbelief as to its possibility on the part of one attempting to deal with it. It matters not whether the impossibility is physical or legal: One may think that he can tread on air, or commit a legal murder, but his thought about the matter would have no influence to change the outcome of his attempt to do either. And it would seem to be true that A's promise to B to do either of these things would be of precisely equal value to B, whether A thought it possible to execute either feat, or impossible. In other words, you have on the one hand a state of mind, a subjective thing, and on the other a state of fact, an objective thing; and the whole purpose of this article is to cast a doubt, at least, on the propriety of allowing the former to count as consideration, when the consideration asked for is the latter.

In order to show that this is done, let us take the case suggested by the opening paragraph — a case just the opposite of the one we have been considering — one where the promisee is *unaware* of the legal impossibility involved, and where consequently courts and writers on the law seem to be equally at one in holding that there *is* a contract.<sup>6</sup> Two cases illustrate this doctrine: *Wild v. Harris*<sup>7</sup> and *Millward v. Littlewood*.<sup>8</sup> In both cases a married man promised to marry an unmarried girl who was ignorant of his existing status, in return for her promise made in good faith to marry him. In each case, the girl suing him in *assumpsit* for breach of promise was allowed to recover. In the former of the two cases it was urged in defense that no consideration for the defendant's promise had been shown, since the plaintiff on her own part could not perform her promise to marry defendant; and it was also said that a consideration is insufficient, if its performance be utterly impossible. Counsel also suggests that defendant might have

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<sup>6</sup> See page 1, note 1. See also WILLISTON ON SALES, § 663, note 4.

<sup>7</sup> 7 C. B. 999 (1849).

<sup>8</sup> 5 Exch. 775 (1850); 2 WILLISTON, CASES ON CONTRACTS, 552.



rendered himself liable to a tort action for deceit — a view of the matter which later commended itself to an American court.<sup>9</sup> In deciding the case of *Wild v. Harris* for the plaintiff, Wilde, C. J., held that the promise alleged was to marry the plaintiff within a reasonable time; and that the plaintiff's counter-promise to marry the defendant within a reasonable time was, for one thing, "not absolutely impossible of performance, for his wife might have died within a reasonable time, and so he would have been in a condition to perform his promise to the plaintiff." This means of outflanking the fortress of legal impossibility thus seized upon by the English judge did not meet with the approval of the court in *Noice v. Brown*,<sup>10</sup> on the theory that the practical effect of it was to make the law countenance an agreement in derogation of the marriage relation, and establish a rule contrary to public policy. This would, doubtless, be the judgment of most courts to-day.<sup>11</sup> An agreement to marry after the death or divorce of a present spouse would be just as void, just as impossible for the law to consider seriously or permit, as would be under the same circumstances an agreement to marry presently. But however that may be, it is with the latter kind of case, and not with the former, that I wish to deal. In order that the discussion may be more clear, let us take as our model the following A B case:

A, a married man, intending to deceive B, an unmarried girl ignorant of A's existing marriage, promises to marry B presently, and in return for his promise requests and obtains B's promise to marry him presently. The question is, can there be found in such a combination of facts any consideration upon which a contract can be erected that is binding upon A, and if so, what is it that B does that constitutes such consideration?

The usual answer, or an essential part of it, as has already been pointed out, is that B is *ignorant* of A's existing marriage, and that *therefore* an action *ex contractu* lies.<sup>12</sup> When so stated, it seems

<sup>9</sup> *Pollock v. Sullivan*, 53 Vt. 507, 38 Am. Rep. 702 (1880). See also *Blattmacher v. Saal*, 29 Barb. (N. Y.) 22 (1858). Opposed to these two cases, which seem to the writer to take the right view, are *Coover v. Davenport*, 1 Heisk. (Tenn.), 368 (1870), and *Kelley v. Riley*, 106 Mass. 339 (1871).

<sup>10</sup> 38 N. J. L. 228 (1876); 2 WILLISTON, CASES ON CONTRACTS, 543.

<sup>11</sup> *Brown v. Odill*, 104 Tenn. 250, 56 S. W. 840 (1900).

<sup>12</sup> *Coover v. Davenport*, 1 Heisk. (Tenn.), 368, 377: "As plaintiff did not know that defendant was married, it was a lawful contract on her part," etc.

like the baldest kind of an assumption, unless it is really meant that ignorance is the consideration. Unless this is intended, then consideration is assumed here and not proved. It is equally and for the same reason an assumption to say that there is a contract voidable at B's option on her discovery of A's fraud. In spite of exceptions, in our law one does not talk of contract as a usual thing without first making sure that consideration is there. Neither does it seem satisfactory to say with the court in *Coover v. Davenport* that there is a lawful contract *on the part of the innocent party*, for the same assumption is here made, and the statement implies a belief that a contract may be made by one party out of his own promise, whereas in a bilateral contract there must be two promises, each of which, in some way, furnishes consideration for the other.

Professor Langdell says, "Both the mutual promises must be binding, or neither will be, . . . for if one of the promises is for any reason invalid, of course the other has no consideration, and so they both fall."<sup>13</sup> In *Kelley v. Riley*<sup>14</sup> it is said:

"The strict rule that a consideration to support a promise is insufficient, if its performance is utterly and naturally impossible, is met by the suggestion, that even if the future performance here [*i. e.*, the agreement here was to marry within a reasonable time after making it] is to be treated as utterly impossible, yet the detriment or disadvantage which must necessarily result to the plaintiff in relying for any time on the promise affords sufficient consideration to support the defendant's contract."

This is not very convincing, and is, in fact, the first ground of judgment in *Wild v. Harris*. It seems to be a sufficient reply to say that it is not the consideration defendant asked for. Mere reliance upon a promise is not to be accounted consideration, even though detriment accompanies such reliance, and the reliance was reasonable, natural, and innocent. At least such facts would not constitute consideration in any widely accepted definition of that term. True, the consideration defendant asked for (a promise of marriage) was impossible of fulfilment; still it may, I think, be questioned whether that fact gives a court the right to say, "Because the consideration you asked is an impossible one, you must therefore take as your consideration and be bound in a contract thereby

<sup>13</sup> SUMMARY OF THE LAW OF CONTRACTS, § 82.

<sup>14</sup> 106 Mass. 339, 342 (1871).

something you did not ask for." Back of this attitude of the courts it is hard to avoid seeing as its more or less unconscious motive and source, perhaps, a certain indignation at the defendant's wrongful conduct, and a feeling that he is not in a position to object to being harnessed in a contract, since at any rate he is the author of his own woes. Doubtless such a view is justified as far as the defendant personally is concerned, but what about legal theory? Does an immoral man cease in the eyes of the law because of his immoral tendencies to be capable of setting his personal estimate on the relative values of things? Can he, in other words, no longer lawfully know his own mind? Of course he cannot be allowed to carry out his project, but the question that concerns us is merely this: Is it good legal theory to say that the defendant is not only to be so prevented, but that also he is guilty of the breach of a contract made upon a consideration he did not ask for, but which the law provided, in order to fix a contract liability upon him? This appears to be undesirable. "The consideration is the matter accepted or agreed upon as the equivalent for which the promise is made."<sup>15</sup>

In *Meyer v. Haworth*<sup>16</sup> the facts were that a merchant had sold goods to a married woman supposing her to be single. Later he sued her in *assumpsit*, relying on her promise to pay for the goods made by her subsequent to her husband's death. It was held there was no consideration for her second promise, since the first promise (made during her coverture) to pay for the goods was wholly void. Professor Williston says in this connection:

"A promise which is void is insufficient consideration, and the cases indicate no inquiry on the part of the court whether the party giving a promise in exchange for the void promise knew or did not know the facts which made void the promise he received."<sup>17</sup>

In a note to the same passage the same writer suggests,

"If lack of knowledge of these facts made a difference, it might be urged that mistake rather than lack of consideration was the reason for the invalidity of the bargain."

If the promisee's "unawareness" of the invalidity of the other's promise does not form consideration and give rise to a contract

<sup>15</sup> LEAKE ON CONTRACTS, 6 ed., 435.

<sup>16</sup> 8 A. & E. 467 (1838).

<sup>17</sup> 27 HARV. L. REV. 517.

in *Meyer v. Haworth*, why should it do so in our A B case? The girl's promise seems in no respect to be a more substantial consideration than the married woman's. Both are void in law when made. "A void agreement is one which entirely fails to receive legal recognition or sanction, the declared will of the parties being wholly destitute of legal efficacy."<sup>18</sup> Holland sets down as the third constituent element of a contract, "The matter agreed upon must be at the time of the agreement both possible and legally permissible."<sup>19</sup> Terry writes, "We speak of a void contract, although an agreement which is simply void is not perhaps in strictness a contract at all."<sup>20</sup> And, indeed, how can the most worthy motive, or the most reasonable ignorance on the part of the one making a promise be regarded as consideration, if such an one is thereby obligated to nothing at all, and if no value present or prospective is exchanged? In a case like ours, where the impossibility of the promise follows from its illegality, it might well be said that, even though quite innocent from a moral point of view, a promise may still be *unlawful* in the sense that it is not capable of being legally carried out.

Let us look at the matter now from another standpoint — that of physical (as opposed to legal) impossibility: Suppose A to be the owner of a cargo of goods which he offers to sell to B for a certain price, and that B accepts the offer. Both parties believe that the cargo is in existence; but the fact is that at the time the contract was entered into ship and cargo were at the bottom of the ocean. Admittedly no contract exists in such a case. The same absence of contract results where a legal impossibility of performance intervenes, as where A's agent with full authority to do so had made a valid sale of the cargo to a third person, but A did not know this fact when he offered to sell it to B.<sup>21</sup> In both cases the parties are unaware of any obstacle or impossibility. Their minds "meet" in an abstraction, *viz.*, the idea of a cargo of a certain sort, under certain physical surroundings. Yet for all their "unawareness" of any impossibility of performance, the fact that performance *is* impossible prevents there being a contract.

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<sup>18</sup> SALMOND, JURISPRUDENCE, 5 ed, 309.

<sup>19</sup> JURISPRUDENCE, 11 ed, 273.

<sup>20</sup> LEADING PRINCIPLES OF ANGLO-AMERICAN LAW, § 172.

<sup>21</sup> *Hastie v. Couturier*, 9 Exch. 102 (1853).

The ignorance of parties as to the impossibility makes no difference, and accordingly we are not obliged to seek the reason for there being no contract in some other element — such as, *e. g.*, mistake. In fact, the latter theory seems not to work well here, if the theory is true that all the law requires for the formation of a contract is that the parties agree upon the abstract character of the thing promised,<sup>22</sup> that is, upon a mere idea stripped of all physical attributes and surroundings — actualities and potentialities — that the only requirement is that “the promise in question must *appear*”<sup>23</sup> to be for the doing of some act which if actually performed would be a good consideration for a binding unilateral promise.” It is true that the cargo is at the bottom of the sea, but what of it? The *idea* of the cargo is undestroyed and unchanged by any possible alterations in the physical condition or location of the cargo, the parties being ignorant of the alterations. If the idea alone is the thing that matters, and it is to be released from all legal obligation to correspond with or even resemble the reality, a mile or so of salt water makes no difference.

If we change the case just put by supposing that at the time of the agreement A, by wireless message, *knew* that the cargo had gone down in mid-ocean, while B remained as before ignorant of this, and supposed that the cargo was still afloat and would in good time arrive in port, the case — as far as impossibility of performance and B’s ignorance of it is concerned — seems to be identical with the A B case. We have added, however, the element of fraud. Is there any reason to believe that this added ingredient, *i. e.*, A’s fraudulent intention, or his knowledge of the impossibility of performing his promise, should make the transaction any more a *contract* than it was when A was innocent of such intent and knowledge? It is just as impossible in the latter as in the former case for A now or ever to deliver, and for B now or ever to receive and pay for that particular cargo. The expressed intentions or minds of both parties are exactly as before. It is only when you come to the unexpressed mind or intent of A that you find any difference. But this old criterion of the law, the “meeting of minds,” if applied here, would furnish an additional reason for denying the existence of a contract, since A thought “I am selling

<sup>22</sup> 2 STREET, FOUNDATIONS OF LEGAL LIABILITY, 110.

<sup>23</sup> Italics are mine.

to B a cargo which is at the bottom of the sea," and B thought "I am buying from A a cargo which is afloat." Of course, if the "agreement upon an abstraction theory" is held to, one should probably think there was a contract both where A was ignorant and where he was aware of the impossibility of performing, since in one as much as in the other there was a "meeting of the minds" upon an idea, *viz.*, "cargo."

This theory of agreement in the abstract does not impress one as altogether suitable for wide application in a science like the law which professes to move in and about a real world of men and affairs.<sup>24</sup> It would seem to the writer that such a promise, issuing forth from an agreement on an abstraction, with an actual breach certain to follow, is not one whit more valuable or likely to be the real motive of men's dealings with one another than was the making of a promise in fact, — the mere making the vocal organs to utter a succession of sounds, which in the view of Professor Ames was sufficient to form consideration, and was the essence thereof.<sup>25</sup> More recently legal theorists are inclined to say that if a promise cannot be performed it is a nullity. Certainly, from a practical standpoint, this would seem to be good sense. Such a promise can have no present or future value. This feature, or what we might term the hopelessness of future value or advantage, distinguishes the cargo case, the married woman's case, and the A B case from those cases where an infant exchanges promises with an adult. It seems to be now generally agreed that in this sort of transactions there is no real consideration given by the infant.<sup>26</sup> But while from a strictly legal and technical point of view this seems indubitable, on the other hand it seems equally indubitable that in the infant's promise there is at least a hope of value or advantage in the future. He *may* perform his promise, and that fact alone is sufficient to distinguish it from a case like ours. There is, then, something which is in the nature of consideration, at least, in the infant's agreement, although there is no mutuality of obligation.<sup>27</sup> This possibility of the final rendition of value also distinguishes from ours a case where A has by fraud induced B to

<sup>24</sup> HOLMES, *THE COMMON LAW*, I, 36.

<sup>25</sup> 13 HARV. L. REV. 31, 32.

<sup>26</sup> See WILLISTON, in 27 HARV. L. REV. 528, 529; ASHLEY ON CONTRACTS, § 43. See also Ballantine, in 28 HARV. L. REV. 128, 129.

<sup>27</sup> Professor Ballantine, 11 MICH. L. REV. 434.

enter into a contract. A is bound while B is free; but in the ordinary case, where no impossibility of performing the agreement intervenes, the law does not deny A the right to expect that if he goes ahead with the contract upon the affirmation thereof by B, the latter will carry out his side of the agreement.

Professor Williston, defining what constitutes sufficient consideration in a bilateral contract, says:

"Mutual promises each of which *assures*<sup>28</sup> some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is rendered void by any rule of law other than that relating to consideration, are sufficient consideration for one another."<sup>29</sup>

Apply this test to our A B case, and the result appears to be that there is no act of any nature or quality whatsoever that is "assured."

Professor Ballantine would modify the above definition and rather state it thus:

"Consideration is something of possible value given or undertaken to be given in return for something promised;" and he adds, "The test of the consideration is the possible value of the thing promised and not the effect of the promise itself."<sup>30</sup>

That is to say, consideration is not to be sought in the promises in fact, or in the actual performances of the promises, but in a *promised* performance, or a prospective value bargained for. Of course anyone can "undertake to give something of possible value," even though he has no idea of actually doing so, or though he well knows at the time he promises that the law will make it impossible for him to execute his undertaking. So, while this theory of consideration offers hospitality to the outcast voidable contracts (those of infants, insane or drunken persons, or others whose promises are for any reason performable only at their own option)<sup>31</sup> it seems to me that it justifies calling our A B case a "contract" only for the same reason that Professor Ames' theory of consideration would allow of this, *viz.*, in the one case as in the other one is dealing in reality with a "lip" promise. Anyone who undertakes

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<sup>28</sup> Italics are mine.

<sup>29</sup> 27 HARV. L. REV. 527, 528.

<sup>30</sup> 28 HARV. L. REV. 133.

<sup>31</sup> 11 MICH. L. REV. 429, 430; 28 HARV. L. REV. 130; see also Professor Williston in 27 HARV. L. REV. 528.

to give what he knows he cannot give is doing nothing of any moment — nothing but moving his lips. It is a mistake to class our kind of case with voidable contracts, as Professor Ames does.<sup>22</sup> It belongs rather with the void contracts of married women.

Professor Ballantine thinks the fact that the promise of a married woman is not binding is not necessarily due to its being void in law, and therefore incapable of serving as consideration, and that it has been somewhat hastily assumed that there is no consideration given by a married woman's promise. In fact, he thinks that there is consideration here, though no mutuality of obligation.<sup>23</sup> This result follows readily enough, of course, if one accepts Ames' theory of consideration; but if the test of consideration is made to be a detriment in the sense of a binding obligation, either assumed in the present or assured for the future, or if it is to be found in the exchange of a real present value or a possible future value of a real kind, it is hard to see how there can be a consideration in either promise in our A B case. It is equally hard to see how there is any mutuality of obligation, if, indeed, any distinction is to be made between these two ideas.<sup>24</sup>

In short, no present theory of consideration seems able to account for our case as a "contract." If not dealt with on the theory of tort, it should be treated on the principles of quasi-estoppel. The man's promise is originally gratuitous, but as it was relied on by the girl innocently, reasonably, and to her disadvantage, it should be upheld. If it is to be continued to be treated by courts and theorists as a contract, I think it can only be said that it is another of those cases which the courts are ready to enforce without any consideration having been given, and which led Professor Ashley to advocate that the whole doctrine of consideration be done away with.

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<sup>22</sup> 13 HARV. L. REV. 33, 34. See also Professor Ballantine, 11 MICH. L. REV. 429.

<sup>23</sup> 11 MICH. L. REV. 429; 80, Ames, 13 HARV. L. REV. 33.

<sup>24</sup> Williston, 27 HARV. L. REV. 525; HARRIMAN ON CONTRACTS, 2 ed., § 103.



## THE POWERS OF CORPORATIONS CREATED BY ACT OF CONGRESS

THE Supreme Court of the United States has decided that the Federal Reserve Board may give national banks permission to engage in the business of acting as trustees and as executors and administrators and as registrars of stocks and bonds.<sup>1</sup>

This suggests the question whether there has been any modification of the doctrine of *M'Culloch v. Maryland*<sup>2</sup> and *Osborn v. Bank of the United States*,<sup>3</sup> and what are the scope and extent of the powers that may be exercised by corporations created by act of Congress.

The creation and control of corporations by federal statute has been suggested as a remedy for the evils arising out of the diversity and feebleness of state control over companies engaged in transportation or commercial business of nation-wide concern, and it has even been urged that existing state corporations should be required to accept incorporation under federal laws as a condition of being allowed to engage in commerce with foreign nations and among the states. With the growth of national consciousness little need is felt of drawing very technically the lines between the spheres of state and federal legislation, and the present tendency is to ignore these distinctions and to consider rather the question of practical efficiency. It is important, therefore, that we should keep in mind the limitations which the Constitution has put upon the purposes for which Congress may create corporations and the powers with which corporations so created may be endowed. A corporation is something more than the personification of an association of individuals; its personality, its properties and powers are derived from the laws of the sovereignty by which it was authorized, or at least recognized, to be a legal person. It is not enough that an association of individuals has filed a certificate in a public office declaring itself to be a corporation and stating the objects and

<sup>1</sup> *First National Bank v. Union Trust Co.*, 244 U. S. 416 (1917), reversing the judgment of the supreme court of Michigan in 192 Mich. 640, 159 N. W. 335 (1916), and overruling the decision of the Supreme Court of Illinois in *People v. Brady*, 271 Ill. 100, 110 N. E. 864 (1915).

<sup>2</sup> 4 Wheat. (U. S.) 316 (1819).

<sup>3</sup> 9 Wheat. (U. S.) 738 (1824).

purposes for which it was organized. The legal existence of the corporation and its powers depend upon the jurisdiction of the state which created it or the recognition of the state wherein it operates. The principles governing the power of Congress to create corporations and the extent of the power conferred are stated by Chief Justice Marshall in the cases of the first and second banks of the United States.

The power to create corporations is not one of the substantive powers conferred upon Congress by the Constitution. "Among the enumerated powers," says Chief Justice Marshall in *M'Culloch v. Maryland* <sup>4</sup> "we do not find that of establishing a bank or creating a corporation." He was discussing the question whether this power, admitted to be a power appertaining to sovereignty, was one which appertained to the sovereignty of the state or to that of the United States, and he said:

"The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished." <sup>5</sup>

It was decided in that case that the creation of a bank with the power to transact private banking business was an appropriate means for carrying into execution the powers expressly given to the government of the United States, and the creation of such a corporation was held to be justified by the authority given to make "all laws necessary and proper for carrying into execution the enumerated powers and all other powers vested by the Constitution in the government of the United States."

Again, in *Osborn v. Bank of the United States*,<sup>6</sup> the Chief Justice said:

"Why is it that Congress can incorporate a bank? This question was answered in *M'Culloch v. The State of Maryland*. It is an instrument which is 'necessary and proper' for carrying on the fiscal operations of government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money which is conferred by its charter? If it can, if it be as competent

<sup>4</sup> 4 Wheat. (U. S.) 316, 406 (1819).

<sup>5</sup> *Ibid.*, 411.

<sup>6</sup> 9 Wheat. (U. S.) 738, 861 (1824).

to the purposes of government without, as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it cannot, then this faculty is necessary to the legitimate operations of government and was constitutionally and rightfully engrafted on the institution. It is, in that view of the subject, the vital part of the corporation: it is its soul; and the right to preserve it originates in the same principle with the right to the skeleton or body which it animates."

These decisions declare the principles upon which rests the power of Congress under the Constitution to create corporations and indicate the extent of the powers that may be conferred upon them. In view of these principles Congress created the national banks under the act of June 3, 1864.<sup>7</sup> Of this act the Supreme Court said in 1875,<sup>8</sup>

"The constitutionality of the act of 1864 is not questioned. It rests on the same principle as the act creating the second bank of the United States. The reasoning of Secretary Hamilton and of this court in *M'Culloch v. Maryland* (4 Wheat. 316) and in *Osborn v. Bank of the United States*, (9 *id.*, 708) therefore, applies. The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are a means appropriate to that end. Of the degree of necessity which existed for creating them Congress is the sole judge."

Victor Morawetz, in an article in the *HARVARD LAW REVIEW* for June, 1913, suggested that although the court was right in sustaining the constitutionality of the national bank act, it seemed little more than a pretense to assert that an unlimited number of banks, some of them small and intended only to give local banking facilities, were incorporated to serve the fiscal operations of the government and that a sounder and better ground was the power to regulate commerce among the states; but it is to be noted that the consolidation of some of these banks under the National Reserve Bank Act has now proved their usefulness for serving the fiscal operations of the government and the transportation of armies in time of war.

When Congress in 1913<sup>9</sup> conferred on the Federal Reserve Board power to license such national banks as should apply for it,

<sup>7</sup> 13 STAT. AT L. 99.

<sup>8</sup> *Farmers' & Mechanics' National Bank v. Dearing*, 91 U. S. 29-33 (1875).

<sup>9</sup> 38 STAT. AT L. 262.

power to act as trustees and executors and administrators and registrars of stocks and bonds, it was insisted that these functions bore no real relation to the purpose of serving the fiscal operations of the government or regulating commerce among the states, nor to any of the federal purposes for which Congress had power to authorize corporations to be created; that the functions were not even the proper functions of a private banking business, but were governed by different rules of law peculiarly within the province of the state and that the duties of executors and administrators were derived and regulated wholly through state laws. The question came before the Supreme Court of Michigan in *Grant Fellows, Attorney General v. First National Bank of Bay City*<sup>10</sup> and before the Supreme Court of Illinois in *People ex rel. First National Bank of Joliet v. Brady, Auditor*.<sup>11</sup>

In both cases the decision was that the permission given by Congress through the Federal Reserve Board to the national banks did not avail to authorize them to carry on the business of trust companies and registrars of stocks and bonds, nor to act as executors and administrators within the states.

The decision of the Supreme Court of Michigan was taken to the Supreme Court of the United States and the judgment was reversed.<sup>12</sup> The effect was to overrule also the opinion of the Supreme Court of Illinois in the Joliet bank case. The opinion of the Supreme Court of the United States was delivered by the Chief Justice. He said the court below, while recognizing that it had been settled beyond dispute that Congress had power to organize banks and endow them with functions both of a public and private character, had,

"instead of testing the existence of the implied power to grant the particular functions in question by considering the bank as created by Congress as an entity, with all the functions and attributes conferred upon it, rested the determination as to such power upon a separation of the particular functions from other attributes and functions of the bank, and ascertained the existence of the implied authority to confer them by considering them as segregated, that is, by disregarding their relation to the bank as component parts of its operation."

<sup>10</sup> 192 Mich. 640, 159 N. W. 335 (1916).    <sup>11</sup> 271 Ill. 100, 110 N. E. 864 (1915).

An article of my own on the Illinois case, with an outline of the arguments of counsel and court, appeared in 16 COL. L. REV. 386.

<sup>12</sup> 244 U. S. 416, 424 (1917).

The Chief Justice said that while fully recognizing the right of Congress to exercise its legislative judgment as to the necessity of creating the bank including the scope and character of the public and private powers which should be given to it, the court disregarded this discretion in Congress to determine whether it was relevant or appropriate to give the bank the particular functions in question, and in so doing the court below took a mistaken view of the actual conditions and failed to observe that the state banks exercised these same functions and by reason of this were rivals in the same field of business so that it was plain that it was necessary to confer these functions upon the national banks in order to promote their efficiency and the success of their business. As to the point that the functions of executors and administrators and trustees were peculiarly within the domain of state regulation, the court said that it was established in *M'Culloch v. Maryland* and *Osborn v. Bank of the United States* that

"although a business was of a private nature and subject to state regulation, if it was of such character as to cause it to be incidental to the successful discharge by a bank chartered by Congress of its public functions, it was competent for Congress to give the bank the power to exercise such private business in coöperation with or as part of its public authority."

The Supreme Court took no notice of the suggestion of counsel that Congress had not, in fact, declared its opinion that the new privileges conferred were necessary to the efficiency of the national banks. They only declared that they might be conferred by the Federal Reserve Board on such national banks as applied for them. It is, perhaps, sufficient that Congress should determine that these privileges were necessary to the efficiency of any national bank that should, in view of the rivalry of state banks, find it was desirable that it should take up these new lines of business. It will be observed that in this case of the national banks the court found as an essential fact that the new functions now conferred upon them were functions which had now become familiar functions of state banks, their rivals in the banking business, so that it was a reasonable exercise of discretion for Congress to consider them a relevant and appropriate means of preserving the efficiency of the banks as instrumentalities in carrying into execution the purposes of the government for which they were created.

The question whether the national banks should be authorized to extend their business over these new fields is not perhaps a matter of much moment. The case is important because of its bearing upon the question of the scope and extent of the powers that may be conferred by Congress upon a corporation created by it for the execution of any of the powers given to it by the Constitution. Does it extend the doctrine of *M'Culloch v. Maryland* and *Osborn v. Bank of the United States*? Is it true, as was insisted by Justice Ostrander in the court below, that the decision involves the conclusion that if Congress has lawfully created a corporation in aid of the fiscal operations of the government, it may confer upon it the powers of a trading company or a transportation company, or to go further and to speak more generally, is there anything in this decision that indicates that Congress having created a corporation with such powers as in its judgment make it an appropriate means of executing the powers committed to the federal government, it may incidentally confer upon it powers not essential to its efficiency for those purposes and having no relation to those purposes?

Before considering the arguments that have been urged in favor of the extension of the field of the activities of federal corporations, it may be well to note that for more than a century Congress, except in legislating for the territories and the District of Columbia, has rarely exercised its incidental power to create corporations other than the national banks and the Pacific Railroad companies. Charters were granted to some interstate bridge companies and ferry companies, some canal companies and a few associations of a benevolent or social character of general concern; but the movement now is toward the incorporation by general law of railroad and transportation companies, of large commercial corporations engaged in interstate commerce and even of companies engaged in manufacturing goods intended to be carried in interstate commerce.

There is a chapter in the first edition of "Thompson on Corporations," 1895, entitled "National Corporations" containing an historical sketch in less than three pages. The chapter was written by Russell H. Curtis of the Chicago bar and the article appeared first in 21 AMERICAN LAW REVIEW, 258 (1887). He says that in 1791 Congress incorporated the earliest bank of the United States, the charter of which expired by limitation in 1811. In 1815 a bill

to incorporate a national bank was passed by Congress, but was vetoed by President Madison. In 1816 Congress granted a charter for twenty years to the second bank of the United States, but before the charter expired President Jackson, on September 24, 1833, found a Secretary of the Treasury who would consent to obey his order to withdraw the funds of the United States from the bank. In 1863 Congress passed a statute authorizing the formation of national banks<sup>13</sup> and the existing National Bank Act was approved June 3, 1864.

In 1862 Congress chartered the Union Pacific Railroad and Telegraph Company,<sup>14</sup> and by the same act granted franchises to certain state railroad companies with provision for their future consolidation, which was effected in part in 1880, and it was held by the Supreme Court in 1883<sup>15</sup> that a suit relating to the validity of the consolidation was a suit arising under the laws of the United States. In 1866 Congress chartered the Atlantic and Pacific Railroad Company to build a line from Missouri to the Pacific coast,<sup>16</sup> and in 1871 a charter was granted to the Texas and Pacific Railroad Company.<sup>17</sup>

The Supreme Court in 1884<sup>18</sup> held that these and similar companies were strictly suits arising under the laws of the United States, and this is now the settled law.<sup>19</sup>

Justice Bradley, in 1887, speaking of these statutes granting franchises to the Pacific Railroad companies, said:

"It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws."<sup>20</sup>

In 1865 Congress incorporated the Freedman's Savings and Trust Company and in 1866 the National Asylum for Disabled Volunteer Soldiers, but both of these were made corporations of the District of Columbia; but the Forty-ninth Congress went further and incorporated the National Trade Union of the District of Columbia, with authority to establish branches in all the states.

<sup>13</sup> 12 STAT. AT L. 665.

<sup>14</sup> *Ibid.*, 489.

<sup>15</sup> *Ames v. Kansas*, 111 U. S. 449 (1883).

<sup>16</sup> 14 STAT. AT L. 292.

<sup>17</sup> 16 STAT. AT L. 573.

<sup>18</sup> *Pacific Railroad Removal Cases*, 115 U. S. 1 (1884).

<sup>19</sup> MORAWETZ ON CORPORATIONS, §§ 984, 985.

<sup>20</sup> *California v. Pacific R. R. Co.*, 127 U. S. 1, 39 (1887).

In 1871 Congress granted a charter to the Centennial Board of Finance for the national exposition of 1876.

In 1889, for the purpose of regulating commerce with foreign countries and among the states, Congress incorporated the Maritime Canal Company of Nicaragua as a private stock company for profit with authority to construct a canal in foreign territory, and in 1890 the North River Bridge Company was incorporated by Congress with power to build a bridge over the Hudson River between New York and New Jersey, to exercise the right of eminent domain and to sue and be sued in the United States Circuit Court.<sup>21</sup>

The Supreme Court likened the creation of this corporation to the creation of "a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the States."<sup>22</sup>

The *Wheeling Bridge Case*,<sup>23</sup> related to the paramount control of Congress over a bridge erected by a state corporation, and in *Stockton v. Baltimore & New York Railway Co.* the authority to construct the bridge had been given by Congress to corporations of New York and New Jersey.

The American Red Cross Society, incorporated in the District of Columbia in 1881 and 1893, was finally reincorporated by act of Congress under government supervision in 1905. The Panama Canal was built by the government. The United States Shipping Board is a commission and its Emergency Fleet Corporations are organized under the laws of the District of Columbia.<sup>24</sup> The Federal Reserve Banks are made up of national banks.<sup>25</sup>

Hitherto Congress has confined the exercise of its power to create corporations pretty strictly to the organization and regulation of national banks and of transcontinental railroads. It has not attempted to require the federal incorporation of existing railroad companies chartered by the states, even though their business within the state of their origin is insignificant, nor has it attempted to insist upon federal incorporation of companies organized for commercial business coextensive with the whole country, still less to incorporate manufacturing companies even though they exercise

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<sup>21</sup> 26 STAT. AT L. 268.

<sup>22</sup> *Luxton v. North River Bridge Co.*, 153 U. S. 525, 529 (1894).

<sup>23</sup> 18 How. (U. S.) 421 (1855).

<sup>24</sup> 38 STAT. AT L. 251, December 23, 1913.

<sup>25</sup> 39 STAT. AT L. 227, June, 1916.



nation-wide competition or threaten to exercise nation-wide monopoly.

The growing sense of national unity and the experience of national efficiency acquired in the war will tend to bring pressure upon Congress to avail itself more freely of its power to create corporations, and the question naturally arises whether corporations engaged in business throughout the whole country should not be created and controlled by national authority and whether this should not apply not only to interstate railroads but also to trading companies and even to companies engaged in the manufacture of goods intended to be sold in interstate and foreign commerce.

In his book on "Social Reform and the Constitution," published in 1911, Professor Frank J. Goodnow, of Johns Hopkins, has a chapter on "Federal Incorporation" prepared under his direction by Mr. Sidney D. Moore Hudson. After examining the opinions of Chief Justice Marshall in *M'Culloch v. Maryland* and *Osborn v. Bank of the United States*, as well as the argument of Secretary Hamilton,<sup>28</sup> he considers first, the constitutionality of the erection of federal corporations having power to engage in interstate commerce,—trade as well as transportation, and secondly, whether such corporations may be granted the power to manufacture goods to be sold or transported in interstate commerce. He finds that no question has been made with regard to corporations engaged in transportation by land or water, and as to corporations formed for the purpose of engaging in interstate trade, he says it must be shown that the corporations are such as to have, in fact, a relation to the regulation of interstate commerce sufficiently close to indicate that such regulation may reasonably be regarded as the purposes of Congress in the erection of the corporation. And the suggestion is that if a railroad or a bridge company may be organized as an instrumentality of interstate commerce why may not companies be erected in order to provide a more efficient organization for carrying it on. He goes further and includes the manufacture of goods in the purposes for which federal corporations may be organized by act of Congress, provided it is found in the judgment of Congress that the manufacture of goods to be transported or sold in interstate commerce is essential to rendering

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<sup>28</sup> 4 Wheat. (U. S.) 316 (1819), 9 Wheat. (U. S.) 738 (1824); 3 HAMILTON'S WORKS, Federal Ed. 448.

the corporation completely efficient for the purposes for which the government has created it. He accepts the distinction made in *Kidd v. Pearson* between manufacture and commerce,<sup>27</sup> but submits "That this principle does not render unconstitutional the conferring of the power to manufacture upon federal corporations engaged in interstate or foreign commerce." He refers to the *Danbury Hatters' case*<sup>28</sup> as affirming the rights under certain conditions of direct federal control over manufacture.

The need of federal incorporation was urged by President Taft in his special message to Congress on January 7, 1910, pages 17-20, and H. L. Wilgus, writing on the question, "Should there be a federal incorporation law?" insisted that "the jurisdiction which can create corporations should be confined exclusively to that one which will have responsibility for their actions in every place." Some five years ago Victor Morawetz wrote in this REVIEW a comprehensive article entitled "The Power of Congress to Enact Incorporation Laws and to Regulate Corporations."<sup>29</sup> He referred to the bank cases and the bridge cases and quoted Hamilton's opinion on the charter of the first bank of the United States to the effect that the creation of a corporation was but a mean having a natural relation to any of the acknowledged objects or lawful ends of the government; it is not an independent, substantive thing, but a quality, capacity or mean to an end. A mercantile company is formed for the purpose of carrying on a particular branch of business, and to add incorporation to this would only be to add artificial capacity for prosecuting the business with more safety and convenience.<sup>30</sup>

Mr. Morawetz discussed the question how far national corporations would be peculiarly subject to national legislation and how they would be affected by state laws, and also the questions of taxation by the states and national control and regulation of state corporations, and suggested that any attempt on the part of Congress to control or regulate state corporations by means of the imposition of prohibitory excise taxes should not be encouraged.

The federal incorporation of railway companies was the subject of an article in the HARVARD LAW REVIEW by Charles W. Bunn, of Minnesota, in April, 1917. He refers to *Railroad Co. v. Mary-*

<sup>27</sup> 128 U. S. 1 (1888).

<sup>28</sup> June, 1913.

<sup>29</sup> *Loewe v. Lawlor*, 208 U. S. 274 (1908).

<sup>30</sup> Ford's Edition of the Federalist, p. 657.

land,<sup>31</sup> in which Justice Bradley referred to the exercise of the power of Congress over interstate commerce in the construction of the Cumberland national road and similar works and the more recent exercise of that power, though mostly through national territory, in the establishment of railroad communication with the Pacific coast. He quoted the Minnesota Rate cases, followed in *Houston, East & West Texas Railway Co. v. United States*,<sup>32</sup> and concludes (page 594):

"It has, therefore, been determined that Congress, under its power to regulate commerce, may itself build railways or provide for government railways by delegation of power to corporations. The government may also provide for transportation of its mails, its armies, and its property by any means it chooses to select. Under these ample powers it may provide its own instrumentalities of transportation, or may make use of existing instrumentalities."

During the last three months there has been a series of articles in the MICHIGAN LAW REVIEW by Professor Myron W. Watkins, of the University of Missouri.<sup>33</sup> He examines in detail the decisions of the Supreme Court in the cases of the banks of the United States and the national banks, the Pacific Railroad cases, the bridge cases, the ferry cases, the cases on the incorporation and regulation of telegraph companies and express companies, and the cases on the regulation of rates and of the operation of the instruments or instrumentalities of interstate commerce, and the jurisdiction over questions of liability to employees and to the public, and upon the effect of the federal statutes upon monopolies and restraint of trade. Referring to the laxity and diversity of the regulation of corporations created by the various states, he examines the question whether compulsory federal incorporation of all corporations engaged in interstate commerce is not a constitutional remedy, and the conclusion on this last point is that the enactment of a national incorporation law, if

"backed by a fair proportion of the business community (and there seems every reason to believe that it would even now have the support of a representative group of men in business and professional life), and if Congress by its first action evidences a disposition to promote the

<sup>31</sup> 21 Wall. (U. S.) 456 (1874).

<sup>32</sup> 234 U. S. 342 (1914).

<sup>33</sup> "Federal Incorporation," 17 MICH. L. REV. 64, 145, 238, November and December, 1918, and January, 1919.

interstate trade, rather than to harry and retard it, the Supreme Court would be diligent to find its way clear to uphold it.”<sup>34</sup>

After examining the bank cases and the Pacific Railroad cases, he says:

“We may conclude that the following principles are confirmed or established by these western railroad cases: first, Congress may charter corporations for certain purposes; second; Congress may create railroad corporations to engage in interstate transportation, *i. e.* corporations endowed with a public interest, but organized and conducted by private parties strictly for profit; third, it is a sufficient basis for the exercise of this power that in the judgment of Congress the erection of such corporations will ‘tend to facilitate’ interstate commerce. It is not for the courts to decide upon the expediency of employing this means of ‘facilitating commerce’ — that is left to the discretion of Congress.”<sup>35</sup>

In these articles the power of Congress to create corporations and the extent of the power conferred has been discussed in connection with an examination of the cases on the power of Congress to regulate interstate and foreign commerce; and it is this power which opens up the most important and the most indefinite field for the creation and operation of federal corporations. It is in this direction that the extension of the power of the federal government is compelled by the expansive force of the commercial instinct in a people which realizes that it is, in fact, a nation and is scarcely conscious any longer of the limitations of the state boundaries. It is on the plea of the need to exercise the power to regulate interstate and foreign commerce that it is proposed that Congress shall erect corporations with power to manufacture goods to be used in trade beyond the borders of a single state, and it is urged that the regulation of commerce may well require the regulation of the incorporated association by which trade is carried on. There is no need to review the arguments in detail. It is enough to collect and quote from these scattered papers while examining the recent decision of the United States Supreme Court on the extent of the power of corporations created by Congress and considering whether it suggests any change in the attitude of the court upon the subject involved. The reversal of the decision of the court below in the Federal Reserve Board case<sup>36</sup> was based distinctly upon the

<sup>34</sup> 17 MICH. L. REV. 259.

<sup>35</sup> *Ibid.*, 77.

<sup>36</sup> 244 U. S. 416, 425 (1917).

assertion that it departed from the rule laid down in *M'Culloch v. Maryland* and *Osborn v. Bank of the United States*.

"What those cases established,"

said the Chief Justice,

"was that although a business was of a private nature and subject to state regulation, if it was of such a character as to cause it to be incidental to the successful discharge by a bank chartered by Congress of its public functions, it was competent for Congress to give the bank power to exercise such private business in coöperation with or as a part of its public authority."

The court below had found that the new functions were quite different from those of a bank, but the Chief Justice said that under present conditions they were, in fact, incidental to the business of banks as now conducted by rival state banks, and therefore might well have been found by Congress to be essential to the efficiency of the national banks. The court below, he said, had erred in not regarding the corporation as an entity and in regarding the new functions as segregated. This does not imply that whatever functions might be given to the corporations created by Congress they could lawfully be exercised, but only, as the Chief Justice himself explains, that any particular functions must be considered as component parts of the operations of the bank as an entity, and by this it is clear that he meant its operation as a means of carrying into execution the powers conferred by the Constitution upon Congress.

Chief Justice Marshall, in *Osborn v. Bank of the United States*,<sup>37</sup> said:

"The constitutional power of Congress to create a bank, is derived altogether from the necessity of such an institution for the fiscal purposes of the Union. It is established, not for the benefit of the stockholders, but for the benefit of the nation. It is a part of the fiscal means of the nation. Indeed, 'the power of creating a corporation is never used for its own sake, but for the purpose of effecting something else.'<sup>38</sup> All its powers and faculties are conferred for this purpose and for this alone, and it is to be supposed that no other or greater powers are conferred than are necessary to this end."

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<sup>37</sup> 9 Wheat. (U. S.) 738, 809, 810 (1824).

<sup>38</sup> *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316, 411 (1819).

The Supreme Court in the case on the powers conferred on national banks by the Reserve Board<sup>39</sup> suggests no modification of this ruling. It makes the doctrine of this case the basis of its decision, and says:

"The ruling in effect was that although a particular character of business might not be when isolatedly considered within the implied power of Congress, if such business was appropriate or relevant to the banking business the implied power was to be tested by the right to create the bank and the authority to attach to it that which was relevant in the judgment of Congress to make the business of the bank successful."

Whether the functions attached to the corporation are appropriate or relevant must be determined by Congress in view of the need of fitting the corporation to carry into execution the powers committed to Congress. There is no question of the power of Congress to create corporations as a means to carry out its constitutional powers. The only question is as to the limitation upon the powers that may be conferred upon and the powers that may be exercised by the corporation. The limitation is not upon the power to create corporations, but only upon the purposes for which the corporation may be used as an appropriate means.

Congress may authorize the formation of corporations for any of the purposes enumerated in the constitution as within its jurisdiction. It may create them for carrying into execution its fiscal operations, its power to raise and transport armies, to declare and carry on war, to regulate commerce between foreign nations or among the states, and having created them for any of these purposes it may incidentally and in its discretion confer upon them other powers relevant and appropriate to make them efficient instruments of the government for its own purposes; and just at this point comes the question what other powers are relevant and appropriate and what is the character and extent of the efficiency and what, if any, is the limit of the discretion the courts will allow to the Congress in these matters.

The Supreme Court, in *First National Bank v. Union Trust Co.*,<sup>40</sup> lays emphasis upon the right of Congress to exercise its legislative judgment as to the necessity for creating the bank, including the scope and character of the public and private powers

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<sup>39</sup> 244 U. S. 416, 420 (1917).

<sup>40</sup> 244 U. S. 416 (1917).

which should be given to it, and says that in that case the discretion of Congress was disregarded and judicial discretion put in its place, but the fact remains that the powers of Congress are enumerated and limited, and the creation of a corporation is not in itself one of the enumerated powers, but only a means of exercising one or more of those powers, and it seems to be clear that Congress, by adopting a corporation as a means, cannot thereby acquire power to do anything which under the constitution is beyond the sphere of its authority and therefore reserved to the states.

It is within the sphere of the power to regulate commerce that there is the greatest latitude for the exercise of the discretion of Congress as to what is appropriate and relevant for making a corporation efficient for exercising the powers given to it with a view to carrying this power into execution.

I shall not attempt to discuss the question whether or to what extent Congress may authorize transportation or trading companies to manufacture goods to be used in interstate or foreign commerce. It may well be that even more general powers will be claimed to be necessary for the successful operation of federal corporations organized for the development of American trade with foreign countries.

It is important to consider that corporations created by Congress will have certain advantages over corporations organized under state laws. They will not be foreign corporations which may be excluded from doing business in the states or be subject to regulation. They will not be on a par with corporations organized by Congress in the territories or the District of Columbia: being organized under an act of Congress their rights are derived from the laws of the United States. In *Osborn v. Bank of the United States*<sup>41</sup> Chief Justice Marshall, speaking of the bank, said: "It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?" and it was settled in that case that a suit by or against a corporation chartered by the United States is one arising under a law of the United States and subject to the jurisdiction of the United States courts without regard to difference of citizenship. So also

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<sup>41</sup> 9 Wheat. (U. S.) 738, 823 (1824).

in the Pacific Railroad Removal cases<sup>42</sup> it was held, on the authority of the case of the United States Bank, that corporations of the United States are entitled to remove suits brought against them in the state courts under the Removal of Causes Act of March 3, 1875,<sup>43</sup> on the ground that such suits are "suits arising under the laws of the United States," and this ruling has been followed and applied in a long line of cases, save when the particular suit was withdrawn or excluded from the federal jurisdiction by some specific enactment, as in the case of national banks or railroads.<sup>44</sup> Similar statutes would have the same effect upon suits by or against other corporations incorporated by Congress. Provision might be made that suits should be brought against them in the state courts, or that such suits should not be removed merely because the corporation was created by act of Congress.

Corporations created by Congress are not, unless by statute, as in the case of the national banks, citizens for jurisdictional purposes of the state wherein they reside, nor citizens of the United States under the Fourteenth Amendment.<sup>45</sup>

Within the scope of the powers conferred upon Congress, the powers conferred upon the corporations created by Congress are protected by the laws and constitution of the United States, and these are paramount and must prevail.<sup>46</sup> "Within the scope of its powers, as enumerated and defined, it (the government of the United States) is supreme and above the States; but beyond, it has no existence."<sup>47</sup>

There is a division of sovereignty within the territory of the several states which is also the territory of the United States. The powers given by Congress to the corporations created by it are the powers which emanate from the sovereignty of the United States and not from that of the states.<sup>48</sup> It is not merely a question of filing the certificate of incorporation in Washington or Boston.

<sup>42</sup> 115 U. S. 1 (1885).

<sup>43</sup> 18 STAT. AT L. 470 (1875).

<sup>44</sup> *Bankers' Trust Co. v. Texas & Pacific Ry. Co.*, 241 U. S. 295 (1916). 22 STAT. AT L. 162 (1882), chap. 290, § 4; 38 STAT. AT L. 804 (1915), chap. 22, § 5.

<sup>45</sup> *Bankers' Trust Co. v. Texas & Pacific Ry. Co.*, 241 U. S. 295 (1916).

<sup>46</sup> *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316 (1819); *Cohens v. Virginia*, 6 Wheat. (U. S.) 264, 414 (1821); *Osborn v. Bank of the United States*, 9 Wheat. (U. S.) 738. *In re*, *Quarles and Butler*, 158 U. S. 532, 536 (1895).

<sup>47</sup> *United States v. Cruikshank*, 92 U. S. 542, 550 (1875). See also *Brennan v. Titusville*, 153 U. S. 289 (1894).

<sup>48</sup> 1 THOMPSON ON CORPORATIONS, § 675 (1895 ed.).



The charter or certificate of the corporation does not merely create the corporation but also endows it with all the powers and faculties which it possesses.<sup>49</sup>

The right to tax the franchises of a corporation created by Congress belongs to Congress alone. As Justice Bradley said in a case on a state tax upon the Pacific Railroad Company,<sup>50</sup> "No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise;" and it was held in this case and a long line of cases that no franchise granted by Congress can be subject to taxation without the consent of Congress. It was the question of the right to tax the Bank of the United States that was the subject of the controversy over the right of Congress to incorporate the bank and the extent of its incidental powers, and controversies with regard to federal and state taxation will arise when corporations created by Congress exercise powers that may not constitutionally be conferred upon them by Congress.

Aside from the national banks acts and acts relating to the District of Columbia, there are, I believe, no general acts of Congress providing for the organization of corporations. Bills for that purpose were introduced on November 9, 1903, and February 7, 1910. The objects for which such corporations might be formed would have to be distinctly limited to those that are appropriate and relevant to carrying out the powers conferred upon Congress, and such as in the judgment of Congress are incidental to assuring the efficiency of the corporations for those purposes. General railroad laws for interstate lines might easily be drafted, and if Congress should determine that the proper regulation of interstate or foreign commerce required it, provision might be made by general law for incorporation of companies for that purpose; but it must be remembered that such companies so formed would not be merely so many companies additional to those now existing. They would be companies created by a different sovereignty, and so far as they acted within their powers they would not be subject to the control of the sovereignty of the state. In view of the decision of the United States Supreme Court that the business of insurance companies is not interstate commerce, such companies could not be

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<sup>49</sup> *Osborn v. Bank of the United States*, 9 Wheat. (U. S.) 738 (1824).

<sup>50</sup> *California v. Pacific R. R. Co.*, 127 U. S. 1, 40 (1887).

incorporated under acts of Congress.<sup>51</sup> Congress could by general laws provide for the incorporation of companies as means for carrying into execution the powers conferred upon Congress, but it could not permit them to include among the objects the transaction of all lawful business.

The question what business is lawful business for companies created by Congress must be determined in each class of cases by reference to the powers conferred upon Congress. The question is a question of the power of the corporation, and it would seem that it would constitute a question involving the application of the doctrine of *ultra vires*. That doctrine depends upon the extent of the power given to a corporation by the legislature, and in the case of federal corporations this depends upon the power possessed by Congress with regard to the objects for which the corporation is formed and the incidental powers which exist by implication. This doctrine, however, is usually invoked in cases involving the private rights of persons dealing with the corporations.

There would seem to be no doubt but that the question of the power of the corporation might be challenged by the Attorney-General of the United States. In the recent case in the Supreme Court relating to the powers conferred upon national banks the court declared that the action was properly brought by the state Attorney-General, but only on the ground that the statute made it a condition that the particular functions in question were given "only when not in contravention of state or local laws."

Mr. Justice Vandeventer dissented on the ground that this was not sufficient reason for permitting the state court to take jurisdiction of a suit relating to a power or franchise conferred by act of Congress. It is undoubtedly true that in the absence of such a limitation in the act creating the corporation, any suit to determine the question what powers the corporation may exercise would be a suit arising under the Constitution and laws of the United States.<sup>52</sup>

In such a case the question would not be whether Congress has or has not the right to create a corporation. Of this there is no question. The right to create a corporation is not one of the sub-

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<sup>51</sup> *Paul v. Virginia*, 8 Wall. (U. S.) 168 (1868); *Hooper v. California*, 155 U. S. 648 (1895); *New York Life Ins. Co. v. Cravens*, 178 U. S. 389 (1900).

<sup>52</sup> *Osborn v. Bank of the United States*, 9 Wheat. (U. S.) 738, 823-25 (1824).

stantive powers conferred upon Congress, but it is one of the ordinary incidents of sovereignty and it is one of the means which Congress may employ for the purpose of carrying into effect any of the powers vested in the government of the United States. A corporation so created is, in a broader or a narrower sense, an instrument of the government. Chief Justice Marshall, in speaking of the United States Bank, said

"it was not considered as a private corporation whose principal object is individual trade and individual profit, but as a public corporation created for public and national purposes." And again, "It was not created for its own sake or for private purposes. It has never been supposed that Congress could create such a corporation."<sup>53</sup>

The idea of a public corporation attaches also to the interstate railroad company and telegraph company which are themselves instruments of interstate commerce; but it is more difficult to connect it very closely with corporations that are created to carry on business in interstate commerce the regulation of which is quite independent of the fact of incorporation; but in all cases in which the United States creates a corporation for executing any of its powers, the primary purpose is the execution of the powers of Congress, and whatever incidental powers the corporations may have are powers which are applied because they are relevant and appropriate to making it efficient as an instrument for carrying those powers into effect.

The decision in the recent case of the *First National Bank v. Union Trust Co.*<sup>54</sup> has not modified the principles laid down by Chief Justice Marshall in the cases of the United States Bank. The court laid stress upon the fact that Congress must have wide discretion and that this discretion must be exercised by Congress rather than by the court, and that in judging the powers you must take the corporation as an entity and consider the particular functions as connected with the operation of the corporation as a whole for the purposes for which it was created; but it did not intimate that once the corporation was created for a federal purpose it was capable of doing anything that might be done by a corpora-

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<sup>53</sup> *Osborn v. Bank* (U. S.), 9 Wheat. (U. S.) 738, 860 (1824).

<sup>54</sup> 244 U. S. 416 (1917).

tion created by any sovereign power. There was nothing to suggest that the power of the corporation was not limited to the sphere of the sovereignty exercised by the government of the United States within the several states of the Union.

*Edward Q. Keasbey.*

NEWARK, N. J.

# HARVARD LAW REVIEW

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Published monthly, during the Academic Year, by Harvard Law Students

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SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER

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RAILROAD WAR BONDS. — In "An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes,"<sup>1</sup> approved by the President, March 21, 1918, there are two passages relating to the issue of railroad securities.

"Section 7. That for the purpose of providing funds requisite for maturing obligations or for other legal and proper expenditures, or for reorganizing railroads in receivership, carriers may, during the period of Federal control, issue such bonds, notes, equipment trust certificates, stock and other forms of securities, secured or unsecured by mortgage, as the President may first approve as consistent with the public interest. . . ."

"Section 15. That nothing in this Act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

It will be noted at once that section 15 mentions only "stocks and bonds," and says nothing about "notes, equipment trust certificates . . . and other forms of securities, secured or unsecured by mortgage" mentioned in section 7.

Although section 15 purports to be only a construction clause, obviously no cautious lawyer could afford to approve a note or equipment trust certificate with the same freedom he would a certificate of stock or a bond, in view of the fact that the framers of the statute enumerated

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<sup>1</sup> C. 107, Sixty-fifth Congress.

only stocks and bonds in section 15, after having made a much longer list in section 7. The statute might conceivably be construed to mean that the power of the states over the issue of notes or equipment trust certificates remains as before the passage of the act. Indeed it is a fair question whether the provision contained in section 7 that carriers may issue securities approved by the President is a grant or a limitation of power.<sup>2</sup> It is provided further in section 7 that securities so approved may be bought by the President. Obviously that would add nothing to their validity.

The only safe position to take in the matter is that whereas before the act the carriers had to comply with the laws of the various states in issuing their securities, now the carriers must also secure the approval of the President as well. The carriers have one more place to go, one more hurdle to leap in the dismal race over conflicting statutes and more conflicting orders of autonomous railroad commissions to the money lender — a way sometimes beset with spoilers whose regard for the Commerce Clause of the Constitution does not prevent them from levying heavy tribute.<sup>3</sup>

If the other interpretation be taken, that section 7 is a new grant of power, part of the supreme law of the land, and exclusive of the action of the state commissions, the going is still very bad. There is first the difficulty that the carriers have only state charters and that it is *ultra vires* for them to issue securities not authorized by the state law. The corporate capacity is lacking. Can it be said that section 7 is an amendment to all state charters of carriers? It is very doubtful that Congress so intended. We might well ask for stronger language to accomplish so revolutionary a purpose. This would be federal incorporation by piecemeal. Many lawyers think that federal incorporation must be voluntary, and accepted by the stockholders concerned, to be constitutional. Not even Congress can force upon them obligations to which they never consented, without depriving them of their property without due process of law. The question involved is similar to that of the limits of the power of the legislature to alter the charter of a corporation, where power to amend has been reserved by the act of incorporation. Thus it is said that the object of the grant or any property rights vested under it may not be defeated or substantially impaired, and that the fundamental character of the corporation may not be changed.<sup>4</sup>

Assuming, however, that the difficulty of the lack of corporate capacity has been safely met, there is still the difficulty in the case of railroad bonds of securing them by lien upon the property. Under the laws of

<sup>2</sup> In this connection, compare section 5 of the same act, which reads as follows:

"SEC. 5. That no carrier while under Federal control shall, without the prior approval of the President, declare or pay any dividend in excess of its regular rate of dividends during the three years ended June thirtieth, nineteen hundred and seventeen: *Provided, however,* That such carriers as have paid no regular dividends or no dividends during said period may, with the prior approval of the President, pay dividends at such rate as the President may determine."

<sup>3</sup> See *Union Pacific R. R. Co. v. Public Service Commission of Missouri*, 248 U. S. 67 (1918).

Illinois has been even a worse offender than Missouri in this respect, and has extorted enormous sums from interstate carriers for the privilege of borrowing money.

<sup>4</sup> Authorities collected in 12 CORP. JUR. 1027, § 654.

many states, a lien upon a railroad can be created only in a certain way, an order of the Railroad Commission being a part of the process. Suppose the President has approved the issue of a railroad bond, how does this make it a lien on the railroad, contrary to the law of the state where the railroad is situated? Assume, if you please, that Congress can create liens upon railroads — no great concession since federal courts constantly do so in creating receiver's certificates — the present statute has done nothing of the kind. The bond is valid, let us say, as a promise to pay, but is it secured by a lien?

Other delightful features of current state statutes, such as those declaring railroad certificates, notes, etc., not issued by the authority of the State Railroad Commission null and void, and punishing by fine or imprisonment those who issue them, need not be dwelt upon. In a statement of Mr. S. T. Bledsoe, General Counsel of the Atchison, Topeka and Santa Fe Railway Company, read before the Senate Committee on Interstate Commerce, January 20, 1919, will be found collected an extraordinary array of highly conflicting state laws about Railroad Bonds, limiting the power to borrow money as to amount, the rate of interest, the price of bonds, and the purpose for which the money may be used. In Texas, where the tribunes of the people have been very watchful, as a practical matter bonds cannot be issued until the railroad is built, but even this provision has not been completely successful in protecting the state against additional lines of railroad, a few having been financed on property in other states. Unless Congress is prepared to regulate the issue of railroad securities in a very much more thoroughgoing way than by the statute under consideration, they would better let it alone. Even the cleverest draftsman cannot frame a statute which will deal with this subject in an adequate way without the aid of lawyers expert from long experience in passing upon railroad securities. What a pity that the admirable qualities which enable a man to get an office are sometimes not the same as those which qualify him to administer it to the greatest public benefit! Until they are the same, there are cases where a legislator can consult an expert to advantage. This is one.

BLEWETT LEE.

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JUDGMENT ON THE EVIDENCE NOTWITHSTANDING THE VERDICT. — If at the trial the defendant makes a motion for a compulsory nonsuit, or if either party moves for a directed verdict in his favor, and on the evidence or lack of evidence, the court should have granted the motion but did not, and a verdict is rendered against the party making the motion, the verdict should not and would not be allowed to stand. In England at common law on motion made to the court in *banc*, a new trial would be ordered. Until 1854 the decision of the court in *banc* was final; but by the Common Law Procedure Act<sup>1</sup> of that year an appeal was permitted, and the appellate court could order a new trial. In this country likewise a new trial may be ordered by the trial court (usually the single judge who presides at the trial), or by the appellate court.<sup>2</sup> It would

<sup>1</sup> § 35. A motion for a new trial is now made in the Court of Appeal. R. S. C., Order 39, Rule 1.

<sup>2</sup> See 31 HARV. L. REV. 682.

seem clear however that usually a new trial is not what is needed. If the state of the evidence was such as to justify taking the case from the jury in the first place, it would normally follow that it would justify the rendition of a judgment notwithstanding the verdict. In rendering such judgment the court is in effect doing after the trial what admittedly should have been done at the trial. Since there was no question on which it was the jury's province to find, its finding should be regarded as immaterial.<sup>3</sup> Accordingly in England by rule of court,<sup>4</sup> and in several states by statute,<sup>5</sup> and in a few by judicial decision,<sup>6</sup> the trial court on motion or the appellate court on appeal may order judgment notwithstanding the verdict when one of the parties moved at the trial for a nonsuit or directed verdict and the court wrongly denied the motion.<sup>7</sup>

But suppose that no attempt was made at the trial to take the case from the jury, but that it is subsequently discovered that the verdict was not supported by any evidence, and that if a motion had been made for a directed verdict it should have been granted. The House of Lords (Lord Finlay, L. C., and Lord Shaw, dissenting) has recently held in *Banbury v. Bank of Montreal*, [1918] A. C. 626, that the Court of Appeal need not grant a new trial but may in its discretion give judgment notwithstanding the verdict.<sup>8</sup>

Now it is well settled that the trial court (or in England the Court of Appeal) may in its discretion grant a new trial on a ground which might have been but was not urged at the trial.<sup>9</sup> In such a case it is not error for the court either to grant or to refuse to grant a new trial. It would seem that the same principle should apply to the ordering of judgment notwithstanding the verdict. If the plaintiff has had his day in court, if he has had a chance to present all his evidence, and if that evidence is insufficient as a matter of law to justify the verdict in his favor, there is no reason in the absence of special circumstances (such as accident, surprise, newly discovered evidence or the like<sup>10</sup>) why he should be entitled as a matter of right to another day in court. As Lord Atkinson

<sup>3</sup> See 31 HARV. L. REV. 688-89.

<sup>4</sup> Order 58, Rule 4 provides: "The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require." In many English cases the court has exercised the power here given it. See *Skeate v. Slaters*, [1914] 2 K. B. 429; *Winterbotham & Co. v. Sibthorp*, [1918] 1 K. B. 625.

<sup>5</sup> MASS. L., 1909, c. 236; MINN. GEN. STAT., § 7998; PA. LAWS, 1905, No. 198.

<sup>6</sup> *Hollingsworth v. Skelding*, 142 N. C. 246, 55 S. E. 212 (1906); *Anderson v. Phillips* (N. D. 1918), 169 N. W. 315 (*semble*); *Dowagiac Mfg. Co. v. Schroeder*, 108 Wis. 109, 84 N. W. 14 (1900); *Muench v. Heinemann*, 119 Wis. 441, 96 N. W. 800 (1903). And see *Astley v. Garnett*, 20 Brit. Col. R. 528 (1914).

<sup>7</sup> In *Slocum v. N. Y. Life Insurance Co.*, 228 U. S. 364 (1913), it was held that these principles could not be followed in the federal courts because it violated the Seventh Amendment. For a criticism of this decision, see 26 HARV. L. REV. 732; 63 UNIV. OF PA. L. REV. 585; REP. AMER. BAR ASSOC., 1913, 561.

<sup>8</sup> The opposite result was reached (Robinson, J., dissenting) in *Anderson v. Phillips* 169 N. W. 315 (N. D. 1918).

<sup>9</sup> *Farr v. Fuller*, 8 Iowa, 347 (1859); *Standard Oil Co. v. Amazon Insurance Co.*, 79 N. Y. 506 (1880). But see *Valerius v. Richard*, 57 Minn. 443, 59 N. W. 534 (1894).

<sup>10</sup> *Alink v. Chicago*, etc. Ry. Co. 169 N. W. 250 (Minn. 1918). All the judges in *Banbury v. City of Montreal* admit that if it is probable that more evidence would have been introduced by the plaintiff if a motion for a nonsuit had been made, then a new trial would be granted.



observed, "it seems hardly just or right that a verdict which never should have been found should be allowed to stand simply because the judge was not asked to prevent its being found."<sup>11</sup>

**RECOVERY FOR DEATH IN COLLISION AT SEA.** — In 1808 Lord Ellenborough laid down the rule which has become so firmly fixed in the common law, that "in a civil court the death of a human being could not be complained of as an injury."<sup>1</sup> Although Lord Campbell's Act,<sup>2</sup> passed in 1846, and similar acts in most American jurisdictions, provide for recovery for death by wrongful act, the effect of Lord Ellenborough's decision is by no means destroyed. Situations not covered by these statutes, where consequently an injury goes remediless, are constantly arising. The principle of Lord Campbell's Act has never been adopted as part of the common law.<sup>3</sup>

The doctrine of the common law has been applied by courts of admiralty to actions for wrongfully causing death on the sea. Before 1886, a number of lower federal courts held that the common-law rule should not be applied in admiralty, and allowed recovery for death at sea.<sup>4</sup> These cases, however, were overruled, and the question was finally settled by the Supreme Court in *The Harrisburg*<sup>5</sup> on the ground that the maritime law, as received by maritime nations generally did not differ on such questions from the law as administered by the civil courts. Neither in England nor by the federal legislature in this country has a statute been passed in terms allowing for recovery for death at sea, so that any claim in admiralty must be based on Lord Campbell's Act and similar statutes in this country. The question whether these statutes give such a right was raised in a recently published case, *The Middlesex*,<sup>6</sup> in which it was held by the District Court for the District of Massachusetts that no recovery could be had against the owners of a Massachusetts ship by the personal representatives of three sailors on a Maine ship for their death in a collision with the former ship in which it was at fault.

<sup>11</sup> *Banbury v. Bank of Montreal*, [1918] A. C. 626, page 675.

<sup>1</sup> *Baker v. Bolton*, 1 Campb. 493. No reason was given by Lord Ellenborough for the decision. An early case, *Higgins v. Butcher*, Yelverton, 89 (1606), had held that a husband could not recover for the death of his wife on a declaration which alleged damage to the wife.

<sup>2</sup> 9 & 10 Vict., c. 93. One of the earliest statutes of this type was enacted in Massachusetts in 1648. See *TIFFANY, DEATH BY WRONGFUL ACT*, § 4, note 5.

<sup>3</sup> See the dissent of Bramwell, B., in *Osborn v. Gillett*, L. R. 8 Ex. 88 (1873), in which he proclaimed the fallacy of the rule in *Baker v. Bolton*, *supra*.

There are some early American cases *contra* to *Baker v. Bolton*: *Cross v. Guthery*, 2 Root (Conn.) 90 (1794); *Ford v. Monroe*, 20 Wend. (N. Y.) 210 (1838); *Sullivan v. Railroad Co.*, 3 Dill. (Circ. Ct.) 334 (1874). These cases were subsequently overruled.

<sup>4</sup> *The Sea Gull*, Chase, 145 (1867); *The Towanda*, 34 Leg. Int. 394 (1877); *The Charles Morgan*, 2 Flip. 274 (1878); *The E. B. Ward, Jr.*, 17 Fed. 456 (1883), 23 Fed. 900 (1885); *The Columbia*, 27 Fed. 704 (1886).

For *dicta* to the same effect see cases cited in *TIFFANY, DEATH BY WRONGFUL ACT*, § 204, note 6.

For a review of these decisions, see *The Harrisburg*, *infra*, note 5.

<sup>5</sup> 119 U. S. 199 (1886). There are no English cases holding that the rule in admiralty differs from the rule at common law. See *Seward v. The Vera Cruz*, 10 A. C. 59, 66, 70 (1884).

<sup>6</sup> 253 Fed. 142 (1916).

All ships which have the right to sail under the maritime flag of a state<sup>7</sup> are under the protection and jurisdiction of that state.<sup>8</sup> This extraterritorial power of a sovereign over ships at sea is sometimes based on the fiction that the ships are portions of the sovereign's territory.<sup>9</sup> But the better explanation seems to be that the ships partake of the state's nationality, and that the sovereign's jurisdiction is personal rather than territorial.<sup>10</sup> It therefore lies within the power of the sovereign to protect the ships and persons aboard them against torts on the high sea and to give remedies for such torts which its courts will enforce, and which, under proper conditions, will be recognized by courts of other states.<sup>11</sup> Thus the maritime law of Continental countries gives a remedy for death by wrongful act at sea. Recognizing this, the United States Supreme Court, where such an act was committed on board a French ship, enforced the right in a proceeding to limit the liability of the French vessel.<sup>12</sup> The question in the United States and England therefore is whether in each death statute the sovereign has intended to give a remedy for death at sea.

It is to be noted, in considering the American cases, that the fact that the United States Constitution has given Congress power to legislate on this subject<sup>13</sup> does not, in the absence of such legislation, deprive the state death statutes of effect on the high seas. The general principle is well settled that the mere grant of power to Congress to legislate on certain subjects, without its exercise, does not wipe out state laws on those subjects.<sup>14</sup>

There is no question in England but that Lord Campbell's Act does apply to deaths on the high sea.<sup>15</sup> The House of Lords, however, has decided that no action *in rem* can be maintained in admiralty under Lord Campbell's Act because the jurisdiction of that court is limited by the Admiralty Court Act of 1861 to "damage done by a ship," which was held not to cover the injury dealt with in the death statute, and because the latter statute did not provide for a lien.<sup>16</sup> But it is settled that an action *in personam* for death at sea can be brought in common-

<sup>7</sup> "Private vessels belonging to a state are those which, belonging to private owners, satisfy such conditions of nationality as may be imposed by the state laws with reference to ownership, to place of construction, the nationality of the captain, or the composition of the crew." HALL, *PRIVATE INTERNATIONAL LAW*, 6 ed., 163.

<sup>8</sup> *Crapo v. Kelly*, 16 Wall. 610 (1872); *The Hamilton*, 207 U. S. 398 (1907). See HALL, 244.

<sup>9</sup> For an exposition and criticism of this view, see HALL, 244-49.

<sup>10</sup> HERSHEY, *ESSENTIALS OF INTERNATIONAL PUBLIC LAW*, § 208, note; HALL, 249; BEALE, *CONFLICT OF LAWS*, Part I, § 106.

<sup>11</sup> See *The Hamilton*, 207 U. S. 398, 403 (1907).

<sup>12</sup> *La Bourgogne*, 210 U. S. 95 (1908).

<sup>13</sup> This power is derived from the power to regulate interstate and foreign commerce (U. S. CONST., Art. I, § 8) and from the extension of the judicial power of the federal courts to "all cases of admiralty and maritime jurisdiction" (Art. III, § 2).

<sup>14</sup> *American Steamboat Co. v. Chase*, 16 Wall. (U. S.) 522 (1872); *The Hamilton*, 207 U. S. 398 (1907); *McDonald v. Mallory*, 77 N. Y. 546 (1879); *Western Union Tel. Co. v. Call Publishing Co.*, 181 U. S. 92 (1901).

<sup>15</sup> *The Bernina*, L. R. 12 P. D. 58 (1887), affirmed in 13 A. C. 1 (1888); *The Orwell*, L. R. 13 P. D. 80 (1888). See *Seward v. The Vera Cruz*, 10 A. C. 59, 71 (1884).

<sup>16</sup> *Seward v. The Vera Cruz*, *supra*, note 15. Cockburn, C. J., in *Smith v. Brown*, 6 Q. B. 729 (1871), put the lack of jurisdiction of the Admiralty Court on the ground that "damage" meant injury to property only.

law courts, and since the judicature acts of 1873 and 1875, by which the Admiralty Court became a branch of the High Court, it is possible to institute such a suit in the Admiralty Court. Such an action, however, is not an admiralty suit, and is governed by common-law rules as to contributory negligence and damages.<sup>17</sup>

The death statutes in this country do not differ greatly in scope from Lord Campbell's Act.<sup>18</sup> The United States Supreme Court has held that such statutes do cover death by wrongful act committed on board ships domiciled in the state although at sea or in the territorial waters of some other state, and that the admiralty courts will enforce such a claim. The leading case is *The Hamilton*,<sup>19</sup> in which Mr. Justice Holmes said of the Delaware statute: "We should add . . . that we construe the statute as intending to govern all cases which it is competent to govern, or at least not to be confined to deaths occasioned on land." Unless the death statute provides for a lien such an action must be *in personam*,<sup>20</sup> against the owner of the ship, but if it does provide for a lien the action may be *in rem*, a libel against the vessel.<sup>21</sup>

Thus it appears that the domicile state has jurisdiction over deaths on ships at sea, and that the death statutes allow recovery for such wrongs. It often happens, as in the case of *The Middlesex* cited above, that the death in question is the result of a collision between two ships from different jurisdictions, in which the death statutes differ, so that it becomes important to determine which law is to be applied. A distinction between substantive and procedural law must be made here. A court will apply the procedural law of the *forum*, irrespective of the nationality of the vessels or the parties before it. Thus the Supreme Court permitted the owners of the British ship *Titanic* to limit their liability under American law so far as claims presented in this country were concerned.<sup>22</sup> As regards the substantive law, however, it is the law of the domicile of the vessel rather than the law of the *forum* which is applied. It was so held by the Supreme Court in the case of *La Bourgogne*,<sup>23</sup> where a British and a French ship collided, and a claim was made against the owners of the latter for the death of a person aboard the French ship. The court applied the French rule of recovery for wrongful death. It is significant to note that the court applied this rule, not as the law of the jurisdiction of the offending vessel but as the law of the place where the injury occurred.<sup>24</sup> That is the usual common-law

<sup>17</sup> *The Bernina*, *supra*, note 15.

<sup>18</sup> See the analytical table of these statutes in TIFFANY, *DEATH BY WRONGFUL ACT*, xx, *et seq.* The usual provision is for an action whenever death is caused by the wrongful act, neglect, or default of another, such as would have entitled the party injured to maintain an action had he not been killed.

<sup>19</sup> 207 U. S. 398 (1907). See *The Corsair*, 145 U. S. 335, 347 (1891). The same conclusion was reached by the New York Court of Appeals in *McDonald v. Mallory*, 77 N. Y. 546 (1879).

<sup>20</sup> *The Corsair*, *supra*, note 19.

<sup>21</sup> *The Oregon*, 45 Fed. 62 (1892).

<sup>22</sup> 233 U. S. 718 (1913). See DICEY, *LAW OF DOMICILE*, 153.

<sup>23</sup> 210 U. S. 95 (1908).

<sup>24</sup> The court, speaking through Mr. Justice White, said (page 138): "But in *The Hamilton* it was also settled that where the law of the State to which the vessel belongs gives a right of action for wrongful death if such death occurred on the high seas on board of the vessel, the right of action . . . will be enforced. . . ." (In *The Hamilton* the two colliding ships were from the same jurisdiction.)

rule and the rule laid down by most writers on private international law.<sup>26</sup> Some Continental countries have applied the law of the jurisdiction of the offending ship, in cases of collision at sea.<sup>26</sup>

The case of *The Middlesex* presents an additional fact to those in *La Bourgogne*, namely, that the deceased was aboard the innocent vessel, and that the two vessels were from different jurisdictions. The court in deciding that case apparently relied on a *dictum* by Mr. Justice Bradley in *The Scollard*,<sup>27</sup> to the effect that if a collision between two vessels of different nationality was being adjudicated in a court of a third jurisdiction, the court would apply the law of the *forum* since it would not be fair to choose between the laws of the jurisdictions of the vessels. It is to be noted that this *dictum* was not overruled by the decision in *La Bourgogne*, since the fact that the deceased was on board the offending ship made it unimportant what the ship collided with. It is submitted, however, that the decision in *The Middlesex*, that the owners of the offending vessel are not liable for these deaths, is not sound. As has been pointed out, the law governing torts is the law of the place where the injury occurred. And that place, in the principal case, was the ship on which the deceased was riding.<sup>28</sup> Or it might be proper for the court to apply the law of the jurisdiction of the offending vessel on the ground that it could not complain if held liable under its own law.<sup>29</sup> The death statutes in either state, in the principal case, although differing as to the measure of damages, would have allowed recovery.<sup>30</sup> Even applying Mr. Justice Bradley's *dictum*, the same result would follow. The suit was brought in a federal court. Hence the law of the *forum*, in the absence of legislation by Congress, must be the state law,<sup>31</sup> and the court is again driven to a choice between the laws of the two states. The necessity of such a choice should not justify denial of all recovery for this greatest of all injuries. It should be the policy of the courts to extend rather than restrict the operation of death statutes.

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RIGHT OF A PUBLIC UTILITY TO CEASE OPERATION AND DISMANTLE ITS PLANT WITHOUT CONSENT OF THE STATE. — At an early date our law recognized that where one devotes his property to a public service such property becomes affected with a public interest and ceases to be *juris*

<sup>26</sup> See MINOR, CONFLICT OF LAWS, § 194; BAR, INTERNATIONAL LAW (Gillespie's Trans.), 360, note 2.

<sup>27</sup> That is the rule in France: 19 Clunet, 153 (Cass., 4 November, 1891). And in Germany: 14 Steuffert, 335 (Sup. Ct. of Berlin, 25 October, 1859).

Bar lays down the rule that recovery in case of collision at sea is limited by the laws of the jurisdictions of both the claimant and the offending vessel. BAR, 489-90.

<sup>28</sup> 105 U. S. 24, 29 (1881).

<sup>29</sup> United States v. Davis, 2 Sumner (Circ. Ct.) 482 (1807).

<sup>30</sup> In Whipple v. Thayer, 16 Pick. (Mass.) 25 (1834), it was held that where the estate of an insolvent was being administered, the right of a creditor from another state could be limited by the law of his state whether or not there was such a limitation in the law of the *forum*.

<sup>31</sup> MAINE REV. STAT., 1903, c. 89, §§ 9, 10; MASS. ACTS OF 1907, c. 375. The offending vessel was domiciled in Massachusetts.

<sup>32</sup> Western Union Tel. Co. v. Call Publishing Co., 181 U. S. 92 (1901). See 1 BEALE, CONFLICT OF LAWS, Part I, § 112 a.

*privati* only.<sup>1</sup> One may enter upon such service voluntarily without preparing the public for his advent,<sup>2</sup> but, because he has by his representations led the public to rely upon the service, he may not withdraw from performing the service without reasonable notice to the public.<sup>3</sup> What constitutes reasonable notice is a question of fact in each case depending upon the character and importance of the business.<sup>4</sup>

The case of *People ex rel. Hubbard v. Colorado Title & Trust Co.*,<sup>5</sup> recently decided by the Colorado Supreme Court, raises the question whether one who is engaged in public service must, in attempting to withdraw therefrom and dismantle his plant, not only give reasonable notice to that effect but in addition obtain the consent of the state. In that case a court of equity upon foreclosure proceedings, without the consent of the Public Utilities Commission, ordered the receiver of the Colorado Midland Railroad Company to discontinue service and dismantle the railroad.<sup>6</sup> The Supreme Court of Colorado held this order void on the ground that under the Public Utilities Act which conferred upon the commission power to regulate service, the commission had exclusive jurisdiction to determine whether or not a railroad company may cease operation and dismantle its plant.

The problem whether a public utility may discontinue service and dismantle its plant only with consent of the state must be considered from two different viewpoints: that of the chartered corporation, and that of the unincorporated proprietor. As to the former, there are three types of charters: first, those clearly mandatory; second, those which are in general terms only, being neither clearly mandatory nor clearly permissive; and third, those clearly permissive.

The case of the mandatory charter raises no difficulty. So long as the corporation retains its charter it is bound by the terms thereof and may be compelled to continue operation.<sup>7</sup> The only limitation upon the

<sup>1</sup> *Munn v. Illinois*, 94 U. S. 113 (1876); *New York Stock Exchange v. Board of Trade*, 127 Ill. 153, 19 N. E. 855 (1889); 1 HARG. LAW TRACTS, 78; 32 HARV. L. REV. 169.

<sup>2</sup> 1 WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 316, 330. However, according to 1 HARG. LAW TRACTS, 6, it appears that because of the King's ancient right of prerogative over rivers and arms of the sea "no man may set up a common ferry for all passengers without a prescription time out of mind, or a charter from the King."

<sup>3</sup> 1 WYMAN, § 316, and cases cited.

<sup>4</sup> "A teamster might withdraw upon a day's notice doubtless, as his patrons may quickly make other arrangements. A canal boatman might tie up at the end of any trip, for other opportunities for shippers over the canal are numerous. But a railroad company may not without a long notice abandon its line. And a gas company could abandon its service only after a long enough period to provide a new supply." 1 WYMAN, § 317, and see cases there cited.

For decisions by public service commissions on the point, see *Re Tidewater & W. R. Co.*, P. U. R. 1917 E, 798 (Va. State Corp. Com.); *Re Delaware & H. Co.*, P. U. R. 1917 A, 715 (N. Y. Pub. Serv. Com., 2d Dist.); *Ex parte Central Illinois Public Service Co.*, P. U. R. 1916 B, 920 (Ill. Pub. Util. Com.).

<sup>5</sup> 178 Pac. 6 (Colo.) (1918).

<sup>6</sup> Since the railroad company appeared and consented to this order no question was raised as to the power of the court to direct that the receiver exercise more than his customary function of preserving the assets from waste and destruction. See *Equitable Trust Co. v. Great Shoshone Co.*, 158 C. C. A. 99, 105, 245 Fed. 697, 703 (1917); *Kokernot v. Roos*, 189 S. W. 505, 508 (Tex. Civ. App.) (1916); *HIGH, RECEIVERS*, 4 ed., § 5.

<sup>7</sup> *Southern Railway Co. v. Hatchett*, 174 Ky. 463, 192 S. W. 694 (1917); *State ex rel.*

state in regard to a corporation with a mandatory charter is that it cannot compel operation at a loss, thereby depriving the corporation of its property for public use without compensation.<sup>8</sup>

The charter of incorporation which is in general terms, being neither clearly mandatory nor clearly permissive, is perhaps the commonest type. Following the well-established rule of construction that a charter from the state is construed most strongly against the grantee,<sup>9</sup> courts, where public necessity is involved, tend to hold such charters mandatory, thereby preventing withdrawal from service except with consent of the state.<sup>10</sup>

The case of the clearly permissive charter seldom arises. The decision in the Dartmouth College case<sup>11</sup> has led to the custom of reserving a power to the legislature to alter charters of incorporation at will,<sup>12</sup> such power being reserved by constitutional provision,<sup>13</sup> by general

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Caster v. Postal Telegraph Co., 96 Kan. 298, 150 Pac. 544 (1915); Rowland v. Saline River Railway Co., 119 Ark. 239, 177 S. W. 896 (1915); Brownell v. Old Colony Railroad, 164 Mass. 29, 41 N. E. 107 (1895); Savannah & Ogeechee Canal Co. v. Shuman, 91 Ga. 400, 17 S. E. 937 (1893). See Columbus R. Power & Light Co. v. Columbus, 253 Fed. 499, 505 (1918); 26 HARV. L. REV. 659.

<sup>8</sup> "The right of the state to regulate public carriers in the interest of the public is very great. But that great power does not warrant an unreasonable interference with the right of management or the taking of the carrier's property without compensation." Chicago, M. & St. P. Railroad Co. v. Wisconsin, 238 U. S. 491, 501 (1915). State ex rel. Caster v. Postal Telegraph Co., *supra*, note 7; Rowland v. Saline River Railway Co., *supra*, note 7.

<sup>9</sup> Cleveland Electric Railway Co. v. Cleveland, 204 U. S. 116 (1907). 2 LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION, 2 ed., §§ 554-57.

<sup>10</sup> Under a franchise giving "the right, power, and authority" to construct, maintain and operate a line of electric railway, the court held that the railway could not, against the will of the state, abandon the enterprise if to do so would work a prejudice to the public interest. Day v. Tacoma Railway & Power Co., 80 Wash. 161, 141 Pac. 347 (1914). Colorado & S. Railway Co. v. State R. Commission, 54 Colo. 64, 129 Pac. 506 (1912); Union Pacific R. R. Co. v. Hall, 91 U. S. 343 (1875). 26 HARV. L. REV. 659.

But the courts construe general charters to be mandatory only "to meet the public wants and exigencies. If there is not sufficient traffic over a particular line of road to pay for the expense of running trains this is sufficient evidence that the public do not require it to be kept in operation; and in such case the company may cease operating the road unless this be contrary to the express terms of its charter." MORAWETZ, PRIVATE CORPORATIONS, 2 ed., § 1119. Central Bank & Trust Corporation v. Cleveland, 252 Fed. 530 (1918); State ex rel. v. Dodge City, M. & T. R. Co., 53 Kan. 329, 36 Pac. 755 (1894); State v. Old Colony Trust Co., 131 C. C. A. 581, 215 Fed. 307 (1914); Moore v. Lewisburg & R. E. R. Co., 80 W. Va. 653, 93 S. E. 762 (1917).

That a public service corporation cannot be compelled to do the impossible is strikingly brought out in Public Service Commission v. International Ry. Co., 224 N. Y. 631, 120 N. E. 727 (1918). Street railway employees were on a strike demanding a retroactive scale of wages which the company could not pay through lack of funds. The court held it error to require the railway to operate cars within two days because to do so would compel the company to take back the striking employees.

In Middlesex R. R. Co. v. Boston & Chelsea R. R. Co., 115 Mass. 347 (1874), the court held it *ultra vires* for a horse-railroad corporation to disable itself by selling in the absence of legislative authority.

<sup>11</sup> 4 Wheat. (U. S.) 518 (1819).

<sup>12</sup> See Albany N. R. R. Co. v. Brownell, 24 N. Y. 345, 351 (1862); Supreme Council C. K. A. v. Fenwick, 169 Ky. 269, 277, 183 S. W. 906, 909 (1916).

<sup>13</sup> Ramapo Water Co. v. New York, 236 U. S. 579 (1915); Jackson v. Walsh, 75 Md. 304, 23 Atl. 778 (1892).

statute,<sup>14</sup> or by provision in the charter itself.<sup>15</sup> Where, however, charters have been held permissive, the courts have generally agreed that the incorporators cannot against their will be compelled to continue the operation of the plant.<sup>16</sup>

The case of the unincorporated proprietor is distinct from that of the chartered corporation. The chartered corporation has a legal existence only as a public servant and as such can be subjected to more rigid requirements than the unincorporated proprietor who has an existence separate and distinct from his existence as a public servant. Accordingly the cases consistently hold that an individual cannot be compelled to continue the operation of a public service against his will.<sup>17</sup> To hold otherwise would endanger his rights under the Thirteenth and Fourteenth Amendments.<sup>18</sup>

The law on this point has been thrown into confusion because the cases have failed to distinguish between cessation of operation on the one hand and dismantling of the plant on the other.<sup>19</sup> The latter works a much greater hardship on the public than the former. As the Maine Public Utilities Commission recently pointed out,<sup>20</sup> "The public is entitled to assurance that the present company shall not be permitted to stand in the way if interested parties wish to render such service." In other words, where a real public necessity for this or a similar service continues, a public utility should not be allowed to scrap its plant until a reasonable time has elapsed within which (1) a purchaser willing to render the same service may be found,<sup>21</sup> or (2) the parties being served by the utility may decide to guarantee it against further loss,<sup>22</sup> or (3) a

<sup>14</sup> *Polk v. Mutual Reserve Fund Life Association*, 207 U. S. 310 (1907); *People ex rel. v. Rose*, 207 Ill. 352, 69 N. E. 762 (1904).

<sup>15</sup> *Supreme Council C. K. A. v. Logsdon*, 183 Ind. 183, 108 N. E. 587 (1915); *Ashuelot R. Co. v. Elliot*, 58 N. H. 451 (1878).

<sup>16</sup> *East Ohio Gas Co. v. Akron*, 81 Ohio St. 33, 90 N. E. 40 (1909); *State ex rel. Knight v. Helena Power & Light Co.*, 22 Mont. 391, 56 Pac. 685 (1899); *San Antonio Street Railway Co. v. State*, 90 Texas, 520, 39 S. W. 926 (1897). See BOOTH, STREET RAILWAYS, 2 ed., § 65.

<sup>17</sup> In the early case of *Rex v. Collins, Palmer*, 373 (1623), the court said that "an innkeeper may at his pleasure demolish his sign and leave off innkeeping." Similarly as to a ferryman, *Carter v. The Commonwealth*, 2 Va. Cas. 354 (1823), and as to teamster, *Satterlee v. Groat*, 1 Wend. (N. Y.) 272 (1828). Since the bulk of public service work is to-day carried on by corporations recent cases as to the right of an unincorporated public service proprietor to withdraw from business at will are scarce. But see *San Antonio Street Railway Co. v. State*, 90 Texas, 520, 528, 39 S. W. 926, 930 (1897) where the court says, "Certainly carriers who are not corporations may at any time discontinue the business, if they elect to do so." See also *State ex rel. Knight v. Helena Power & Light Co.*, 22 Mont. 391, 397, 56 Pac. 685, 687 (1899).

<sup>18</sup> As to Thirteenth Amendment, see *United States v. Reynolds*, 235 U. S. 133 (1914), *Ex parte Hollman*, 79 S. C. 9, 60 S. E. 19 (1908). As to the Fourteenth Amendment, see *Van Denman & Lewis Co. v. Rast*, 214 Fed. 827 (1913); *Allgeyer v. Louisiana*, 105 U. S. 578, 589 (1897).

<sup>19</sup> The proper distinction was, however, made in *Rowland v. Saline River Railway Co.*, 119 Ark. 239, 246, 177 S. W. 896, 899 (1915) where the court said, "It does not follow that, because we have held that the order of the railroad commission was arbitrary and oppressive, the railroad company has a right to take up its rails and dispose of them of its own motion."

<sup>20</sup> *Re St. Croix Gaslight Co.*, P. U. R. 1919 A, 487, 493 (Maine Pub. Util. Com.).

<sup>21</sup> *Re St. Croix Gaslight Co.*, *supra*, note 20.

<sup>22</sup> See *Central Bank & Trust Corporation v. Cleveland*, 252 Fed. 530, 534 (1918).

substitute service may be provided,<sup>23</sup> or (4) the state may exercise its option to take the property by eminent domain in behalf of either state or private ownership and operation.<sup>24</sup>

The principal case raises the further question whether a public utilities commission has jurisdiction over the cessation of service by and dismantling of a public utility. It is settled that the inherent power of the state to regulate the service of a public utility enterprise may be delegated to a commission or other administrative body.<sup>25</sup> The Colorado Public Utilities Act, which is typical of the public utilities acts of other states, simply confers upon the commission power to regulate service,<sup>26</sup> but the court expressly says, and it seems correctly, that the power to regulate, necessarily includes the power to prevent a railway, where there is a public necessity, from discontinuing service and dismantling its plant.<sup>27</sup> It is true, great power is thereby conferred upon the commissions, but it must be remembered that their decisions are kept by the courts within constitutional bounds.<sup>28</sup>

<sup>23</sup> 1 WYMAN, § 317.

<sup>24</sup> See 2 LEWIS, EMINENT DOMAIN, 3 ed., § 445.

On the other hand, "a railroad track may be abandoned and its construction material removed when it is conclusively shown that the public no longer has any interest in such materials remaining on the roadbed." *Enid, O. & W. Railway Co. v. State*, 181 S. W. 498, 502 (Tex. Civ. App.) (1915).

<sup>25</sup> See *Atlantic Coast Electric Railway Co. v. Board of Public Utility Commissioners*, 104 Atl. 218 (N. J.) (1918); *Trustees of Saratoga Springs v. Saratoga Gas, E. L. & P. Co.*, 191 N. Y. 123, 83 N. E. 693 (1908). 32 HARV. L. REV. 74.

<sup>26</sup> 1913 SESS. LAWS COLORADO, chap. 127, as amended by 1915 SESS. LAWS COLORADO, chap. 134, and by 1917 SESS. LAWS COLORADO, chap. 110.

<sup>27</sup> *People ex rel. Hubbard v. Colorado Title & Trust Co.*, *supra*, note 5, at page 9; *State ex rel. Tate v. Brooks-Scanlon Co.*, 143 La. 539, 78 So. 847 (1918).

For commission decisions see *Re Parkville Oil & Gas Co.*, P. U. R. 1919 A, 502 (Mo. Pub. Serv. Com.); *City of Pana v. Central Illinois Public Service Co.*, P. U. R. 1916 B, 177 (Ill. Pub. Util. Com.).

It is submitted that in exercising this power the commission should not be too hasty in deciding that the utility in question cannot be operated except at a loss. The utility should be compelled to exhaust every reasonable effort to give the service required. The Indiana, New Jersey, and Colorado commissions have taken a proper step in refusing to allow discontinuance of service without a previous application to the commission to increase rates. *Re Muncie Light Co.*, P. U. R. 1918 B, 194 (Ind. Pub. Serv. Com.); *Re Seashore Gas Co.*, P. U. R. 1918 A, 871 (N. J. Board of Pub. Util. Comrs.); *Re Denver, L. & N. R. Co.*, P. U. R. 1917 F, 744 (Colo. Pub. Util. Com.). See also *City of Pana v. Central Illinois Public Service Co.*, P. U. R. 1916 B, 177, 179 (Ill. Pub. Util. Com.).

<sup>28</sup> *State ex rel. Railroad Commissioners v. Florida East Coast Railway Co.*, 69 Fla. 165, 67 So. 906 (1915); *Northern Pacific Railway Co. v. North Dakota*, 236 U. S. 585 (1915); *Atchison, Topeka, & S. Fe Railway Co. v. Railroad Commission*, 173 Cal. 577, 160 Pac. 828 (1916). See *St. Louis, I. M. & S. Railway Co. v. Bellamy*, 113 Ark. 384, 169 S. W. 322 (1914).

The types of questions arising before the courts on review are illustrated in *Salt Lake City v. Utah Light & Traction Co.*, 173 Pac. 556, 559 (Utah), (1918), where the court says: "The order of the commission increasing the fares as aforesaid presents three questions: (1) Did the passing of the franchise ordinances fixing the fares and their acceptance by the defendant constitute a contract . . . ? (2) If the franchise ordinances constituted contracts, was it within the power of the Legislature to authorize the commission to change the fares? (3) Does the constitutional provision by which the city authorities are given the exclusive right to permit or to refuse permission to street railway companies to construct and operate street cars within the cities of this state prevent the state, through its Legislature, from exercising its sovereign prerogative to regulate and change the fares fixed in the franchise ordinances?"



**EXEMPTION OF FEDERAL HOMESTEAD FROM LIABILITY FOR DEBTS CONTRACTED PRIOR TO PATENT.** — Section 2296 of the United States Revised Statutes provides: "No lands acquired under the provisions of this Act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor."<sup>1</sup> Under the literal interpretation put upon this enactment in a recent decision by the United States Supreme Court,<sup>2</sup> until the patent does issue, the claimant may hold the land and laugh at his creditors. Other courts have construed the statute in the same way.<sup>3</sup> But some courts have sagaciously held the land liable for debts contracted after the issuance of the final certificate, even though before the patent.<sup>4</sup>

The patent is the legal conveyance. Until it issues, the legal title is in the United States.<sup>5</sup> However, when the entryman has done everything necessary to entitle him to the patent, even before the patent issues he has a complete equitable title.<sup>6</sup> Indeed, many states have statutes permitting one in such a position to maintain ejectment.<sup>7</sup> Congress cannot

<sup>1</sup> Act of May 20, 1862. 12 STAT. L. 392. Except this provision, there is nothing in the federal laws indicating the remotest difference between lands patented under the Homestead Act and other privately owned lands within the state. See *Buchser v. Morss*, 196 Fed. 577, 579 (1912).

<sup>2</sup> *Ruddy v. Rossi*, No. 17, October Term, U. S. Sup. Ct. (1918). See RECENT CASES, page 730.

<sup>3</sup> *Barnard v. Boller*, 105 Cal. 214, 38 Pac. 728 (1894); *Wallowa National Bank v. Riley*, 29 Ore. 289, 45 Pac. 766 (1896); *Sprinkle v. West*, 62 Wash. 587, 114 Pac. 430, 34 L. R. A. (N. S.) 404 (1911); *Grames v. Consolidated Timber Co.*, 215 Fed. 785 (1914). See *In re Cohn*, 171 Fed. 568, 570 (1909).

The same court which laid down this literal interpretation in *In re Cohn*, *supra*, later held that the exemption must be confined to the debts of the entrywoman, and did not cover those of her husband contracted before patent. *In re Parmeter's Estate*, 211 Fed. 757 (1914). This construction, while obviously correct, is against the sweeping terms of the statute.

In *Brandhoffer v. Bain*, 45 Neb. 781, 64 N. W. 213 (1895), the debt was contracted in 1876 and the patent issued in 1878. The entryman conveyed away the land in 1885 and reacquired title in 1892. It was held that the land was still not liable. *Accord*, *Van Doren v. Miller*, 14 S. D. 264, 85 N. W. 187 (1901). *Contra*, *De Lany v. Knapp*, 111 Cal. 165, 43 Pac. 598 (1896). It is refreshing to find a court showing such a whole-hearted respect for a statute; but in playing this judicial Ruth to the legislative Naomi, the court reaches a result entirely foreign to the purposes of the Act.

<sup>4</sup> *Struby-Estabrook Mercantile Co. v. Davis*, 18 Colo. 93, 31 Pac. 495 (1892); *Leonard v. Ross*, 23 Kan. 292 (1880); *Johnson v. Borin*, 7 Kan. App. 365, 54 Pac. 989 (1898); *Flanagan v. Forsythe*, 6 Okla. 225, 50 Pac. 152 (1897). See *Kansas Lumber Co. v. Jones*, 32 Kan. 195, 4 Pac. 74 (1884).

<sup>5</sup> *Bagnell v. Broderick*, 13 Pet. (U. S.) 436 (1839); *Gibson v. Chouteau*, 13 Wall. (U. S.) 92 (1871); *United States v. Schurz*, 102 U. S. 378 (1880); *Michigan Land and Lumber Co. v. Rust*, 168 U. S. 589 (1897). See *Gould v. Tucker*, 18 S. D. 281, 100 N. W. 427 (1904).

<sup>6</sup> *Carroll v. Safford*, 3 How. (U. S.) 441 (1845); *Lytle v. Arkansas*, 9 How. (U. S.) 314 (1850); *Garland v. Wynn*, 20 How. (U. S.) 6 (1857); *Lessee of French v. Spencer*, 21 How. (U. S.) 228 (1858); *Lindsey v. Hawes*, 2 Black (U. S.) 554 (1862); *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210 (1866); *Simmons v. Wagner*, 101 U. S. 260 (1879); *Deffenback v. Hawke*, 115 U. S. 392 (1885); *Benson Mining Co. v. Alta Mining Co.*, 145 U. S. 428 (1891); *United States v. Detroit Lumber Co.*, 200 U. S. 321 (1905); *Gourley v. Countryman*, 18 Okla. 220, 90 Pac. 427 (1907); *Budd v. Gallier*, 50 Ore. 42, 89 Pac. 638 (1907); *S. S. Dale & Sons v. Griffith*, 93 Miss. 573, 46 So. 543 (1908).

<sup>7</sup> The language in some of the cases suggests that legal title passes with the certificate and the patent is merely evidence. See *Goodlet v. Smithson*, 5 Porter (Ala.) 245, 249 (1837). This is an erroneous conclusion from the well-established doctrine that the patent when issued relates back to the inception of the rights of the patentee, so

have intended that an administrative delay, due to the rush of business or to negligence in the Land Department and lasting perhaps for years, should change the substantive rights of the parties.<sup>8</sup> "Legislative bodies rarely take into consideration the period between the time when, under the law, executive officers should perform clerical duties, and the time when such duties are actually performed."<sup>9</sup> While the terms of the enactment are unambiguous, the courts are not precluded from correcting the legislative misstatement. "The intention of the lawmaker is the law,"<sup>10</sup> anything in the terms of the statute to the contrary notwithstanding.<sup>11</sup>

A far more fascinating problem is raised by Mr. Justice Holmes' opinion. He says:

"My question is: When land has left the ownership and control of the United States and is part of the territory of a State not different from any privately owned land within the jurisdiction and no more subject to legislation on the part of the United States than any other land, on what ground is a previous law of Congress supposed any longer to affect it in a way that a subsequent one could not? This land was levied upon, not on the assertion that any lien upon it was acquired before the title passed from the United States, but merely as any other land might be attached for a debt that Rossi [the creditor] had a right to collect, after the United States had left the premises. I ask myself what the United States has to do with that. There is no condition, no reserved right of re-entry, no reversion in the United States, saved either under the Idaho law as any private grantor might save it, or by virtue of antecedent title. All interest of the United States as owner is at an end. It is a stranger to the title. Even in case of an escheat the land would not go to it, but would go to the State. Therefore the statute must operate, if at all, purely by way of legislation, not as a qualification of the grant. If § 2296 is construed to apply to this case, there is simply the naked assumption of one sovereignty to impose its will after whatever jurisdiction or authority it had has ceased and the land has come fully under the jurisdiction of what for this purpose is a different power. It is a pure attempt to regulate the alienability of land in Idaho by law,

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far as may be necessary to cut off intervening claimants. *Stark v. Starrs*, 6 Wall. (U. S.) 402 (1867).

<sup>8</sup> Section 2324, Revised Statutes, provides: "On each claim located after May 10, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. . . ." Plaintiff had a final certificate but no patent for his land, and had failed to do the one hundred dollars' worth of work during a year. *Held*, that he did not have to do the work after obtaining the certificate. *Benson Mining Co. v. Alta Mining Co.*, note 6, *supra*. *Accord*, *Aurora Hill Con. Min. Co. v. 85 Mining Co.*, 34 Fed. 515 (1888); *Deno v. Griffin*, 20 Nev. 249 (1889). See SICKELS, MINING DECISIONS, 377, 384.

It is interesting to note that an exemption in the Timber-Culture Act similar to that in the Homestead Act covers only "debts contracted prior to the issuing of the final certificate." Act of March 3, 1893, c. 208, 27 STAT. AT L. 593, 5 U. S. COMP. STAT. 1916, § 5116.

<sup>9</sup> Per Keaton, J., in *Flanagan v. Forsythe*, note 4, *supra*.

<sup>10</sup> Per Swayne, J., in *Smythe v. Fiske*, 23 Wall. (U. S.) 374, 380 (1874).

<sup>11</sup> *United States v. Kirby*, 7 Wall. (U. S.) 482 (1868); *Lionberger v. Rouse*, 9 Wall. (U. S.) 468 (1869); *Church of the Holy Trinity v. United States*, 143 U. S. 457 (1892); *Hawaii v. Mankichi*, 190 U. S. 197 (1903).

without regard to the will of Idaho, which we must assume on this record to authorize the levy if it is not protected by an act of Congress occupying a paramount place."<sup>12</sup>

Authority, such as it is, is against this view.<sup>13</sup> The exemption could conceivably be enforced in one of two ways: first, as a qualification of the grant, or secondly, as legislation. The courts in giving it effect did not clearly comprehend the problem. They all point to the situation before the patent issues. Judge Dillon said: "It will be observed that Congress does not attempt to exempt the land from debts contracted after the patent has issued. . . . Before the title has thus passed, Congress, under its power to dispose of the public lands, may prescribe the terms and conditions upon which the disposition shall be made. . . ." <sup>14</sup> This and similar language from other courts is indicative of the weakness of their position. They apparently consider this exemption as a qualification of the grant,<sup>15</sup> and this possibility has been buried by Mr. Justice Holmes beneath the granite of unimpeachable reasoning, without so much as a *requiescat in pace* from the majority of the court.

Can the exemption take effect as legislation? We must really look at the situation after the patent has divested the United States of title, when the levy is attempted. That is the time when the congressional enactment is to shield the land. If, at this date, Congress can control the alienability of the land for debts contracted prior to the patent, why not for debts contracted, say, within two years after the patent? The date of issue of the patent is not, in the fortunes of the settler, the turning point at which he ceases to need protection from his creditors. The Federal Constitution provides: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."<sup>16</sup> Ours is a territorial scheme of government. It has been frequently asserted that the United States, in holding land within a state, has nothing in the nature of municipal sovereignty.<sup>17</sup> It must stand as a private proprietor,

<sup>12</sup> Per Holmes, J., in *Ruddy v. Rossi*, note 2, *supra*. It is regrettable that the opinion of the court, written by Mr. Justice McReynolds, did not consider more particularly this argument.

<sup>13</sup> *Sorrels v. Self*, 43 Ark. 451 (1884); *Miller v. Little*, 47 Cal. 348 (1874); *Russell v. Lowth*, 21 Minn. 167 (1874); *Gile v. Hallock*, 33 Wis. 523 (1873); *Seymour v. Sanders*, 3 Dill. (Fed.) 437 (1874).

<sup>14</sup> Per Dillon, J., in *Seymour v. Sanders*, 3 Dill. (Fed.) 437, 442 (1874). Much the same language appears in *Sorrels v. Self*, 43 Ark. 451, 454 (1884).

<sup>15</sup> "To deny to Congress the power to make a valid and effective contract of this character with the homestead claimant would materially abridge its power of disposal. . . ." Per Crockett, J., in *Miller v. Little*, 47 Cal. 348, 351 (1874).

<sup>16</sup> Indeed, the exemption created by the act of Congress has never been looked upon as a homestead exempt at all. It is in the nature of a condition attached to the grant, in virtue of the power of the Federal government relating to the primary disposal of the soil, rather than in virtue of any police power vested in the government." Per Rudkin, J., in *Ritzville Hardware Co. v. Bennington*, 50 Wash. 111, 96 Pac. 826 (1908). This case, holding that the rule, exempting for a reasonable time the proceeds from the sale of a homestead exempt under the state laws, does not include the proceeds from the sale of a federal homestead, is most illuminating.

<sup>17</sup> Art. IV, § 3, par. 2.

<sup>18</sup> *Pollard's Lessee v. Hagan*, 3 How. (U. S.) 212 (1845); *Omahevarria v. Idaho*, 246 U. S. 343 (1917); *United States v. Railroad Bridge Co.*, 27 Fed. Cas. 686 (1855). See *Camfield v. United States*, 167 U. S. 518 (1897); *Jones v. Florida C. & P. R. Co.*,

with whatever additional power is included in the "power to dispose of and make all needful rules and regulations" respecting these lands. This clause properly construed should give Congress control over the public lands while they are public lands, but should confer no power over land which has ceased to be a part of the public domain.<sup>18</sup>

**THREATS TO TAKE THE LIFE OF THE PRESIDENT.** — The meaning of the word "threat," as used in the federal legislation of February 14, 1917,<sup>1</sup> obviously differs from the usual legal meaning. In the cases of the statutory offense of threatening a private individual,<sup>2</sup> extortion,<sup>3</sup> robbery by threat,<sup>4</sup> or the avoidance of instruments or acts as induced by threats,<sup>5</sup> the menace must be communicated to the threatened person and must be such as at least to influence the mind of a reasonable man. In the case of an assault<sup>6</sup> the words must in addition import to the reasonable hearer an intention to execute it almost immediately; and hence a threat of harm conditioned upon a future event cannot constitute an assault.<sup>7</sup> But to interpret the word "threat" as used in this law of Congress to mean a "menace of such a nature as to unsettle the mind of the person on whom it operates, and to take away from his acts that free and voluntary action which alone constitutes consent,"<sup>8</sup> would de-

41 Fed. 70, 72 (1889); *Minnesota v. Bachelder*, 5 Minn. 223, 235 (1861). Cf. *Van Brocklin v. Tennessee*, 117 U. S. 151 (1885); *Kansas v. Colorado*, 206 U. S. 46 (1906).

<sup>18</sup> The power "to dispose of" includes the power to lease. *United States v. Gratiot*, 14 Pet. (U. S.) 526 (1840).

"[Congress] had no power whatever to enlarge the rights of the vendees of the United States as against rights already vested in prior purchasers. It could in no way authorize any encroachment by the grantees of the United States upon, or injury to, the property of other private parties." Per Sawyer, J., in *Woodruff v. North Bloomfield Min. Co.*, 18 Fed. 753, 771 (1884). Cf. *Wilcox v. Jackson*, 13 Pet. (U. S.) 498, 517 (1839).

<sup>1</sup> The Act provides: "That any person who knowingly and willfully deposits or causes to be deposited for conveyance in the mail or for delivery from any postoffice or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, or who knowingly and willfully otherwise makes any such threat against the President, shall upon conviction be fined not exceeding \$1,000 or imprisoned not exceeding five years, or both." 39 STAT. 919, c. 64.

Constitutionally the Act may be supported on the broad ground of a right in the federal government to punish offenses aimed at its integrity, but certainly on the narrower ground of a right to protect its officers. *In re Neagle*, 135 U. S. 1 (1889). See Biklé, "The Jurisdiction of the United States over Seditious Libel," 41 Am. L. Reg. (N. S.) 1. In *United States v. Metzdorf*, 252 Fed. 933 (Dist. Ct., Mon., 1918), the indictment failed on the strange ground that it did not state that the alleged threat was uttered of the President in his official character. The court held that Congress had no power to protect its officers in their private capacities. Thus jurisdiction for the murder of a federal official would be made to turn on the motive of the killing.

<sup>2</sup> *State v. McGee*, 80 Conn. 614, 69 Atl. 1059 (1908).

<sup>3</sup> *People v. Williams*, 127 Cal. 212, 59 Pac. 581 (1899).

<sup>4</sup> *Rex v. Fuller, Russ. & Ryan's Crown Cases*, 408 (1820).

<sup>5</sup> *Robinson v. Gould*, 11 Cush. (Mass.) 55 (1853).

<sup>6</sup> *Stephens v. Myers*, 4 Carr. & Payne 349 (1830); *Townsdin v. Nutt*, 19 Kan. 282 (1877).

<sup>7</sup> *Tuberville v. Savage*, 1 Mod. 3 (1669). Cf. *Commonwealth v. Eyre*, 1 Serg. & R. (Pa.) 347 (1815).

<sup>8</sup> In *United States v. French* this definition was applied, erroneously, it is believed, to the Act of Feb. 14, 1917. 243 Fed. 785 (So. Dist. Fla., 1917).

prive the Act of serious meaning.<sup>9</sup> In making it a crime to "threaten to take the life of or inflict bodily harm upon the President," Congress can hardly have intended only to protect the President's peace of mind from a threat personally communicated to him. One court relies on the rule of construction that where a word has had a legal definition the legislature must be taken to have used the word in the sense of that definition, unless a different meaning appears to have been intended.<sup>10</sup> It is submitted that a different meaning is implicit in the words of the Act. Why make it criminal to "*deposit* . . . in any post office" any writing containing such a threat, if communication to the President were necessary?

The federal statute doubtless finds its ancestry in the Statute of Treason,<sup>11</sup> which made it criminal "to compass and imagine the death of the King." Under this statute in the fifteenth century two interesting indictments were brought, one against Walter Walker<sup>12</sup> and the other against Sir Thomas Burdet.<sup>13</sup> Regarding the former, Lord Campbell relates<sup>14</sup> that Walter Walker kept an inn called the "Crown," and was suspected of taking part in a plot for the restoration of the imprisoned King, Henry VI; but that "there was no witness to speak to any such treasonable conduct, and that the only evidence to support the charge was that the accused had once, in a merry mood, said to his son, then a boy: 'Tom, if thou behavest thyself well, I will make thee heir to the Crown.'" We are told that the prisoner urged that he had never formed any evil design upon the King's life; that he spoke only to amuse his little boy, meaning by his statement that his son should succeed him as master of Crown Tavern. But, according to Lord Campbell, "Mr. Justice Billing ruled: 'That the words proved were inconsistent with the reverence for the hereditary descent of the Crown which was due from every subject under the oath of allegiance; therefore if the jury believed the witness, about which there could be no doubt as the prisoner did not venture to deny the treasonable language he had used, they were bound to find him guilty.' A verdict was accordingly returned, and the poor publican was hanged, drawn, and quartered."

As to Sir Thomas Burdet, Lord Campbell narrates<sup>15</sup> that he had been out of favor at court; and the King, making a progress in his parts, had rather wantonly entered his park, and hunted and killed a white buck of which Burdet was particularly fond; that "when the fiery knight heard of the affair — he exclaimed: 'I wish that the buck, horns, and all, were in the belly of the man who advised the King to kill it,' or, as some reported, 'were in the King's own belly'"; that on trial for treason Sir Thomas "proved, by most respectable witnesses, that the wish he had rashly expressed applied only to the man who advised the King to kill the deer." But, continues Lord Campbell, "The Lord Chief Justice left

<sup>9</sup> See a collection of definitions of the word "threat" in *United States v. Jasick*, 252 Fed. 931 (East. Dist. Mich., 1918).

<sup>10</sup> *United States v. French*, note 8, *supra*.

<sup>11</sup> 25 EDW. III.

<sup>12</sup> 1 HALE, *PLEAS OF THE CROWN*, 115; SIR RICHARD BAKER, *CHRON.* (ed. 1606) 215.

<sup>13</sup> *Ibid.*; 3 HOLINSHED, *CHRON.* (London, 1808) 345.

<sup>14</sup> 1 CAMPBELL, *LIVES OF THE CHIEF JUSTICES* (ed. 1874), 151.

<sup>15</sup> *Ibid.*, 153.

it to a jury to consider what the words were — [telling them that] 'however, the story as told by the witnesses for the Crown was much more probable, for Sovereigns were not usually advised on such affairs, and it had been shown that on this occasion the King had acted entirely out of his own head. — Here the King's death had certainly been in the contemplation of the prisoner; in wishing a violence to be done which must inevitably have caused his death, he imagined and compassed it.' The jury immediately returned a verdict of guilty; and the frightful sentence of high treason, being pronounced, was carried into execution with all its horrors."

Fortunately these two cases have been shown to be incorrectly set forth by Lord Campbell, and do not even form precedents to be overruled.<sup>16</sup> Although the federal courts have been none too lenient in construing the war legislation,<sup>17</sup> coming sometimes perilously near to the standard which was long erroneously attributed to Chief Justice Billing, no fault can, on the whole, be found with their interpretation of the statute here under discussion. In a recent case<sup>18</sup> the requisites for a threat under the Act are well set forth. (1) The words must import to reasonable hearers an intent to harm the President. (2) If oral, they must have been uttered in the hearing of some one.<sup>19</sup> But (3) they need not have been addressed to any one; nor (4) need they have been communicated to the President or have been intended to be communicated to the President. Moreover, under the Act a threat may be conditional. Juries have been permitted to find, or it has been held that they could properly find, the following words to constitute threats: "The President ought to be shot, and I would like to be the one to do it."<sup>20</sup> "President Wilson ought to be killed. It is a wonder some one has not done it already. If I had an opportunity, I would do it myself."<sup>21</sup> "If I got a chance, I would shoot President Wilson."<sup>22</sup> "I wish the President were in Hell, and if I had the power I would put him there."<sup>23</sup> The first of these cases presents, as the court intimates, a close question, to be decided in the light of the circumstances and the manner of uttering the words. The other cases are clear.

<sup>16</sup> Edward Foss in "The Judges of England" (London, 1851, pp. 414-16) sharply criticizes Lord Campbell's sharp strictures on Chief Justice Billing, and shows that the flimsy facts of the above cases were not the real support of the charge of treason, and that Lord Campbell's apparent quotations from the court's charges to the jury are pure fiction. He shows that the true facts are these: Walter Walker was charged with "words spoken of the title of Edward when he was proclaimed"; the story of the buck was a figment, and the charge against Burdet was for conspiracy to kill the King and Prince "by casting their nativity, foretelling the speedy death of both, and scattering papers containing the prophecy among the people."

<sup>17</sup> See note, "The Espionage Cases," 32 HARV. L. REV. 417. See also Zechariah Chafec, Jr., "Freedom of Speech," 17 NEW REPUBLIC, No. 211, 66.

<sup>18</sup> *United States v. Stobo*, 251 Fed. 689 (Dist. Ct., Del., 1918).

<sup>19</sup> It was for omitting to allege that the words were uttered in the hearing of any one that the indictment in *United States v. Stobo* failed.

<sup>20</sup> *United States v. Stobo*, note 18, *supra*.

<sup>21</sup> *United States v. Stickrath*, 242 Fed. 151 (So. Dist. Ohio, 1917).

<sup>22</sup> *United States v. Jasick*, 252 Fed. 931 (East. Dist. Mich., 1918).

<sup>23</sup> *Clark v. United States*, 250 Fed. 449 (Circ. Ct. App., Fifth Circ., 1918).

## RECENT CASES

**ADMIRALTY — CONFLICT OF LAWS — REMEDIES — RECOVERY FOR DEATH BY WRONGFUL ACT IN COLLISION AT SEA.** — In a collision on the high sea between two ships from different states, in which one ship was negligent, persons aboard the innocent ship were killed. The statutes of each state provided for recovery for death by wrongful act, but differed as to the measure of damages. The owner of the offending ship was sued by the representatives of the deceased. *Held*, that they could not recover. *The Middlesex*, 253 Fed. 142 (Dist. Ct.).

For a discussion of this case, see NOTES, page 713.

**ADMIRALTY — JURISDICTION — IMMUNITY OF GOVERNMENT VESSELS FROM LIBEL.** — For damage to a cargo carried upon the *Maipo* the owners sought to libel the ship. The *Maipo* was a transport in the Chilean navy, owned and manned by that government. It was chartered for hire by a private person contracting to carry freight, but by the charter-party the Chilean government reserved freight space, agreed to pay all port duties, and to manage the ship. *Held*, that the court had not jurisdiction. *The Maipo*, 252 Fed. 627.

Ships of war everywhere receive exemption from local jurisdiction. 2 MOORE, DIG. INT. LAW, 1906, § 254. Whether all public vessels should be so exempted was long a moot question. LAWRENCE, INT. LAW, 3 ed., 224; HALL, INT. LAW, 6 ed., 188. The sovereign cannot be sued, and in so far as jurisdiction is concerned the courts recognize no difference between a suit against the sovereign and a suit against his property. *Vavasour v. Krupp*, L. R. 9 Ch. Div. 351; *The Siren*, 7 Wall. (U. S.) 152. While the existence of a right to a lien or to an action for salvage or damage from collision is recognized the strict application of the doctrine of extraterritoriality forbids its enforcement. *United States v. Peters*, 3 Dall. (U. S.) 121; *The Exchange*, 7 Cranch (U. S.) 116; *Briggs v. Light Boats*, 11 Allen (Mass.) 157; *Pizarro v. Matthais*, 10 N. Y. Leg. Obs. 97; *The Parlement Belge*, 5 P. D. 197; *The Constitution*, 4 P. D. 39; *Young v. Scotia*, [1903] A. C. 501; *The Pampa*, 245 Fed. 137. Nor will a writ issue against a person upon a public vessel. 7 OPIN. ATT'Y GEN'L, 122; HALL, INT. LAW, 6 ed., 191. The English court has decided that immunity from local jurisdiction is not lost though the public vessel carry for hire merchandise and passengers. *The Parlement Belge*, *supra*. However, an ambassador's property which he has engaged in commerce has been attached. *Emperor of Brazil v. Robinson*, 5 Dowl. 522; 2 PHILLIMORE, INT. LAW, 3 ed., 222. There has been American opinion that because the owner could not be sued the action against the ship might be allowed. *Pizarro v. Matthais*, *supra*. See *United States v. Wilder*, 3 Sumn. (C. C. A.) 308, 316. A lien is enforced, therefore, upon property of the sovereign when not in his possession nor in public use, but in the possession of a bailee. *The Davis*, 10 Wall. (U. S.) 15. The rule would seem to extend to public vessels. *Long v. Tampico*, 16 Fed. 491. *The Attualita*, 238 Fed. 909. WESTLAKE, PVT. INT. LAW, 5 ed., 271. The courts recognize the hardship endured by a libellant forced to seek relief in distant foreign jurisdictions, especially where the merchant marine is becoming government controlled.

**BANKS AND BANKING — NATIONAL BANKS — VALIDITY OF STATE TAX ON SHARES WITHOUT DEDUCTION FOR TAXABLE STOCK HELD BY BANK IN ANOTHER NATIONAL BANK.** — The National Bank Act, as amended, provides (REV. STAT. § 5219) that "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the

state within which the association is located." Plaintiff, a national bank, held stock in another national bank and was taxed as owner thereof. Taxes were also assessed against the shareholders of the plaintiff based on a valuation which included the stock ownership as an asset of the association. Plaintiff, on behalf of its shareholders, seeks to recover from the state a part of the taxes so levied upon them corresponding to assets of the value of this stock. *Held*, that such sum be refunded. Pitney, Brandeis, and Clarke, JJ., dissenting. *Bank of California, National Association v. Richardson*, U. S. Sup. Ct. Off., October Term, 1918, No. 262.

As instrumentalities of the federal government, national banks are exempt from state taxation, except as permitted by Congress. *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316; *City of Pittsburg v. First National Bank*, 55 Pa. St. 45. And section 5219 does not permit a state to tax such a bank upon its capital or upon its property, but only upon the shares as personal property of the holder. *Owensboro National Bank v. Owensboro*, 173 U. S. 664, 19 Sup. Ct. Rep. 537. An exception in this section authorizes taxation of realty. *Second National Bank v. Caldwell*, 13 Fed. 429; see *M'Culloch v. Maryland*, *supra*, 436. Also it is settled that a bank may be taxed as owner of stock in another national bank. *Bank of Redemption v. Boston*, 125 U. S. 60. Now the principal case holds that when the association pays such a tax, a corresponding deduction must be made in assessing its shareholders. This result can be reached only on the ground that the statute treated the bank and the shareholders as one, for purposes of state taxation. The proposition is fundamental, however, that a corporation is an entity distinct from its members, for taxation as in other respects. See 1 COOLEY, TAXATION, 3 ed., 687. Accordingly the Supreme Court has repeatedly held that a tax on a corporation or its property is not the legal equivalent of a tax on the stockholders, but that the two are distinct and different subjects-matter of taxation. See *Owensboro National Bank v. Owensboro*, *supra*, 677-81; T. R. Powell, "Indirect Encroachment on Federal Authority by the Taxing Powers of the States," 31 HARV. L. REV. 321, 339-44. Thus stockholders of a state bank can be taxed without deduction for its ownership of tax-exempt United States securities. *Cleveland Trust Co. v. Lander*, 184 U. S. 111, 22 Sup. Ct. Rep. 394. And under section 5219 stockholders of a national bank can be taxed, although its capital was wholly invested in such securities. *Van Allen v. The Assessors*, 3 Wall. (U. S.) 573. Moreover, where the realty of a bank has been directly taxed, the state is not required to make deduction in assessing the stockholders. *Commercial Bank v. Chambers*, 182 U. S. 556, 21 Sup. Ct. Rep. 863; *St. Louis National Bank v. Papin*, 21 Fed. Cas. No. 12,239; *People's National Bank v. Marye*, 107 Fed. 570, 579. It is difficult to see why the same principle should not apply to assets in the form of stock in another national bank.

**BANKRUPTCY — PREFERENCES — TRANSFER PURSUANT TO PRIOR AGREEMENT LIQUIDATING THE DAMAGES.** — The bankrupt had contracted to cut timber for a lumber company on the latter's lands, the funds by which the operations were to be carried on being furnished also by the lumber company. It was provided, in a clause which was construed to be an agreed ascertainment of damages, that in case of a default a nearby sawmill with its logging equipment belonging to the bankrupt should forthwith become the property of the lumber company. The agreement was entered into more than four months before bankruptcy proceedings were instituted, but the transfer of the property took place within the period. The trustee in bankruptcy sought to avoid as a preference the transfer of that part of the equipment which was composed of personalty. *Held*, that no preference was effected. *Stennick v. Jones*, 252 Fed. 345 (Circ. Ct. App.).

The court asserted that the company had a right to act not as a general



creditor, but under the contract. However, the mere fact that there is a contract right to a transfer will not prevent it from being a preference. *National City Bank v. Hotchkiss*, 231 U. S. 50. It has been held that a transfer of goods within the four-month period, according to a prior agreement, as payment for money that had been advanced to be used in their production is not a preference. *Hurley v. Atchison, etc. Railroad Co.*, 213 U. S. 126; *Sieg v. Greene*, 225 Fed. 955. Cf. *In re Klingaman*, 101 Fed. 691. But in the principal case no part of the equipment was obtained with the money advanced by the company. The decision, nevertheless, may be justified by considering the contract as one to cut timber or, upon default, to convey the property. A default having been committed, there remains the promise to convey the mill and its equipment. This promise, although it relates partly to personalty, is specifically enforceable, for it also involves land and is indivisible. *Leach v. Fobes*, 77 Mass. 506; *Fowler v. Sands*, 73 Vt. 236. There arises then an equitable ownership in the equipment which strips the transfer of its preferential character.

**BILLS AND NOTES — PURCHASERS FOR VALUE WITHOUT NOTICE — BURDEN OF PROOF IN SUIT FOR CANCELLATION.** — In a suit by the maker for the cancellation of a negotiable instrument shown to have been secured by fraud of the payee, the question arose as to who had the burden of proving the defendant holder a holder in due course. Section 59 of the Negotiable Instruments Law provides that "Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course." Held, that the burden is on the defendants. *Lundean v. Hamilton*, 169 N. W. 208 (Ia.).

In a bill in equity for cancellation of an instrument for fraud, failure to allege that defendant is not a purchaser for value without notice is a demurrable defect. *Molony v. Rourke*, 100 Mass. 190. And what a party must plead he has the burden of establishing. LANGDELL, EQUITY PLEADING, 2 ed., § 185. The rules in equity should also apply to equitable defenses at law. Logically, therefore, in an action at law on a negotiable instrument by a subsequent holder, a maker setting up the defense of fraud should have the burden of establishing that plaintiff took with notice. But the rule developed that this burden be transferred to the plaintiff when fraud is shown. Its origin may have been in the principle of a discovery, the facts being peculiarly within the holder's knowledge. Cf. *Lord Portarlington v. Soulby*, 6 Sim. 356. In view of the pleadings the only burden shifted to the holder should be that of going forward with the evidence. Such burden, however, the courts confused with that of establishing the facts by a preponderance of evidence, owing to the dual aspect of the ambiguous term "burden of proof." See Abbott, "Two Burdens of Proof," 6 HARV. L. REV. 125; 4 WIGMORE, EVIDENCE, §§ 2483-2489. Thus the rule became established that this ultimate burden should be saddled upon the holder. *Harvey v. Towers*, 6 Ex. 656; *Atlas National Bank v. Holm*, 71 Fed. 489. The same interpretation is made under the Negotiable Instruments Law. *Parsons v. Utica Cement Co.*, 82 Conn. 333, 73 Atl. 785; *Leavitt v. Thurston*, 38 Utah 351, 113 Pac. 77. Being settled at law this construction should be followed in equity, although the result conflicts with the pleadings. *Regester's Sons Co. v. Reed*, 185 Mass. 226, 70 N. E. 53; *Mills v. Keep*, 197 Fed. 360.

**CONFLICT OF LAWS — TRUSTS INTER VIVOS — WHAT LAW GOVERNS.** — Two settlors, of New York and New Jersey respectively, contributed an equal amount to a fund of which they declared themselves trustees by instrument

executed in New Jersey. The fund was in New York and a New York trust company was named as alternate trustee. The New Jersey settlor died, and the New York settlor filed this bill for a settlement of accounts and a construction of the trust deed. The question arose as to what law governed the disposition of unexpended accumulations. *Held*, that the New York law governed. *Curtis v. Curtis*, 173 N. Y. Supp. 103.

It is well settled that the validity of a testamentary trust of personalty is determined by the law of the testator's domicile at the time of his death. *Whitney v. Dodge*, 105 Cal. 192, 38 Pac. 636; *Canterbury v. Wyburn*, [1895] A. C. 89. *Cf. In re Crum*, 98 Misc. 160, 164 N. Y. Supp. 149. See 19 HARV. L. REV. 457. As to declarations of or transfers on trust *inter vivos*, the law of the *situs* of the *res* would seem to govern its validity, as that law alone can effectively create an interest in the *res*. See *Cammell v. Sewell*, 5 H. & N. 728. *Green v. Van Buskirk*, 5 Wall. (U. S.) 307, 7 Wall. (U. S.) 139. See also 20 HARV. L. REV. 382, 394. Where, however, it is held that the *cestui que trust* acquires but a right *in personam* against the trustee and not rights *in rem*, though the validity of the transfer to the trustee would be determined as above by the law of the *situs*, yet the validity of the trust would be determined by the law of the place of the declaration of or the transfer on trust. See 17 COL. L. REV. 467, 497. In either case the administration of a trust of personalty must be governed by the law of the place where the testator or settlor intended the trust to be administered. *First National Bank v. National Broadway Bank*, 156 N. Y. 459, 51 N. E. 398. See 20 HARV. L. REV. 382, 395. See also 17 HARV. L. REV. 123, 570. As in the principal case it was clear that the settlors intended the trust to be administered in New York, and as the right of the life *cestui que trust* to accumulated income is a question of administration, the court properly applied New York law.

CONSTITUTIONAL LAW — CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONS — FEDERAL POWER OVER LANDS OF UNITED STATES WITHIN A STATE. — Section 2296 of the United States Revised Statutes provides: "No lands under the provisions of this Act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor." The entryman contracted debts, some before the issuing of the final certificate, others after it but before the issuing of the patent. *Held*, that the statutory exemption covers all these debts. *Ruddy v. Rossi*, U. S. Sup. Ct., No. 17, October Term, 1918.

For a discussion of this case, see NOTES, page 721.

CRIMINAL LAW — HOMICIDE — THREATS — THREATS TO TAKE THE LIFE OF THE PRESIDENT. — An act of Congress made it an offense punishable by fine of \$1,000 or imprisonment not exceeding five years, or both, knowingly and wilfully to make a threat against the President. 39 STAT. 919, c. 64. An indictment was brought under this act charging John Stobo with making a threat in the following language: "The President ought to be shot and I would like to be the one to do it." The indictment did not allege that the threat was addressed to any one, or that it was uttered with intent to menace the President, or that any one heard it. *Held*, that the indictment fails. *United States v. Stobo*, 252 Fed. 689 (Dist. Ct., Del.).

For a discussion of threats under this statute, see NOTES, page 724.

EQUITY — EQUITABLE EASEMENTS OR SERVITUDES — INTENTION OF PARTIES. — In developing a tract of land for the sale of building lots, the owner installed a sewage system according to a plan, the system being operated by a pumping plant on the owner's land. By an agreement with the village the owner agreed to run the plant as long as the system should be in use. After a number of

lots had been sold, the defendant bought the tract and continued to sell lots, but discontinued operating the plant, which resulted in an overflow of sewage dangerous to public health. In an action by the village to determine who was to bear the expense of operation, *held*, that the defendant must bear it. *Village of Larchmont v. Larchmont Park*, 173 N. Y. Supp. 32.

Equity, in order to carry out the intention of the parties, will enforce agreements restricting the use of land for the benefit of other land on the theory that an equitable easement or servitude has been created. *Smith v. Young*, 160 Ill. 163, 43 N. E. 486; *Peck v. Conway*, 119 Mass. 546, 549; *Tulk v. Moxhay*, 11 Beav. 571. Accordingly, if the intent appears from a deed referring to a plat, the intention will be enforced. *White v. Tide Water Oil Co.*, 50 N. J. Eq. 1; *Chickhaus v. Sanford*, 83 N. J. Eq. 454, 91 Atl. 878; *Smith v. Young*, *supra*. The same is true when the deed does not refer to the plan. *Briggs v. Sea Gate Ass'n*, 211 N. Y. 482, 105 N. E. 664; *Tallmadge v. The East River Bank*, 26 N. Y. 105. In the principal case, the plan of the sewage system was to confer a benefit on the land sold by allowing sewage to flow to the pumping plant. An equitable servitude having thus arisen, the defendant alone must bear the expense of abating the nuisance caused by the overflow, not only as to the lots sold by him, but also as to those sold by his predecessor since he bought the servient estate with notice. *Whitney v. Union Railway Co.*, 11 Gray (Mass.) 359; *Tallmadge v. The East River Bank*, *supra*. And it follows that if the village had not brought the action, the purchasers of the lots could have maintained a suit for specific performance of the equitable servitude. *Tulk v. Moxhay*, *supra*; *Tallmadge v. The East River Bank*, *supra*.

EVIDENCE — JUDICIAL ADMISSIONS — CONCLUSIVENESS. — The complainant brought a bill in equity to enjoin the infringement of his label, alleging similarity and confusion. The defendant answered and counterclaimed to enjoin the complainant from infringing the former's label, admitting the complainant's averment of similarity and confusion, but alleging and subsequently proving his own label to be the elder. The lower court reasonably found that on the evidence offered there was no confusion. *Held*, that the averments in the bill are conclusive against the complainant on the counterclaim. *Wrigley v. Larson*, 253 Fed. 914 (Circ. Ct. App.).

Admissions in the pleadings amount to a waiver of proof of the facts pleaded. They are conclusive against the pleader on the issue in which they occur. *Paige v. Willet*, 38 N. Y. 28; *S. W. Broom Co. v. Bank*, 52 Okla. 422, 153 Pac. 204. But on another issue in the same cause the pleadings may not be used as admissions. *Nye v. Spencer*, 41 Me. 272; *Ayres v. Covill*, 18 Barb. (N. Y.) 260. Neither could such judicial admissions be used in a subsequent suit as admissions by a party. Allegations were not at common law supposed to be necessarily truthful, but merely served the purpose of raising an issue. *Starkweather v. Kittle*, 17 Wend. (N. Y.) 20. Even with the development of chancery pleading, bills were not admissible in a subsequent suit. *Kilbee v. Sneyd*, 2 Molloy (Ir. Chanc.) 186; *Durden v. Cleveland*, 4 Ala. 225. To-day, however, pleadings in law and equity are not considered fictitious, as they must be signed or sworn to, and are competent evidence in subsequent suits. *Pope v. Allis*, 115 U. S. 363; *Elliott v. Hayden*, 104 Mass. 180. Such averments are then certainly competent evidence on another issue in the same cause. *State v. Firemen's Ins. Co.*, 152 Mo. 1, 52 S. W. 595; *Derby v. Gallop*, 5 Minn. 119. In equity, moreover, the defendant does not separate his pleas into negative and affirmative. The answer is treated as homogeneous. See LANGDELL, SUMMARY OF EQUITY PLEADING, § 68; 3 WIGMORE, EVIDENCE, § 2122. There is, then, practically only one line of pleading, and the averments of the complainant in the present case are therefore conclusive against him.

**FIXTURES — REMOVAL OF — ANNEXATION BY CONDITIONAL BUYER TO REALTY OF ANOTHER, SUBJECT TO A MORTGAGE.** — A conditional buyer of steam boilers and radiators annexed them to the realty of another which was subject to a prior mortgage. The mortgagee, who was ignorant of the conditional sale, brought this suit of foreclosure. *Held*, that the boilers and radiators are subject to the mortgage. *Realty Associates v. Conrad Construction Co.*, 173 N. Y. Supp. 25.

When an owner of realty annexes thereto fixtures which he bought on a conditional sale, and then subsequently mortgages the land, the fixtures are held to be subject to the mortgage, either because a *bona fide* purchaser cuts off an equitable estate or because of a judicial dislike for secret liens. *Horn v. Clark Hardware Co.*, 54 Colo. 522, 131 Pac. 405; *Bank v. Wolf*, 114 Tenn. 255, 86 S. W. 310. *Contra*, *Falaenau v. Reliance Steam Foundry Co.*, 74 N. J. Eq. 325, 69 Atl. 1008; *Adams v. Interstate Building Association*, 119 Ala. 97, 24 So. 857. As to the rights of prior mortgagees, opinions differ. Some jurisdictions allow such mortgagees to treat the fixtures as subject to the mortgage, regardless of the possibilities of removal without impairing the realty. *Clary v. Owen*, 15 Gray (Mass.) 522; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85 N. W. 698; *Tippett & Ward v. Barham*, 180 Fed. 76. Other states hold that the agreement between the vendor of fixtures and the mortgagor of the realty is valid against a prior mortgagee only if removal of the fixtures is possible without damaging the realty. *Blanchard v. Eureka Planing Mill Co.*, 58 Ore. 37, 113 Pac. 55; *Detroit Steel Cooperage Co. v. Sistersville Brewing Co.*, 233 U. S. 712. This seems the better view, since the mortgagee's security is not impaired. Though in the principal case the mortgagor was not the conditional buyer, yet as the annexation of chattels to the realty by one having no right, title, or interest in either, makes them part of the realty, and as in the principal case they could not be removed without impairing the mortgagee's security interest, the case seems well decided. See *Peck-Hammond v. School District*, 93 Ark. 77, 123 S. W. 771; *Goddard v. Bolster*, 6 Greenleaf (Me.) 427.

**INSURANCE — CHANGE IN INTEREST, TITLE, AND POSSESSION — WHETHER SHERIFF'S SALE CONSTITUTES.** — The plaintiff insured real property subject to a mortgage lien against loss by fire, the policy to be void for change in interest, title, or possession. Loss occurred after judgment of foreclosure and the sheriff's sale, but before the expiration of the statutory period allowed for redemption. *Held*, that the policy was not avoided by the foreclosure or sheriff's sale. *Collins v. Iowa Manufacturers' Ins. Co.*, 169 N. W. 199 (Iowa).

Hostility of the bench to forfeitures in insurance has polarized the decisions construing conditions as to changes in interest, title, and possession in favor of the insured. So a binding contract for the sale of land is not such a change of title as will avoid a policy. See 1 AMES, CASES IN EQUITY JURISDICTION, 242, note. The bent of the courts is evidenced by recoveries allowed for loss between the adjudication and appointment of trustees in bankruptcy. See 21 HARV. L. REV. 531. On the other hand change of the equitable ownership ought to be recognized as a change of interest. *Skinner v. Houghton*, 92 Md. 68; *Gibb v. Philadelphia Co.*, 59 Minn. 267. But see VANCE ON INSURANCE, § 161. This should be so not only in the ordinary contract for the sale of land, but also when a court of equity confirms a contract of sale made by a master, or where there is a sheriff's sale. See 13 HARV. L. REV. 223. See FREEMAN, LAW OF EXECUTION, 2 ed., § 326. In the latter situation equities may be cut off before the sheriff's deed is executed. See 11 HARV. L. REV. 131. But where statute allows a period for redemption following the sale, the equitable interest of a mortgagor or his purchaser would seem unaffected by the sale until the expiration of the prescribed period. See IOWA CODE, §§ 4044, 4045, 4289. See 2 POMEROY, §§ 1190, 1227, 1228. Accordingly the principal case

is supported by the great weight of decision. *Wood v. American Fire Ins. Co.*, 149 N. Y. 382, 44 N. E. 80; *Stephens v. Illinois Mutual Fire Ins. Co.*, 43 Ill. 327.

**INTERSTATE COMMERCE — CONTROL BY CONGRESS — FEDERAL STATUTE AGAINST SHIPPING LIQUOR INTO STATES WHICH PROHIBIT ITS MANUFACTURE AND SALE.** — A federal statute prohibits the shipment of intoxicating liquor into states which prohibit its manufacture and sale (39 STAT. L. 1069). Defendant was convicted under this statute for carrying intoxicating liquor for his personal use from Kentucky into West Virginia, which prohibited the manufacture and sale of liquor but did not prohibit its importation for personal use. *Held*, that the statute was not unconstitutional. *United States v. Hill*, 39 Sup. Ct. Rep. 143.

The power of Congress to regulate interstate commerce is limited only by the constitution of the United States. *Hipolite Egg Co. v. United States*, 220 U. S. 45. It extends to absolute prohibition. *Lottery Case*, 188 U. S. 321. Means may be adopted for its exercise that have the quality of police regulations, even though the states have police power over the same subject within their boundaries. *Hoke v. United States*, 227 U. S. 308. The statute is therefore constitutional unless it involves such an unreasonable and arbitrary discrimination between states as to constitute a denial of due process of law. A statute prohibiting the sale of liquor to Indians for a limited time after they had lost the character of tribal Indians has been held a reasonable exercise of the power to regulate commerce with the Indian tribes. *Dick v. United States*, 208 U. S. 340. And likewise a statute prohibiting the sale of liquor in a portion of a state inhabited partially by tribal Indians. *Ex parte Webb*, 225 U. S. 663. A statute taxing corporations has been held not an arbitrary discrimination between classes of persons. *Corporation Tax Cases*, 220 U. S. 107. The principal case goes slightly further than these, as the statute goes beyond the state policy which is the basis for the distinction, but this basis is nevertheless a sound one, and on the whole the discrimination does not seem an unreasonable one.

**LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — ABUSE OF PRIVILEGE.** — A bank depositor requesting blank checks received some with the name of an association faintly stamped above the line for signature. The depositor, oblivious to the stamp, signed and distributed the checks. The bank returned the checks to the payees, with "Forgery" written upon them, and an attached slip marked "Signature Incorrect." The depositor brought action for libel and slander against the bank. *Held*, that he may recover. *Schwartz v. Chatham & Phenix National Bank*, 172 N. Y. Supp. 762.

The charge "Forgery" is actionable *per se* as imputing an indictable offense. *Herzog v. Campbell*, 47 Neb. 370, 66 N. W. 424. A libellous publication reasonably impressing one as designating the plaintiff renders the defendant liable. *The King v. Clerk*, 1 Barn. 304. That the plaintiff is not named by the defendant is immaterial if intrinsic evidence makes apparent the allusion to him. *Van Ingen v. Mail & Express Pub. Co.* 156 N. Y. 376, 50 N. E. 979. Accusation of an illegal drawing by the plaintiff on the association's funds is reasonably to be inferred from the charge. Communications between banks and payees of checks drawn thereon, concerning their validity, are, on principle, privileged. *Christopher v. Akin*, 214 Mass. 332, 101 N. E. 971; *Rotholz v. Dunkle*, 53 N. J. L. 438, 22 Atl. 193. But a privilege exceeded is a privilege lost. *Payne v. Rouss*, 61 N. Y. Supp. 705; *Smith v. Smith*, 73 Mich. 445, 41 N. W. 499. In the absence of a privilege or where one is exceeded no malice need be shown. POLLOCK, TORTS, 7 ed., 600; 23 HARV. L. REV. 218. The charge "Forgery" in addition to the notification "Signature Incorrect," was

unnecessary to protect the bank's interest; nor was it made in connection with an inquiry into the act or a prosecution thereof. This abuse of privilege, though unintentional, renders the defendant liable.

**MUNICIPAL CORPORATIONS — POLICE POWER — VALIDITY OF ORDINANCE PROHIBITING CIRCULATION OF A NEWSPAPER.** — The municipal council of North Bergen, N. J., passed an ordinance forbidding the circulation within its limits of a German newspaper. The enforcement of the ordinance was restrained until final hearing, and the defendant appealed. *Held*, that the restraint be continued. *New Yorker Staats-Zeitung v. Nolan*, 105 Atl. 72 (N. J.).

An ordinance passed under the general exercise of police power must be reasonable; that is, it must tend in an impartial manner to promote public health, morals, or welfare by methods that are adapted to the purpose and are not unduly oppressive. *Zion v. Behrens*, 262 Ill. 510, 104 N. E. 836; *State v. Starkey*, 112 Me. 8, 90 Atl. 431; *Tolliver v. Blizzard*, 143 Ky. 773, 137 S. W. 509. Thus ordinances requiring bicycles to carry lights after dark, or forbidding automobiles to run on country roads after sunset, are valid. *In re Berry*, 147 Cal. 523, 82 Pac. 44; *City of Des Moines v. Keller*, 116 Iowa, 648, 88 N. W. 827. But an ordinance forbidding vehicles other than those propelled by animals to use the streets is void. *Bogue v. Bennett*, 156 Ind. 478, 60 N. E. 143. So also an ordinance regulating laundries was held invalid because it tended to discriminate against Chinamen *qua* Chinamen. *Yick Wo v. Hopkins*, 118 U. S. 356. Recently the New Jersey court seems to have overlooked such discrimination in upholding an ordinance forbidding aliens to operate "jitneys." *Morin v. Nunan*, 103 Atl. 378 (N. J.). In the principal case, however, it properly forbids an unreasonable personal discrimination.

**NEW TRIAL — GROUNDS FOR GRANTING NEW TRIAL — JUDGMENT NOTWITHSTANDING THE VERDICT.** — The plaintiff in his statement of claim alleged that he was a customer of the defendant bank, that acting under the advice of its manager he made an investment in a security which turned out to be worthless, and that the advice was negligently given. The defendant denied that the advice was given negligently, and denied that the manager was acting within the scope of his authority. In answer to questions the jury found that the advice was negligently given by the manager and that he was acting within his authority in giving the advice; and they gave a verdict for the plaintiff. The defendant appealed to the Court of Appeal, asking for judgment or a new trial, on the ground (*inter alia*) that there was no evidence that the manager in giving the advice was acting within the scope of his authority. This point was not made by the defendant at the trial. The Court of Appeal decided that there was in fact no evidence of the manager's authority, and ordered judgment to be entered for the defendant. *Held*, that the order should be affirmed. *Banbury v. Bank of Montreal*, [1918] A. C. 626.

For a discussion of this case, see NOTES, page 711.

**PRINCIPAL AND SURETY — ACCELERATION OF MATURITY — DUTY TO DISCLOSE — DISCHARGE OF SURETY.** — By an agreement between the plaintiff payee and the maker all notes were to become due four months after default on any one. The defendant refused to go surety for a certain amount on one note, but, being unaware of the agreement accelerating maturity, consented to and did sign as surety, at the maker's request, a series of notes for a similar amount. The plaintiff payee had notice of the defendant surety's refusal, but did not disclose the agreement. *Held*, that defendant is liable to the payee on the original due dates. *Hatfield v. Jackway*, 170 N. W. 181 (Neb.).

If, at the inception of the relation, the creditor has knowledge of material facts, unknown to the surety, increasing the ordinary suretyship risks, a failure to disclose them will discharge the surety. *Damon v. Empire State Surety Co.*,

161 App. Div. (N. Y.) 875, 146 N. Y. Supp. 996; *First National Bank v. Clark*, 59 Colo. 455, 149 Pac. 612; *Bidcock v. Bishop*, 3 Barn. & Cr. 605. See *Warren v. Branch*, 15 W. Va. 21. The mere non-disclosure is sufficient; the creditor need not have a fraudulent motive. *Ratillon v. Matthews*, 10 Cl. & Fin. 934; *Sooy v. State*, 39 N. J. L. 135; *Damon v. Empire State Surety Co.*, *supra*. This defense is generally founded on fraud. *Bellevue Bldg. & Loan Ass'n v. Jeckel*, 104 Ky. 159, 46 S. W. 482; *Lee v. Jones*, 17 C. B. (N. S.) 482; *Damon v. Empire State Surety Co.*, *supra*; *Sooy v. State*, *supra*. See 1 STORY, EQUITY JURISPRUDENCE, 14 ed., § 305. It is submitted, however, that the defense should be variation of risk which is based on equitable grounds. See 16 HARV. L. REV. 511. Thus, if the creditor has knowledge of facts which increase the surety's risk and also knows or has reasonable cause to believe that the surety is unaware thereof, then a duty to disclose should be imposed on the creditor. In the principal case, the agreement accelerating maturity imposed a heavier burden on the principal which, since it might interfere with the enforcement of the surety's rights, was a variation of the surety's risk. The defendant meant to guard against this by refusing to sign one note for the full amount, and as the creditor had notice, he was under a duty to disclose.

**PROFITS À PRENDRE**—WHAT CONSTITUTES AN ABANDONMENT.—The owner of a farm conveyed part thereof, a slate quarry, to the predecessor of the plaintiff, reserving for himself, his heirs, and assigns the privilege of removing all waste slate resulting from the operation of the quarry. Thereafter, the owner conveyed the remainder to the defendant's predecessor, but reserved no right of way, thereby leaving himself without means of access to the quarry. For thirty-three years neither the grantor nor his heirs exercised the right to remove the slate, after which period the heirs granted all rights under the reservation to the defendant. The plaintiff seeks to restrain the defendant from entering his premises to remove the slate. *Held*, that the injunction be granted. *Mathews Slate Co. v. Advance Ind. Supply Co.*, 172 N. Y. Supp. 830.

Mere nonuser, however long continued, cannot operate as an abandonment of an easement created by grant. *Arnold v. Stevens*, 24 Pick. (Mass.) 106; *Welsh v. Taylor*, 134 N. Y. 450, 33 N. E. 896; WASHBURN, EASEMENTS, 4 ed., 717. But it has been held that where the easement has been acquired by prescription, nonuser without more for the statutory period will extinguish the right. *Browne v. Baltimore M. E. Church*, 37 Md. 108. See also *Sayles v. Hastings*, 22 N. Y. 217, 224. *Jewett v. Jewett*, 16 Barb. (N. Y.) 150, 157. And this distinction has been adopted by statute. CAL. CIV. CODE, § 811; OKLA. REV. LAWS, 1910, § 6633. The distinction seems unsound, since prescription is based upon the presumption of a grant, and it has been disregarded in many cases. See *Ward v. Ward*, 7 Exch. 838; *Veghte v. Raritan Water Power Co.*, 19 N. J. Eq. 142, 156. But where nonuser is accompanied by adverse possession for the statutory period, it is clear that in both cases the right is barred. *Horner v. Stilwell*, 35 N. J. L. 307; *Woodruff v. Paddock*, 130 N. Y. 618, 29 N. E. 1021; *McKinney v. Lanning*, 139 Ind. 170, 38 N. E. 601. Also, where nonuser is coupled with some act showing clearly the intent to abandon the easement, it will be extinguished. *Snell v. Levitt*, 110 N. Y. 595, 18 N. E. 370; *Vogler v. Geiss*, 51 Md. 407; *Pope v. Devereux*, 5 Gray (Mass.) 409. The duration of the nonuser, however, is only important in that it tends to strengthen the presumption of an abandonment. *Queen v. Chorley*, 12 Q. B. 515; *Canning v. Andrews*, 123 Mass. 155. In the principal case the nonuser extended through a period of thirty-three years, and the grantor by alienating the farm without reserving for himself means of access to the quarry, showed clearly an intent to abandon the right. Though a profit and not an easement was involved, it made no difference in the application of the above principles and the court correctly held that the profit had been abandoned.

**PUBLIC SERVICE COMPANIES — MUNICIPAL GRANT TO USE STREETS — EXPIRATION OF GRANT.** — The complainant owned a system of tracks upon the greater part of which the municipal grants had expired. The defendant city enacted an ordinance providing, *inter alia*, a maximum fare of five cents on any line in the city operated without a grant fixing the rate of fare. In a bill to enjoin the enforcement of these regulatory provisions, the complainant alleged that an industrial necessity required the operation of the non-franchise lines, and that the enforcement of the ordinance would result in a deficit to the complainant. *Held*, that the rate-fixing provisions were confiscatory and their enforcement should be enjoined. *Detroit United Railway v. Detroit*, 39 Sup. Ct. Rep. 151.

A public utility, so long as it retains its mandatory or general charter, may not abandon its service to the detriment of the public. *Colo. & S. Ry. Co. v. State Commission*, 54 Colo. 64, 129 Pac. 506; *State v. Spokane St. Ry. Co.*, 19 Wash. 518, 53 Pac. 719. See 26 HARV. L. REV. 659. The same should be true at the expiration of a municipal grant to use the streets, so long as the utility retains its state charter, and there is a public necessity. See *Denver v. Denver Union Water Co.*, 246 U. S. 178, 190; *State v. Spokane St. Ry. Co.*, *supra*. *Contra*, *Laighton v. Carthage*, 175 Fed. 145. Conversely it would seem the utility could compel permission to continue in the city streets, at least until a substitute was provided. See 31 HARV. L. REV. 1036. But usually by constitution or statute municipal consent must be obtained before the utility may exercise its state franchise. See *Detroit v. Detroit City Railway*, 64 Fed. 628, 638; *Morrison v. Tenn. Tel. Co.*, 115 Fed. 304, 305, 306. See 3 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1226. This practically leaves the city the sole judge of the public necessity to have the utility operate. So it is held the city may oust the utility company when the municipal grant to use the streets terminates. *Detroit United Railway v. Detroit*, 229 U. S. 39; *Laighton v. Carthage*, *supra*. The city may then impose any conditions precedent to the use of the streets by that utility. In the principal case the ordinance was substantially a statement of such conditions, instead of a grant to the utility as was held in the majority opinion. The dissenting opinion would accordingly be correct if the conditions were imposed when the municipal grant expired. But here, with permission, the utility used the streets for four years thereafter. Such a revocable license becomes irrevocable if further investment was made with the city's knowledge. *Rochdale Canal Co. v. King*, 16 Beav. 630; *Spokane Ry. Co. v. Spokane Falls*, 6 Wash. 521, 33 Pac. 1072.

**PUBLIC SERVICE COMPANIES — REGULATION — ABANDONMENT OF SERVICE AND DISMANTLING OF PLANT WITHOUT CONSENT OF PUBLIC UTILITIES COMMISSION.** — The mortgagees of a railroad in foreclosure proceedings asked that a receiver be appointed, operation discontinued, and the plant dismantled. A receiver was appointed, the railroad company appearing and consenting thereto. Upon application by the receiver, the district court ordered that service be abandoned and the plant dismantled. The Public Utilities Commission thereupon moved the court to vacate the order alleging that because of its power to regulate service (1913 SESS. LAWS OF COLORADO, c. 127, § 24), the commission had exclusive jurisdiction over the cessation of service and dismantling of the railroad. *Held*, that the order be vacated. *People ex rel. Hubbard v. Colorado Title & Trust Co.*, 178 Pac. 6 (Colo.).

For a discussion of the principles involved in this case, see NOTES, page 716.

**SALES — TITLE OF GOODS SUBJECT TO BILL OF LADING — CONSIGNMENT OF GOODS UNDER MISTAKEN BELIEF AS TO EXISTENCE OF CONTRACTUAL OBLIGATION.** — The consignor, who had agreed to sell some flour to a third party, consigned the flour to the plaintiff under a mistaken impression that he had



agreed to sell it to him. The plaintiff, believing in good faith that the goods were intended for him, paid a bill of exchange drawn on him, to which an order bill of lading was attached, and demanded the flour from the carrier. The consignor had, in the meantime, discovered his mistake and had induced the carrier to return the flour to him. The plaintiff sued the railroad company for conversion of the flour. *Held*, that he could not recover. *Jones v. Chicago, B. & Q. R. Co.*, 170 N. W. 170 (Neb.).

Generally, to-day, the *bona fide* purchaser of an order bill of lading acquires an indefeasible title to the goods, and the carrier may not deliver them to another. *Munroe v. Philadelphia Warehouse Co.*, 75 Fed. 545; *Commercial Bank v. Armsby*, 120 Ga. 74, 47 S. E. 589; UNIFORM SALES ACT, §§ 33, 38. But see *Adrian Knitting Co. v. Wabash Ry. Co.*, 145 Mich. 323, 108 N. W. 706. Cf. *Shaw v. Railroad Co.*, 101 U. S. 557, 565. The question in the principal case is whether the plaintiff is in fact the purchaser of the bill of lading and of the goods. Here, as everywhere in contractual law, it is expressed, not secret, intention that is considered. *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N. E. 544; *Wood v. Allen*, 111 Iowa, 97, 82 N. W. 451. See WILLISTON, SALES, § 5. By sending forward the bill of exchange with bill of lading attached, the consignor unequivocally expressed an intention to sell the flour to the plaintiff. *Evans v. Marlett*, 1 Ld. Raym. 271; *Wigton v. Bowley*, 130 Mass. 252. The plaintiff, in good faith, so understood the consignor's intention and acted on it, completing the sale. Moreover, if actual and not expressed intention were considered, the consignor, although he also intended to sell to one to whom he was under contractual obligations, primarily intended to sell to the person to whom he consigned the goods. It is this primary intention that must control. *Edmunds v. Merchants' Transportation Co.*, 135 Mass. 283. Cf. *Cundy v. Lindsay*, 3 A. C. 459. See WILLISTON, SALES, § 635. The principal case, therefore, cannot be supported.

**WAR ALIENS — STATUS OF ALIEN ENEMIES IN THE COURTS OF A BELLIGERENT.** — In a tort action, it appeared at the trial that the plaintiff was an alien enemy, a subject of Germany, but resident in the United States and not in internment. The trial court nonsuited the plaintiff. *Held*, that the nonsuit was improper. *Heiler v. Goodman's Motor Express Van & Storage Co.*, 105 Atl. 233 (N. J. L.).

It is uniformly held that an alien enemy resident in the hostile territory cannot maintain an action as plaintiff. *Brandon v. Nesbit*, 6 T. R. 23; *Le Bret v. Papillon*, 4 East, 502; *Rothbarth v. Hersfeld*, 179 App. Div. 865, 167 N. Y. Supp. 199. The modern basis for these decisions — that to allow a recovery in such a case would by so much diminish the resources of the home country and strengthen the enemy country — has no application where the plaintiff resides in the home territory. See *Hepburn's Case*, 3 Bland, Ch. (Md.) 95, 120; *Janson v. Driesontien*, [1902] A. C. 484, 505; *Porter v. Freudenberg*, [1915] 1 K. B. 857, 868. Further, the common-law rule allowed an enemy subject resident in the home territory to sue on the theory that, by permitting him to remain a resident, the sovereign took him under his protection. *Wells v. Williams*, 1 Ld. Raym. 282; *Clarke v. Morey*, 10 Johns. (N. Y.) 69. The same principles have been recognized in our courts and the courts of England and Canada during the present war. *Topay v. Crow's Nest Pass Coal Co.*, 29 West. L. R. 555 (Canada); *Princess Thurn & Taxis v. Moffett*, [1915] 1 Ch. 58; *Arndt-Ober v. Metropolitan Opera Co.*, 182 App. Div. 513, 169 N. Y. Supp. 944. See 28 HARV. L. REV. 312. See also 31 HARV. L. REV. 470. One difference should be noted between the English and the American cases. England, applying the common-law rule, allows an enemy subject, even though he has been interned as a civilian prisoner of war, to maintain an action. *Schaffenius v. Goldberg*, [1916] 1 K. B. 284. Cf. *Sparenburg v. Bannatyne*, 1 Bos. & P. 163.

But in the United States an interned subject of an enemy country was, by the President's proclamation of February 5, 1918, in accordance with a provision in the act, brought within the term "enemy" in the Trading with the Enemy Act of October 6, 1917. See 40 STAT. AT L. 411. This has the effect of putting such interned enemy subjects under a disability to sue except in the limited class of suits specifically mentioned by the act. See *Tortoriello v. Seghorn*, 103 Atl. 393, 394 (N. J. Eq.); *Arndt-Ober v. Metropolitan Opera Co.*, 182 App. Div. 513, 519; 162 N. Y. Supp. 944, 948.

**WARRANTY — IMPLIED WARRANTY OF PLANS AND SPECIFICATIONS.** — The plaintiff contracted to build a dry dock for the government in accordance with plans and specifications prepared by government officials. These provided first, for the relocation of an intersecting sewer, which work the plaintiff performed. Due to a defect in the plans the sewer proved insufficient and burst, flooding the excavation of the dry dock. The government refused to assume responsibility for the damage done, and upon the plaintiff's refusal to continue with the work annulled the contract. The plaintiff sued for work done and his profits. *Held*, that he could recover. *The United States v. Spearin*, U. S. Sup. Ct. Off., October Term, 1918, Nos. 44 and 45.

No supervening difficulty short of making performance impossible will excuse a party from completing that which he has contracted to do. *Walton v. Waterhouse*, 2 Wms. Saunders, 422 a, note 2; *Beebe v. Johnson*, 19 Wend. (N. Y.) 500; *Phillips v. Stevens*, 16 Mass. 238. Thus, destruction by fire, lightning or subsidence of the soil will not warrant a refusal on the part of the builder to render full performance, or entitle him to compensation for what he has already done. *Adams v. Nichols*, 19 Pick. (Mass.) 275; *School District v. Dauchy*, 25 Conn. 530; *Stees v. Leonard*, 20 Minn. 494; *Dermott v. Jones*, 2 Wall. (U. S.) 1. But where the difficulty results from defective plans and specifications, the general rule has been held not to apply, since the owner impliedly warrants the sufficiency of the plans he submits. *Bentley v. State*, 73 Wis. 416, 41 N. W. 338; *Faber v. City of New York*, 223 N. Y. 496, 118 N. E. 609. *Penn. Bridge v. City of New Orleans*, 222 Fed. 737. The English and some American courts deny the existence of such a warranty. *Thorn v. Mayor of London*, 1 A. C. 120; *Magnan v. Fuller*, 222 Mass. 530, 111 N. E. 399; *Leavitt v. Dover*, 67 N. H. 94, 32 Atl. 156; *Loneragan v. San Antonio Loan & Trust Co.*, 101 Tex. 63, 104 S. W. 1061. It seems erroneous to lay down a hard-and-fast rule that an owner does or does not warrant his plans. The existence of an implied warranty, as in the law of sales, should depend upon whether there has been a justifiable reliance by one on the other's judgment, which the particular facts of each case alone can decide. See *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108; WILLISTON, SALES, § 231. The respective knowledge of the parties, the opportunity for inspection by the builder, and the visibleness of the defects should all be considered in determining the question.

## BOOK REVIEWS

**INTERNATIONAL RIVERS.** A Monograph based on Diplomatic Documents. By G. Kaackenbeeck, B.C.L. Grotius Society Publications, No. 1. London: Street and Maxwell. 1918. pp. xxvi. 255.

"Et quidem naturali jure communia sunt omnium hæc: . . . aqua profluens . . ." (JUST. INST., II, 1, 1). At the Congress of Vienna in 1815 a body of diplomats controlling the destinies of the world took up for the first time as a general European problem the question of navigation upon "international

ivers," *i. e.*, those which form the national boundaries between states or flow through more than one state. The demands created by the growth of international shipping had come into irreconcilable conflict with the mediæval and feudal theory of the ownership of rivers, — a particularistic theory which made each state the uncontrolled owner of that portion of the river which lay within its boundaries. From such a theory came heavy local tolls and harassing regulations, so excessive and intolerable that either the theory must be modified or the rivers cease to be used as international highways. In a famous article (Art. 109) the diplomats of Vienna laid it down that the navigation of such international rivers "along their whole course, from the point where each of them becomes navigable, to its mouth, shall be entirely free, and shall not, as far as commerce is concerned, be prohibited to anyone."

Since that day for a century there has been a conflict between what might be called the "states' rights" school, contending that the riparian states may together exclude from river navigation whom they will and make such common regulations as they please, and the "internationalists' school," which maintains that international rivers shall be free and open to the ships of all nations upon equal and reasonable terms. The slow trend of opinion seems to have been in favor of the latter, if we may judge from the various conventions entered into during the last century.

Whether or no we have yet reached a point where it can be said that in the absence of convention international rivers are legally open to the flags of all nations, the diplomats at Versailles can best decide. Certain it is that the problem of international rivers must be considered by them; "in the countries whose fate will have particularly to be decided after this war, questions like those of the Danube, of the Polish rivers, of the Rhine, of the Scheldt, etc., will call for particular attention" (p. 28).

In order to bring together and review the mass of facts and documents connected with the regulation and administration of international rivers during the past century, Mr. Kaeckenbeeck, a gifted young Belgian who soon after the outbreak of the war came to Oxford and took up study in the law school there, has published a monograph entitled "International Rivers." Mr. Kaeckenbeeck advances no theories and carefully refrains from extended discussion; his purpose is simply to present his data and evidence in concise form, and this he does remarkably well. His mastery of a foreign tongue is excellent, and his presentation clear; the work as a whole possesses a unique value as constituting perhaps the only extended account in English of the gradual development of free navigation, announced at the Congress of Vienna, and applied successively to the Rhine, the Scheldt, the Danube, and the Congo and Niger rivers. The international regulations for the navigation of each of these rivers he describes at length. A brief survey at the outset of the mode of dealing with the problem of river navigation as developed under the Roman law, the mediæval law, the Law of Nature, and under the theory of State Sovereignty, adds to the interest of the book. Appendices dealing with other European rivers and briefly touching upon certain American rivers add to its value.

Mr. Kaeckenbeeck, within the limited sphere which he has chosen, has made a real contribution to the historical study of the law of international rivers, and as a reference book upon the nineteenth century treatment of these rivers his book will be of lasting value.

FRANCIS BOWES SAYRE.

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THE LEAGUE OF NATIONS AND ITS PROBLEMS. Three Lectures. By L. Oppenheim, M.A., LL.D. Longmans, Green and Company. 1919. pp. xii. 84.

That an American critic should accuse an Englishman of being over-conservative is perhaps only the natural result of a deep-lying temperamental

difference between the staid attitude of a nation old in years and the idealistic, adventurous spirit of a youthful America. Professor Oppenheim is a thinker of ability and a writer of note; as holder of the Whewell Chair of International Law at the University of Cambridge, the founder of which laid the injunction upon every holder of the chair that he should "make it his aim to lay down such rules and suggest such measures as may tend to diminish the evils of war and finally to extinguish war between nations," Professor Oppenheim has published three lectures, in which he seeks to outline the framework upon which the coming League of Nations should be built. It is so easy to throw bricks of destructive criticism at the edifice reared by careful constructive work that one hesitates to criticize at all. Yet many American readers cannot but feel that Professor Oppenheim's vision for a League of Nations is too narrowly confined, and his conception too constricted by the past; his suggestions lack originality, boldness, and even practicability.

After showing that there already exists a substantial historical basis upon which to build the League of Nations, Professor Oppenheim in a few well-reasoned paragraphs points out why a federalized world state is not within the realms of present possibility, if indeed it can ever be attained. Thus far most serious thinkers will be inclined to agree. But when, in his second lecture, Professor Oppenheim goes on to develop his idea that the future League shall be little more than a glorified Hague Conference there comes a distinct sense of disappointment. Only establish International Courts and add to the Hague meetings, already begun, a regular periodicity, says Professor Oppenheim, and you have your "organised League of Nations"; "for by such periodically assembling Hague Peace Conferences there would be established an organ for the conduct of all such international matters as require international legislation or other international action" (p. 34). Accordingly Professor Oppenheim lays down seven principles upon which the League of Nations should be built:

"First principle: The League of Nations is composed of all civilised States which recognise one another's external and internal independence and absolute equality before International Law.

"Second principle: The chief organ of the League is the Peace Conference at The Hague. The Peace Conferences meet periodically — say every two or three years — without being convened by any special Power. Their task is the gradual codification of International Law and the agreement upon such International Conventions as are from time to time necessitated by new circumstances and conditions.

"Third principle: A permanent Council of the Conference is to be created, the members of which are to be resident at The Hague and are to conduct all the current business of the League of Nations. This current business comprises: The preparation of the meetings of the Peace Conference; the conduct of communications with the several members of the League with regard to the preparation of the work of the Peace Conferences; and all other matters of international interest which the Conference from time to time hands over to the Council.

"Fourth principle: Every recognised sovereign State has a right to take part in the Peace Conferences.

"Fifth principle: Resolutions of the Conference can come into force only in so far as they become ratified by the several States concerned. On the other hand, every State agrees once for all faithfully to carry out those resolutions which have been ratified by it.

"Sixth principle: Every State that takes part in the Peace Conferences is bound only by such resolutions of the Conferences as it expressly agrees to and ratifies. Resolutions of a majority only bind the majority. On the other hand, no State has a right to demand that only such resolutions as it agrees to shall be adopted.

"Seventh principle: All members of the League of Nations agree once for all to submit all judicial disputes to International Courts which are to be set up, and to abide by their judgments. They likewise agree to submit, previous to resorting to arms, all non-judicial disputes to International Councils of Conciliation which are to be set up. And they all agree to unite their economic, military and naval forces against any one or more States which resort to arms without submitting their disputes to International Courts of Justice or International Councils of Conciliation" (p. 39).

In modeling the League, upon the past Hague Conferences, Professor [Oppenheim would seem to forget the dissatisfaction which the last Hague Conference produced in the minds of many, and the feeling that world affairs of really great moment could not there reach a settlement. "The rights of individual delegates to take up the time of the Conference," said the ranking British delegate in his official report upon the Conference to the British Foreign Secretary, "the rights of the majority over a minority in the absence of unanimity, the power of a chairman to confine the discussion within due limits, — these and many other questions demand solution before another meeting of the Conference can prove satisfactory." (See Brit. Parl. Accounts and Papers, 1908, vol. cxxiv [Cd. 3857], p. 20.) In Professor Oppenheim's plan there is no suggestion for avoiding the stumbling block of the equality of votes, which has wrecked so many international schemes; if to each of the great world Powers is given a vote no greater than that accorded to the smallest principality, it is difficult to believe that the five great world-controlling nations would be willing to intrust large or vital powers to a League so constituted. The only suggestion for overcoming the Unanimity Requirement, which proved such a check upon effective action of large concern at the Second Hague Conference, is the proposal that a minority shall not be able to prevent the *discussion* and *voting* upon new legislation, though the minority can in no way be bound by legislation so voted upon.

If the new League is to be a really effective force in the world, it would seem imperative that some kind of Executive Organ or Council be created to decide quickly and authoritatively in each case whether common action either of a military or economic nature is to be initiated, what kind of action is to be taken, and when and how it is to be brought into play. Yet Professor Oppenheim would have no executive at all, other than a "Permanent Council," endowed apparently with only ministerial power, much resembling the powerless Permanent Bureaus of the various Public Unions. Similarly Professor Oppenheim would have no international military or naval forces, and no international legislation binding upon any unwilling state. As he himself points out (p. 41), he would have no international legislation in the strict sense of the word, but only a codification of law among such states as might find it to their advantage to agree upon a common codification.

In his third lecture Professor Oppenheim deals with the administration of Justice and Mediation within the League of Nations. The main feature of Professor Oppenheim's plan is the institution of an International Court of Appeal to correct errors in law of the international courts of first instance. One cannot help wondering why an Appeal Court is necessary when one thinks of the additional expense and complication of legal machinery thereby involved, to say nothing of the cost in time which may be so vital a matter in the settlement of international disputes. Professor Oppenheim's only reason appears to be that "just as Municipal Courts of Justice, so International Courts of Justice are not infallible. If the States are to be compelled to have their judicial disputes settled by International Administration of Justice there must be a possibility of bringing an appeal from lower International Courts to a Higher Court" (p. 63). Why an appeal court would be more likely to be infallible than the same judges sitting as a court of first instance, Professor Oppen-

heim does not point out. Many forward-looking thinkers may be inclined to question the advisability of having a majority of the court of first instance composed of *advocates*, *i. e.*, of citizens or representatives of the nations in dispute, rather than of *judges*, — a feature of the 1899 Hague Arbitration Convention which was discarded as objectionable in the light of arbitration experience when the Hague Conference came to remodel the Arbitration Convention in 1907. (Compare Article 24 of the Arbitration Convention of 1899 with Article 45 of the Arbitration Convention of 1907.) The trend of thought to-day is perhaps in favor of having *no* parties in interest sitting as judges but as in ordinary law courts, letting the interested parties appear as advocates to plead their cases before impartial and unbiased judges. To his system of international courts Professor Oppenheim adds a further scheme for the constitution of international councils of conciliation for the settlement of non-justiciable questions.

One cannot help feeling throughout that Professor Oppenheim's mind is too firmly fixed in the ways of the past. He would have a League which, so far as legislation is concerned, would amount to little more than a periodically meeting diplomatic gathering. His conception of sovereignty seems to be the old-time idea that a sovereign state's most sacred and precious duty is to maintain an utter independence of any external control (p. 33). No law can be possible without obligation; and international obligation of necessity presupposes a certain external restriction. As Kant long ago pointed out, it is the obligation and restriction of law that gives real freedom and independence. Although in his conclusion Professor Oppenheim struggles to free himself from the popular bugbear of the sacredness of national sovereignty (p. 75), yet, at least so far as legislation is concerned, it seems essentially to underlie his whole conception of the League.

It would be only carping to point out certain inaccuracies of statement and minor errors. We live at a time which calls for large constructive thought rather than for small destructive criticism. Professor Oppenheim's lectures are readable and thoughtful, and contain much that is worth while. Perhaps Americans are hoping for too much; perhaps it is a sense of disappointment rather than of criticism which will prompt many American readers to feel that the constructive suggestions contained in the book are grounded upon the conservatism of the past rather than upon a large-visioned and practical-minded conception of the future.

FRANCIS BOWES SAYRE.

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EXPERIMENTS IN INTERNATIONAL ADMINISTRATION. By Francis B. Sayre. New York: Harpers. 1919. pp. 201.

The author of this interesting little book, having found that after former great wars the victorious allies, in Peace Congress assembled, solemnly dedicated themselves to "the repose and prosperity of Nations, and . . . the maintenance of the peace of Europe," and other lofty sentiments significantly like those enunciated to-day, seeks to discover the reasons for the failure of realization of those pious wishes and finds them (1) in the fact that previous peace treaties ending great wars were "founded essentially upon injustice," and (2) in the fact that nations in the past "have been unwilling to submit to a sufficient amount of external control to make an effective international executive organ possible." The author then presents suggestions for curing, in the forthcoming League of Nations, the defects thus diagnosed. In deprecating the first he points out that "no treaty founded on injustice can endure; no possible effort to retard the irresistible progress and triumph of justice and righteousness in the world can succeed" (pages 7, 160). He offers, however,

no suggestion by which any different standard of "justice and righteousness" than has prevailed in the past, namely, the will of the victors, shall now be applied; and it may be remarked that the statesmen of those days in concluding peace treaties appear not to have doubted that they were the apostles of justice and righteousness. The author speaks of the "purely selfish interests" which mark earlier settlements; but aside from our own contribution, the influence of any other than selfish "interests" in the draft of the settlement now proposed is not conspicuous.

It is, however, to the second defect, namely, the absence of executive machinery to enforce the lofty aspirations of peace treaties, that the major portion of the volume is devoted. To illustrate this want of executive authority the author has classified into three different groups or types, according to the degree of power exerted by the central executive organ, the various international unions which states have created for the administration of some common economic or social interest. English readers had already been acquainted with the operation of these organizations through the work of Professor Reinsch on "Public International Unions, Their Work and Organization" (1911). Mr. Sayre has classified the administrative organs of some of these unions and of some recent examples of joint governmental administration into (1) those having little or no power of control over the member states, *e. g.*, the Postal Union; (2) those having a measure of control over some local situation, such as the Danube, Congo, and Huangpu River commissions, International Sanitary Councils, the Albanian Commission, the Moroccan Police, the Suez Canal and Congo commissions, and the Spitzbergen and New Hebrides administrations; and (3) those having some power over the actions of the member states, among which he cites the International Sugar Commission and the Rhine River Commission. The author analyzes the powers of these executive bodies and their internal organization, such as methods of voting, representation of states, etc. From his study it appears but too clearly that in the few rare cases where these bodies have been intrusted with duties other than informational, statistical, or purely formal and have had duties which bore a shadow of political power they have practically always failed. The nearest analogy to political functions involving some impairment of state sovereignty the author finds in the Rhine Commission and in the International Sugar Commission, which was designed to prevent the grant of sugar bounties by states. Its determinations of fact were to result in an obligatory change of tariff laws by member nations, much like Presidential power under the reciprocity provisions of the McKinley tariff. To deduce from such a commission an analogy for an executive organ such as the proposed League of Nations embodies, requires well-developed powers of projection. The difference in degree amounts to a difference in kind. The author has no illusions in this regard, but is hopeful that the illustrations given and the analysis of the underlying reasons for success or failure will offer encouragement to the belief in and the creation of an "international government" by a League of Nations. From the evidence offered, however, such encouragement is more than doubtful. The author deprecates (page 151) the conception of sovereignty by which "each state is the unrestricted arbiter of its own fate, and that no state therefore can be bound against its will." The unnecessary abandonment of this conception, however, upon adherence to which we have become a nation, and a committal of our fate to the determination of nations whose interests may, on the whole, be opposed to ours is possible of even greater deprecation. Especially is this so when the document on which our fate is to rest is drawn in such vague terms — occasionally, as in Article XV, indicating a deliberate vagueness inspired by compromise — that perhaps the leading English authority on international law confesses to having read it six times without having grasped its full meaning.

Mr. Sayre's book is written in a clear and concise style, and is entertaining

throughout. The Appendices of texts are useful. The distribution of foot-notes between the end of the chapter and the bottom of the page is somewhat disconcerting.

EDWIN M. BORCHARD.

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A HISTORY OF GERMANIC PRIVATE LAW. By Rudolf Huebner. Translated by Francis S. Philbrick. With Introductions by Paul Vinogradoff and by William E. Walz. Boston: Little, Brown, and Company. \$5.00. 1918. pp. 785.

As a volume for "The Continental Legal History Series" no more suitable book on Germanic law could have been selected than Professor Huebner's "Grundzüge der deutschen Privatrechts." Though a purely scientific and historical work, not intended as a textbook to prepare students for examinations, its merit is attested by the fact that its first publication in 1908 was speedily followed by a second edition in 1913. It is from this second edition that the present translation is made.

Though Huebner called his book "Principles," the translator has more accurately indicated its true nature by entitling it "History." For it is in no sense a mere exposition either of medieval Germanic law or of the Germanistic paragraphs in the Civil Code of 1900. On the contrary, its peculiar interest and value to the American student lies in the great historical sweep with which the author surveys the development of Germanic private law through the course of twenty centuries. In so doing, he shows a wide command of the vast literature of the subject, and, on disputed points, always refers to the views of his opponents, even though he does not clog his exposition by entering into a detailed discussion of their arguments. Huebner is frankly an enthusiast of the Germanistic school which developed under the inspiration of, and in opposition to, the Romanistic claims of Zavigny and his disciples. Being a follower of Albrecht, Brunner, and Gierke, Huebner rejoices every time that a good old Germanic institute, twisted or displaced at the Reception, has again come into its own by being given recognition in the Civil Code of 1900. But his enthusiasm cannot be said to bias his judgment. Nor why should it? For now that the scholars of the Germanistic school have secured in the paragraphs of the present Civil Code such a generous restoration and purification of Germanic law there is no longer need for them to carry on their propaganda. The Code has set the seal upon their labors. All that Huebner, therefore, seeks to do is to elucidate the historical development which Germanic law has undergone.

His method may be very briefly indicated. He divides the whole subject into five books (Law of Persons, Things, Obligations, Family, and Inheritance) and subdivides each into its constituent institutes. He then follows each through the five phases of its history. Take, for instance, by way of illustration, the law of associations. (1) The medieval Germanic law is portrayed in all its rich variety of forms. The weakness of the medieval state, which was too weak to give efficient protection to individuals, naturally led "fellows" ("Genosse") to form themselves into all sorts of associational groups. Besides the old "sib" and "mark" associations, there grew up associations for special agricultural purposes (*Gehöferschaften*, *Hauberge*), mining associations, transportation unions, the craft and the merchant guilds, and various other associations for fraternal, convivial, religious, and political purposes. In addition to these associations proper (*Genossenschaften*), so organized as to confer upon the entire body of members as such an independent personality, there developed also various personal unions "of collective hand," which had no such independent personality. All these forms of association shaded into



one another. They were not sharply separated from each other by any clear-cut formulas. They were adapted to express the needs of the varied social life of the German Middle Ages, and they were susceptible of further development and scientific treatment, had not the alien Roman law broken in to arrest their development. (2) The Roman law corporation theory, with its contrasted "*universitas*" and "*societas*" is then traced from its classical form into its modification by later writers. (3) Then follows in the period of the Reception the conflict between the native Germanic and the alien Romanistic association theories. The German "*Genossenschaft*" was violently twisted and forced into the mold of the "*universitas*" and the "community of the collective hand" into that of the "*societas*." The result of this legal violence was that the Roman principles were themselves modified, and yet the resulting legal rules did not accurately reflect existing native customs. (4) To what extent this legal muddle was embodied or clarified in the territorial laws and codes of the eighteenth and early nineteenth centuries is next examined. (5) Finally the present Civil Code is shown to mark a triumphant renaissance of parts of the Germanic law; for the Civil Code knows nothing of the "*persona ficta*" of the later Roman "*universitas*"; and the principle of "the collective hand" has been made by the Civil Code the basis not only of the marital community of goods, but, what is more important, of the ordinary partnership of private law. Huebner also frequently adds to the interest and breadth of his discussion by indicating those cases in which Germanic law is embodied in Napoleon's Code and in the Swiss Civil Code of 1907.

The translation, while it lacks the genius with which Maitland rendered part of Gierke, is on the whole excellent. Dr. Philbrick is sometimes inconsistent in using different English expressions for one and the same German word and idea. But he has wisely avoided the pitfall of trying always to find Anglo-Saxon phrases which might mislead the reader into assuming a greater similarity between the English and Germanic legal systems than really exists.

SIDNEY B. FAY.

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EXECUTORY INTERESTS IN ILLINOIS. By Thomas W. Hoopes, of the Springfield Bar. Chicago: Burdette J. Smith and Company. 1918. pp. vi, 339.

The title of this book carries with it a fairly adequate description. It belongs to that class of local treatises which are of considerable value to the local practitioner, but of less interest to the profession outside the state, except in the case of an attorney who chances to have business in that particular state. Within these limits, however, local treatises are very convenient, and are always welcome. Many law teachers in fact are believers in the value of teaching local law primarily.

The author in his preface states that the book is a text based upon a compilation which he had made of the Illinois cases on future interests. To this extent it seems to be very well done. The cases are systematically gathered, the topics logically arranged, and the discussion dovetailed, so far as possible, with the general law.

The obvious disadvantage of a strictly local book dealing with such a fundamental topic as future interests is that many branches of the law equally important with those discussed are necessarily ignored because the points have not come up in the particular jurisdiction. In this respect such a book differs from a discussion of such topics as probate law, or conveyancing, or similar matters, which are largely statutory.

The book follows the lines previously covered by Professor Kales' treatise on "Conditional and Future Interests in Illinois," published thirteen years ago, having the advantage over the latter of being up to date. It does not go quite

as much into the discussion of the English cases by which the fundamental principles of the law of future estates were established as does Kales' book.

It is in the main what it purports to be, a summarized digest of the Illinois cases on this topic, which seem to be fairly numerous, with a good preliminary discussion of the general principles governing each topic as an introduction. On the whole it should prove a valuable aid to Illinois lawyers having business with this branch of the law.

G. N.

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THE LAW AS A VOCATION. By Frederick J. Allen. Cambridge: Harvard University Press.

SPIRIT OF THE COURTS. By Thomas W. Shelton. Baltimore: John Murphy Company. [To be reviewed.]

TRACTATUS DE BELLO, DE REPRESALIIS ET DE DUELLO. Edited by Thomas Erskine Holland. New York: Oxford University Press. [To be reviewed.]

CONSTITUTIONAL POWER AND WORLD AFFAIRS. By George Sutherland. New York: Columbia University Press.

INCOME AND OTHER FEDERAL TAXES. Fourth Edition. By Henry Campbell Black. Kansas City: Vernon Law Book Co.

**VOL. XXXII**

MAY, 1919

No. 7

**D**ESPITE the testimony of the late J. P. Morgan <sup>1</sup> that the basis of commercial credit is character, his fellow bankers still attach considerable importance to collateral. Negotiable instruments given for a loan frequently state that they are secured by specified stock or bonds or produce documents, and authorize the summary sale of this collateral in the event of nonpayment at maturity. Even this protection does not render the bank entirely safe. The security may begin to depreciate, so that it will be worth much less than the loan before the instrument falls due, and if the bank cannot sell until the date fixed for maturity, a large portion of the loan may be lost. Consequently, it is becoming usual for time paper secured by collateral to contain numerous provisions for the acceleration of payment, if the bank or other holder feels insecure. The note states the present value of the collateral, and agrees that if it depreciates the maker will furnish additional security on request so as to maintain a satisfactory margin above the loan. If he fails to do this, the note immediately falls due, and the bank or other holder is empowered to sell the collateral at once.<sup>2</sup>

<sup>1</sup> Report of the Committee appointed pursuant to House Resolutions 429 and 504 to investigate the Concentration of Money and Credit, February 28, 1913, page 136. Washington, 1913.

<sup>2</sup> The following form is much used in Boston and the vicinity:

\$....., *Mass.*.....19..  
months after date, for value received,  
.....promise to pay to the..... Trust Company, of....., or  
order, at the said Trust Company..... Dollars, having  
deposited with the said Trust Company as collateral security for the payment of this

The instrument is transferable in form, being payable to the bank or its order, and is evidently intended to circulate.

Many bankers would probably be surprised to learn that a form of note in such common use has repeatedly been declared by courts not to be negotiable. Consequently, the holder of the note must prove as part of his case that it was given for consideration, and will take it subject to any defenses which the debtor who made the note has against his creditor, the payee. Such a judicial view obviously renders the instrument unsuited to circulation on the note market, for a purchaser would not usually care to make the necessary inquiries or assume the unavoidable risk of unknown defenses.

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or any other direct or indirect liability of . . . . . to the said Trust Company, due or to become due or that may hereafter be contracted, the following described security:

. . . . .  
 . . . . .  
 . . . . .  
 . . . . .  
 . . . . .

Should the market value of the security hereby pledged or which may hereafter be pledged for this loan depreciate in the opinion of either the President or Treasurer of said Trust Company, . . . . . agree to furnish satisfactory additional security at the demand of the said Trust Company, so that the market value of the security shall always be at least . . . . . per centum more than the amount of this note. And upon . . . . . failing to deposit such additional security when requested, this note shall become due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding, and the said Trust Company or its assigns may immediately reimburse themselves by the sale of the security as hereinafter authorized. And . . . . . hereby give authority to the said Trust Company or its assigns to sell, assign, and deliver the whole or any part of the said property, also any security substituted therefor or added thereto, with or without notice or advertisement, either at public or private sale, at the option of the said Trust Company or its assigns, on the non-performance of either of the above promises; any balance of the net proceeds of such sale remaining after paying all sums, whether then or thereafter payable, due from . . . . . to the said Trust Company, on account of this note or otherwise, after paying all legal costs and expenses for collection, sale, and delivery, to be returned to . . . . . And it is further agreed that the said Trust Company or its assigns may bid and become purchasers at such sale, and no other purchaser shall be responsible for the application of the purchase money.

In case the undersigned shall be adjudged a bankrupt, or shall file a voluntary petition in bankruptcy, or shall make a general assignment for the benefit of creditors, or in case a petition shall be filed praying that the undersigned be adjudged a bankrupt, this note shall become forthwith due and payable.

*Due* . . . . .

For another form, see Cases on Negotiable Instruments, Z. Chafee, Jr., page 101.

The same attitude has been taken by the courts in many states toward similar provisions in another common type of commercial paper, called chattel notes. Such a note is usually given by the buyer of a chattel for the unpaid portion of the purchase price, and states that the seller retains title to the chattel until the note is paid.<sup>8</sup> For example, the purchaser of an automobile has it delivered to him for a small sum in cash and a chattel note for the balance of the price, payable to the seller or his order at a distant day, but containing an acceleration clause that the holder of the note may sue at once and seize the automobile if the buyer attempts to sell it or remove it permanently from the state, or suffers it to be taken by a third party on legal process. Such a provision is often held to destroy the negotiability of the note and turn it into an ordinary contract in writing. If so, the purchaser of the note from the seller can not recover from the buyer of the automobile if the car was defective or the sale fraudulent.

This conflict between mercantile understanding and judicial decision may have far-reaching consequences in the business world. The cases are not unanimous against negotiability, and the legal problem of the effect of these acceleration provisions in collateral time paper is still unsettled. It is therefore worth while to examine the rules of the law of negotiable instruments which are said to be violated by these provisions, and the application of those rules to still other types of paper, which also have a fixed date for payment but mature earlier upon the happening of some event. It will then be possible to determine whether the bank form of promissory notes and the chattel notes are rendered not negotiable by their acceleration clauses.

A negotiable instrument is a substitute for money. It was first used to aid in the payment of money at distant points, and the international bill of exchange still serves that purpose. As an addition to money it increases the purchasing medium in circulation. For instance, if many people did not pay their monthly bills

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<sup>8</sup> In states which hold that the clause as to title makes the instrument invalid as a note, the effect of the acceleration clauses is of course immaterial. *Sloan v. McCarty*, 134 Mass. 245 (1883). It is usually held, however, that the transaction is equivalent to a chattel mortgage by the buyer to the seller, who retains title for security only; the beneficial ownership and risk of loss are in the buyer, who is therefore unconditionally liable upon a negotiable note. *Chicago, etc. Equipment Co. v. Merchants' Bank*, 136 U. S. 268 (1889). The cases are collected in 8 *CORPUS JURIS*, 129.

by checks, more specie or paper money would be needed in circulation, and economically as well as practically, there is often not enough money to go round. The manufacturer who cannot obtain cash from his customers insists upon a note or accepted bill instead, which he can immediately discount at his bank and turn into money for his pay roll. The bank in turn rediscounts the bill or note with the Federal Reserve Bank, which makes it part of its reserve for the issue of more money in the form of bank notes. Like money a negotiable instrument is intended to have a definite value and to be taken almost at sight, free from the need for investigation into outside facts and unaffected by the claims of former owners, even if it was stolen or lost. When genuine, it ought to serve as the equivalent of money, except for the distant maturity and the risk of insolvency of private persons and their legal incapacity.

Anything so closely related to money and circulating almost as rapidly must be plainly distinguishable from the ordinary non-transferable written contract, just as a five-dollar gold piece is distinguishable from uncoined gold. Therefore, business custom has established several "formal requisites" for a negotiable instrument, which adapt it for quick circulation and give it an unmistakable label. Although the law usually cares little about the form of a contract and looks to the actual understanding of the parties who made it, the form of a negotiable instrument is essential for the security of mercantile transactions. The courts ought to enforce these requisites of commercial paper at the risk of hardship in particular cases. A business man must be able to tell at a glance whether he is taking commercial paper or not. There must be no twilight zone between negotiable instruments and simple contracts. If doubtful instruments are sometimes held to be negotiable, prospective purchasers of queer paper will be encouraged to take a chance with the hope that an indulgent judge will call it negotiable. On the same principle, if trains habitually left late, more people would miss trains than under a system of rigid punctuality.

A few careless persons must be sacrificed so that the world at large will know just what the rule is and regulate its affairs accordingly. Consequently, as Chief Justice Emery puts it,<sup>4</sup>

"Commercial paper has long been governed by special rules which, while designed to ensure justice, are also designed to ensure the free and

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<sup>4</sup> *Neal v. Coburn*, 92 Me. 139, 145, 42 Atl. 348 (1898).

safe use of an indispensable commercial agency. The commercial world needs and seeks for the plain workable rule rather than for the somewhat abstract right in each case."

It must not be forgotten, however, that these rules of certainty are not mathematical formulæ evolved out of the pure reason of the judges, but are business requirements created by business needs and susceptible of modification with changing commercial conditions. Law is made for business, not business for law. While the influence of custom on legal principles has sometimes been exaggerated,<sup>5</sup> the history of negotiable instruments leaves no doubt that the courts have based the governing principles upon actual commercial practice, though modifying it when it seemed unreasonable or out of accord with general considerations of justice.<sup>6</sup> Judge Amidon remarks with his refreshing common sense:<sup>7</sup>

"The rule requiring certainty in commercial paper was a rule of commerce before it was a rule of law. It requires commercial, not mathematical, certainty. An uncertainty which does not impair the functions of negotiable instruments in the judgment of business men ought not to be regarded by the courts. The fine phrase of Chief Justice Gibson in the case of *Overton v. Tyler*, 3 Pa. 346, . . . that a negotiable instrument 'is a courier without luggage,' has been made to do much service in the discussion of this subject. The real question, however, is who shall determine what constitutes 'luggage'—the business world, or the judge in his library? In no branch of the law has the sound judgment of the English courts shown itself more conspicuously than in the treatment of this subject. Whenever a new instrument, varying in some of its features from the ordinary promissory note or bill of exchange,

<sup>5</sup> J. C. CARTER, *LAW, ITS ORIGIN, GROWTH, AND FUNCTION*; criticized by J. C. GRAY, *THE NATURE AND SOURCES OF THE LAW*, §§ 598-641.

<sup>6</sup> *Goodwin v. Roberts*, L. R. 10 Ex. 337 (1875); 2 CAMPBELL'S *LIVES OF THE CHIEF JUSTICES*, 407, and note, London, 1849.

<sup>7</sup> *Cudahy Packing Co. v. State National Bank*, 134 Fed. 538, 542-43 (C. C. A., 8th, 1904). For presentations of a similar view as to corporate bonds, see 2 MACHEN ON CORPORATIONS, § 1734 ff. *Edelstein v. Schuler*, [1902] 2 K. B. 144; *Mercer County v. Hackett*, 1 Wall. (U. S.) 83, 95 (1863), per Grier, J.: "A mere technical dogma of the courts or the common law can not prohibit the commercial world from inventing or using any species of security not known in the last century. Usages of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law." *First National Bank of Springfield, Ohio v. Skeen*, 101 Mo. 683, 687, 14 S. W. 732 (1890). The unfortunate results of a rigid *a priori* doctrine are pointed out by A. M. Kidd in 6 CAL. L. REV. 444 (1918). See note 166.

has been presented for admission to the class of commercial paper, those courts have called for their guidance men from the actual business world, best qualified to speak on the subject. If, from their evidence, it has appeared that the instrument in question was by the general custom and practice of the business world treated as a negotiable instrument, the court has given effect to that usage, and adjudged the instrument to be subject to the same law as other negotiable paper. This was true not only in the early and formative periods of the commercial law, coming down to the age of Lord Mansfield, but has been followed with the same freedom from time to time down to the current year. Those courts have never forsaken the business world to pursue a definition."

Consequently, we must always interpret the formal requisites with our eyes upon the actual conduct of life, continually testing them by the ultimate purpose of negotiable instruments, free circulation as a substitute for money. In other words, a formal requisite is only a concise statement of a method for avoiding the evils of uncertainty, and when those evils do not arise the requisite cannot properly be said to be violated.

The formal requisites which may conceivably render invalid instruments with acceleration provisions are three in number: the sum payable must be a sum certain;<sup>8</sup> the instrument must be payable on demand, or at a fixed or determinable future time;<sup>9</sup> it must not contain an order or promise to do anything in addition to the payment of money.<sup>10</sup> Of these, the second is the most important and must be fully considered at once. The other two will be discussed subsequently.

Much of the confusion in the cases is due to the failure of the courts and textbooks<sup>11</sup> to distinguish between the requisite of certainty of time and that which forbids the instrument to be conditional.<sup>12</sup> Some instruments violate both requisites. For instance, if a note is payable when the maker marries, it is conditional since he may never marry, and furthermore, if he does the time of pay-

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<sup>8</sup> NEGOTIABLE INSTRUMENTS LAW, §§ 1 (2), 2; 2 AMES, CASES ON BILLS AND NOTES, 830; 1 DANIEL, NEGOTIABLE INSTRUMENTS, 6 ed., § 53.

<sup>9</sup> NEGOTIABLE INSTRUMENTS LAW, §§ 1 (3), 4; 2 AMES, CASES ON BILLS AND NOTES, 831.

<sup>10</sup> NEGOTIABLE INSTRUMENTS LAW, § 5; 2 AMES, CASES ON BILLS AND NOTES, 829; 1 DANIEL, NEGOTIABLE INSTRUMENTS, 6 ed., § 59.

<sup>11</sup> An example is 1 DANIEL, *op. cit.*, Chap. II, Section III.

<sup>12</sup> NEGOTIABLE INSTRUMENTS LAW, §§ 1 (2), 3; 2 AMES, CASES ON BILLS AND NOTES, 827.



ment is very uncertain.<sup>13</sup> On the other hand, if it is payable when he dies, it is unconditional and sure to be payable eventually, but no one can say when. A condition is a fatal objection for purposes of free circulation on the money market. The prospective purchaser cannot tell from inspection of the paper whether it will ever be exchanged for money, but must inquire into outside facts, oftentimes in the future, to learn if the condition is performed. There is not time in the rapid dealings of the market to ascertain more than the genuineness of the signatures, and the solvency and legal capacity of the signers. Consequently, it has always been settled that a conditional order or promise is not negotiable.

Unfortunately many judges have jumped to the opposite proposition, that any unconditional promise or order is negotiable.<sup>14</sup> If the day of payment is sure to arrive some time, the objection just considered does not arise, and therefore they conclude that it is immaterial when that day is to arrive. The statutes perpetuate the confusion.<sup>15</sup> The law tends to overlook the fact that an unconditional instrument with an uncertain time for payment may be open to other and very serious objections.

1. Its value is rendered uncertain. The time element in value is well understood. The distance to maturity determines the discount upon a non-interest-bearing obligation. If it bears interest above the market rate, a long-time security will command a premium diminishing as maturity approaches; *vice versa*, if the interest is low. So close is the relation of time to value, that the price of a gilt-edged bond may be accurately ascertained from mathematical tables, given the maturity, return, and current interest-rate. On the other hand, if the maturity of an instrument is uncertain, the premium or discount becomes purely speculative. One hesitates to offer a premium for even a ten per cent note due at the maker's death, for it may be paid off next week at par. Nobody can tell what it will sell for a year hence. Life-tables cannot determine the

<sup>13</sup> Such instruments are always held bad. 1 AMES, CASES ON BILLS AND NOTES, 30, and note.

<sup>14</sup> *Colehan v. Cooke*, Willes, 393 (1743), note payable ten days after death of maker's father, is the leading case.

<sup>15</sup> NEGOTIABLE INSTRUMENTS LAW, § 4 (3): "An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable, . . . on or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain." BILLS OF EXCHANGE ACT, § 11 (2) is practically the same.

duration of this particular existence. And the value of paper with uncertain maturity is rendered still more speculative by the objections about to be considered, which make it possible that the promise though unconditional in terms will never be performed because of unknown defenses to which the purchaser will be subject when he sues.

2. If the time of payment is uncertain it may have already occurred. If so, the paper is in fact overdue and affected by the equitable defenses of prior parties. On business paper, maturity should be definite, so that any one who buys after maturity will do so with eyes open.

3. If the maturity has occurred six years before (less in some states), the Statute of Limitations will defeat recovery, even if there are no other defenses. The statute may have run before the purchase or before the holder can ascertain the date of the critical event, such as some one's death, which fixed maturity.

4. Even if maturity has not yet arrived, it is essential for the holder to know in advance just when it will come, so that he may present the instrument to the primary party and give notice of dishonor to the secondary parties in order to make them liable to him. If a note is payable at the death of the maker's father, he must, to be safe, maintain telegraphic communication with his deathbed.<sup>16</sup> If it is payable at the end of the war, does this mean November 11, 1918, or the signing of the peace treaty, or its ratification by the Senate, or the President's proclamation of peace? The holder's failure to determine the critical date correctly and act at once will forfeit his rights against indorsers.<sup>17</sup>

5. A less serious difficulty is, that the obligors on the instrument ought to know the time of payment definitely, so that the primary party may have funds ready as the day approaches, and the secondary parties may watch him and protect themselves if he appears unprepared to pay. Good business policy requires that men shall foresee the maturity of their obligations and adjust their affairs accordingly.

6. Because of these specific objections, the paper is unsuited to

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<sup>16</sup> Yet such instruments are always held negotiable. *Colehan v. Cooke*, Willes, 393 (1743); *McClenathan v. Davis*, 243 Ill. 87, 90 N. E. 265 (1909); 1 DANIEL, *op. cit.* § 46 note 22.

<sup>17</sup> For cases upholding Civil War notes, see 1 DANIEL, *op. cit.*, § 49.

rapid circulation in the legitimate money market. Its speculative value, the need of inquiry into outside facts, and the risk of hidden defenses make business men fight shy of it and prevent it from being a substitute for money at all. It should be classed as an ordinary simple contract, and not as a circulating instrument.

Notwithstanding these objections, American decisions have gone very far in upholding instruments with no certain time for payment.<sup>18</sup> Our problem is different, for it concerns paper with a certain maturity and provisions for a contingent earlier payment. However, the judicial attitude toward acceleration clauses has been affected by the widespread disregard of the requisite of certainty of time in the decisions just mentioned, and the prevalence of the maxim that an instrument is good so long as the day of payment must ultimately arrive, a maxim which would logically validate all acceleration paper. On the other hand, the recognition of the time requisite in the Negotiable Instruments Law<sup>19</sup> has brought a general stiffening of standards, which has reacted upon acceleration cases.

Before examining the decisions upon the various forms of acceleration provisions, including those in collateral and chattel notes, I shall present the principles which seem to me controlling.

There are two broad classes of negotiable instruments without acceleration provisions, each of which has its own distinctive method of satisfying the formal requisite of certainty of time.

(a) In time paper, "the time of payment of a bill or note must be obvious from the bare inspection of the instrument." (b) In demand or sight instruments, the time is not certain at the outset, but is fixed "by the performance of an act regularly incident to the collection of the paper."<sup>20</sup> Thus, a demand note becomes payable by the maker's act of tender of money, or the holder's act of presentment for payment.<sup>21</sup> A sight bill is made certain by the

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<sup>18</sup> 1 DANIEL, *op. cit.*, § 43 ff.

<sup>19</sup> § 4.

<sup>20</sup> 2 AMES, CASES ON BILLS AND NOTES, 831. THE NEGOTIABLE INSTRUMENTS LAW presents the two methods in a little different way. § 1 (3) says the instrument "must be payable on demand, or at a fixed or determinable future time." § 4 (1) says the time is "determinable" in sight bills.

<sup>21</sup> In demand notes presentment for payment does determine maturity if payment is thereupon made. If, however, payment is not made, maturity is determined regardless of demand. For purposes of suit or the Statute of Limitations, the note matures

holder's act of presentment for acceptance. Apart from the well-established exception of instruments payable after some one's death, which is perhaps commercially justifiable because of the prevalence of life-estates which are anticipated by borrowing, maturity cannot properly be fixed by an extrinsic event, which is not closely connected with the collection of the instrument. In other words, business men should not be affected by facts which are not on the instrument or part of the business methods of collection and payment.

Now, the effect of the ordinary acceleration provision is to combine these two classes of paper in one instrument. A note payable on or before July 1 is like Class (a) in having a definite maturity, and like Class (b) in having a movable time of payment fixed by the maker's tender or the holder's demand. My contention is that the law merchant recognizes only the two methods of satisfying the formal requisite of certainty of time. An instrument may use either or both of these two methods of stating its maturity, but it cannot regulate its maturity by some outside event. An acceleration provision is analogous to a demand note. The business world allows paper with a movable time of payment, but it cannot bother with it unless the time is eventually fixed by a business fact. This applies just as much to paper with an ultimate definite maturity and an acceleration provision, as to paper with no stated date for payment at all and maturing at an uncertain time. Consequently, I would state my first principle as to acceleration provisions thus:

*I. An instrument with an acceleration provision in order to be negotiable must conform to the following requirement. The ultimate time of payment must be obvious from the bare inspection of the instrument; and payment can be accelerated only by the performance of an act regularly incident to the collection of the paper.<sup>22</sup>*

To this I would add two other principles, leaving the argument in their support till later:

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when it is written. For purposes of charging secondary parties and letting in equities, it matures after a reasonable time. Thus it might be said that the maturity of a demand note is in fact certain from the outset, being either its issue or the end of a reasonable time. From this point of view, no act is necessary to fix maturity.

<sup>22</sup> This combines Ames' alternative requirements in one. 2 AMES, CASES ON BILLS AND NOTES, 831.

II. *The ultimate time of payment is the maturity of the instrument for all purposes with respect to persons who have not received notice that the fact which was to accelerate payment has occurred.*

III. *The time fixed by the acceleration provision is the maturity of the instrument for all purposes with respect to persons who have received notice that the fact which was to accelerate payment has occurred.*

We can now proceed to the authorities on the various types of acceleration provisions.

#### INSTRUMENTS PAYABLE "ON OR BEFORE" A SPECIFIED DAY

This is the simplest form of acceleration provision, and is valid on principle, because the acts causing acceleration are incidental to collection of the instrument. At common law, it did not impair negotiability, except in Massachusetts,<sup>23</sup> and it is expressly permitted by the Negotiable Instruments Law.<sup>24</sup> With regard to the objections involved in uncertainty of time, the cases say very little, so that some discussion of this question is needed.

If the maker alone has the option of accelerating payment, the matter is simple. "The legal rights of the holder are clear and certain; the note is due at a time fixed, and it is not due before. . . . This option if exercised, would be a payment in advance of the legal liability to pay, and nothing more."<sup>25</sup> "For all purposes of negotiation it is to be regarded as a note payable solely on the day therein named."<sup>26</sup> If the maker's tender is accepted and payment made, no further question will arise, unless the note is left in circulation. In that event, a *bonâ fide* purchaser before the ultimate date of maturity will be free from equities and can oblige the maker to pay a second time.<sup>27</sup> He is like the purchaser of a demand note, paid but wrongfully kept by the owner and renegotiated to an

<sup>23</sup> See cases in notes 25, 26, 27, 29, and 32.

<sup>24</sup> § 4 (2): "An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable . . . on or before a fixed or determinable future time specified therein."

<sup>25</sup> Cooley, J., in *Mattison v. Marks*, 31 Mich. 421 (1875), construing "on or before" to give only the maker an option.

<sup>26</sup> *Jordan v. Tate*, 19 Ohio St. 586 (1869); *Helmer v. Krolick*, 36 Mich. 37 (1877); *Harrison v. Hunter*, 168 S. W. 1036 (Tex. Civ. App. 1914); *Bates v. Leclair*, 49 Vt. 229 (1877).

<sup>27</sup> *Fogg v. School District of Sedalia*, 75 Mo. App. 159 (1898); *contra*, *Hubbard v. Mosely*, 11 Gray (Mass.) 170, 172 (1859) *semble*; but see note 32 for later Massachusetts statute.

innocent buyer before equities are let in.<sup>28</sup> If his tender is refused, there can be no dispute about the time equities are let in or notice of dishonor should be given, for there is no dishonor. The Statute of Limitations begins to run at the specified date.<sup>29</sup> One difficulty is that tender stops the running of interest;<sup>30</sup> if the holder after his refusal negotiated the paper to a purchaser without notice of the tender, could that purchaser collect interest? On principle, the tender, like actual payment, should affect only holders who know of it.<sup>31</sup> A similar question might arise on an ordinary demand note, negotiated after tender but before equities are let in. Another difficulty is that the holder may be deprived of his investment at any time if the maker pays up, so that the value is uncertain. The objection, while real, applies also to a demand note. Therefore, an instrument payable on or before a certain date at the option of the maker is negotiable,<sup>32</sup> including such securities as Liberty

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<sup>28</sup> *Nash v. De Freville*, [1900] 2 Q. B. 72 (C. A.); *State v. Wells, Fargo & Co.*, 15 Cal. 336 (1860).

<sup>29</sup> In *Ackley v. Hall*, 113 U. S. 135, 140 (1885), Harlan, J., said: "The debtor incurred no legal liability for nonpayment until that day passed."

<sup>30</sup> *Wright v. Robinson*, 84 Hun (N. Y.) 172, 177, 32 N. Y. Supp. 463 (1895); *Chapman v. Wagner*, 1 Neb. Un. 492, 496 (1901).

<sup>31</sup> This was apparently Dean Ames' opinion, 2 CASES ON BILLS AND NOTES, 831: "The option of the maker seems indeed to be of no significance, except in the case of interest-bearing instruments, and even in these the fact that the maker may by a tender bar the right of him to whom the tender is made to claim interest accruing subsequent to the tender seems hardly to render the instrument uncertain in the commercial sense of the term."

But in *Pemberton v. Hoosier*, 1 Kan. 108, 114 (1862), Bailey, J., in upholding an "on or before" note, seems to think that a purchase before the ultimate date must inquire as to the possible prior payment: "The defendants promise to pay a sum certain on a day certain, provided only, that it is not paid *before* that time. The condition is only such as the law annexes to all promises to pay, and the effect of expressing such a condition is simply to charge third parties with notice."

<sup>32</sup> Cases cited in notes 25, 26, 27, 29, *supra*; also the following cases out of a large number. *Union Loan & Trust Co. v. Southern California Motor Road Co.*, 51 Fed. 840 (Cal. Code, 1892); *Cowing v. Cloud*, 16 Colo. App. 326, 65 Pac. 417 (1901); *Leader v. Plante*, 95 Me. 339, 50 Atl. 54 (1901). *First National Bank of Springfield, Ohio v. Skeen*, 29 Mo. App. 115 (1888) — if negotiability is denied, lenders will refuse the concession of earlier payment, and "thus ensues oppression of the debtor class," *affd.* 101 Mo. 683; 14 S. W. 732 (1890); *Curtis v. Horn*, 58 N. H. 504 (1878); *National Bank v. Kenney*, 98 Texas, 293, 83 S. W. 368 (1904) *semble*; *Cunningham v. McDonald*, 98 Texas, 316, 83 S. W. 372 (1904); *Lovenberg v. Henry*, 104 Texas, 550, 140 S. W. 1079 (1911), "on or before" construed as maker's option. *Contra*, *Hubbard v. Mosely*, 11 Gray (Mass.) 170 (1858); *Way v. Smith*, 111 Mass. 523 (1873); *Stults v. Silva*, 119 Mass. 137 (1875); *Farmers' Loan & Trust Co. v. McCoy*, 32 Okla. 277, 122

Bonds, which are redeemable at an earlier date at the option of the obligor.<sup>33</sup>

Even if the maker has the option to pay in parts, the same result follows.<sup>34</sup> There is, indeed, an additional difficulty here, for the paper is not surrendered after a part payment, and may be negotiated afterwards as if wholly unpaid. Although the cases do not raise this point, it seems, by analogous cases and the principles of this article, that a purchaser without actual notice of prior part payments can collect in full, unless they are indorsed on the instrument, just as he can if an accelerated payment in full was made.<sup>35</sup>

Instruments payable "on or before" a fixed date at the option of the holder raise different questions from those subject to the maker's option. The holder cannot be deprived of his investment without his consent, so that its value is absolutely certain. Nevertheless, it has been held in Massachusetts<sup>36</sup> that several of the other objec-

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Pac. 125 (1912), statute prior to N. I. L., note gave discount for early payment; *National Bank of Commerce v. Feeney*, 12 S. D. 156, 80 N. W. 186 (1899), same. The Massachusetts law was changed by STAT. of 1888, c. 329: "No written promise to pay money shall be held not to be a promissory note, or not to be negotiable for the reason that the time of payment is uncertain: *provided*, that the money is payable at all events and at some time that must certainly come." *Lowell Trust Co. v. Pratt*, 183 Mass. 379, 67 N. E. 363 (1903). See also *Union Cattle Co. v. International Trust Co.*, 149 Mass. 492, 21 N. E. 962 (1889), bonds. Massachusetts, Oklahoma, and South Dakota have adopted the N. I. L. The Oklahoma and South Dakota cases may rest on uncertainty of amount because of the discount; so also where interest is waived if payment is accelerated, *Lamb v. Story*, 45 Mich. 488, 8 N. W. 87 (1881); *Story v. Lamb*, 52 Mich. 525, 18 N. W. 248 (1884); or a premium must be paid, *Chouteau v. Allen*, 70 Mo. 290, 339 (1879).

<sup>33</sup> *Hughes County v. Livingston*, 104 Fed. 306 (C. C. A. 8th, 1900). Where there are two possible dates of payment, as with Liberty Bonds, and there is a public announcement of redemption at the earlier date, it is possible that the bonds would afterwards be overdue; but see note 27.

<sup>34</sup> *Bowie v. Hume*, 13 App. D. C. 286, 309 (1898); *Crocker v. Green*, 54 Ga. 494 (1875); *Lowell Trust Co. v. Pratt*, 183 Mass. 379, 67 N. E. 363 (1903), see note 32; *Fisher v. O'Hanlon*, 93 Neb. 529, 141 N. W. 157 (1913, N. I. L.). *Riker v. Sprague Mfg. Co.*, 14 R. I. 402 (1884), maker's option to pay not less than five per cent of principal on semiannual interest dates; *Contra*, *Pierce v. Talbot*, 213 Mass. 330, 100 N. E. 553 (1913), *semble*, overlooking STAT. 1888, c. 329, and *Lowell Trust Co. v. Pratt*, *supra*; *Bell v. Riggs*, 34 Okla. 834, 845, 127 Pac. 427 (1912), under statute prior to N. I. L., raising objection that interest would stop on the portion paid.

A provision that the advance payments are not to be borrowed elsewhere does not impair negotiability. *Lasher v. Union Central Life Insurance Co.*, 115 Iowa, 231, 88 N. W. 375 (1901); *contra*, *Union Central Life Insurance Co. v. Champlin*, 11 Okla. 184, 65 Pac. 836 (1901).

<sup>35</sup> See note 27, *supra*.

<sup>36</sup> *Mahoney v. Fitzpatrick*, 133 Mass. 151 (1882), — "on demand or in three years";

tions caused by uncertainty of time are fatal to the negotiability of these instruments. While either time paper or demand paper is valid, here is paper which is both, and apparently has two maturities of equal importance. It is uncertain whether the Statute of Limitations runs from the fixed date, or from demand, or from issue, whether equities are let in and indorsers should be charged after the fixed date, or after demand, or after a reasonable time from issue. The Massachusetts court concludes that probably the exercise of the holder's option fixes the maturity at the day of demand.<sup>37</sup> Consequently, a subsequent purchaser before the fixed date, though ignorant of the dishonor, would be subject to equitable defenses and unable to sue the indorsers if notice of the dishonor had not been given them.

This Massachusetts interpretation of the effect of demand by the holder seems untenable. In the first place, a business man would naturally consider that the instrument has only one maturity, the fixed date, and that the demand clause is incidental and subordinate, to provide for emergencies. Secondly, these instruments are negotiable in every state which has adopted the Uniform Act,<sup>38</sup> and it would be contrary to the fundamental rights of the holder in due course to subject him to hidden equities and oblige him to investigate outside facts, inquiring whether demand had been made and refused. Furthermore, an unknown demand should be without legal significance. The purchaser of an ordinary demand note within a reasonable time after its issue is not subject to equities if ignorant of a prior dishonor.

This brings us to a striking and well-established analogy, which strongly supports the underlying principles of this article. Every bill of exchange payable on time has an implied acceleration provision. Though possessing a fixed date of payment, yet if it is presented for acceptance, and acceptance is refused, it becomes due at once.<sup>39</sup> The time for payment is accelerated. However, the acceleration affects only the existing holder and such subsequent

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changed by STAT. 1888, c. 329, and N. I. L. § 4 (2). Such instruments were upheld at common law elsewhere. *Louisville v. Gray*, 123 Ala. 251, 26 So. 207 (1898); *Protection Insurance Co. v. Bill*, 31 Conn. 534 (1863).

<sup>37</sup> 133 Mass. 151, 153 (1882).

<sup>38</sup> NEGOTIABLE INSTRUMENTS LAW, § 4 (2).

<sup>39</sup> NEGOTIABLE INSTRUMENTS LAW, § 151; *Sterry v. Robinson*, 1 Day (Conn.) 11 (1802).



holders as have notice of the dishonor. As to them the bill is overdue;<sup>40</sup> drawer and indorsers are discharged by want of notice;<sup>41</sup> and the Statute of Limitations runs from the dishonor.<sup>42</sup> As to holders in due course, ignorant of the dishonor, the instrument remains due for all purposes at the original maturity, and the acceleration is immaterial.<sup>43</sup> The implied acceleration provision of the bill of exchange operates according to the principles stated on page 756 of this article. (I) Acceleration is by an act incidental to the collection of the instrument, presentment for acceptance; (II) it applies to persons with notice; (III) it does not apply to persons without notice.

The same principles should govern express acceleration provisions generally. A purchaser ignorant of the fact of acceleration is, in the words of the Negotiable Instruments Law,<sup>44</sup> a holder in due course of the instrument, because "he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact." Therefore, he can rely on the face of the instrument, treat it as maturing at the stated day, and recover its full amount at that time.<sup>45</sup>

Consequently, on instruments payable "on or before" a fixed date at the holder's option, the fixed term is maturity for all purposes except for persons with notice of demand and refusal.<sup>46</sup> Such instruments are well fitted for circulation, for they offer a durable investment, with the possibility of earlier collection when the holder needs the money or apprehends the insolvency of the obligor.<sup>47</sup>

<sup>40</sup> *Goodman v. Harvey*, 4 Ad. & El. 870 (1836); N. I. L. § 52 (2).

<sup>41</sup> *Whitehead v. Walker*, 9 M. & W. 506, 513, 514 (1842); *Bartlett v. Benson*, 14 M. & W. 733 (1845); *Robinson v. Ames*, 20 Johns. (N. Y.) 146, 150 (1822), *semble*.

<sup>42</sup> *Whitehead v. Walker*, 9 M. & W. 506 (1842).

<sup>43</sup> *Dunn v. O'Keefe*, 5 M. & S. 282 (1816); N. I. L. § 117.

<sup>44</sup> § 52 (2).

<sup>45</sup> N. I. L. § 57.

<sup>46</sup> *Louisville v. Gray*, 123 Ala. 251, 256, 26 So. 207 (1898), — note authorizing the payee bank to appropriate makers' deposit in payment at any time. Tyson, J.: "The purchaser would have the right to presume, unless the sum appropriated by the bank [payee] . . . was indorsed somewhere upon the note, that none had been made by the bank; and that the full amount was owing by the makers."

<sup>47</sup> The holder can call for part payments in advance. *Protection Insurance Co. v. Bill*, 31 Conn. 534 (1863). Such a note is subject to special difficulties, for it is not surrendered upon payment, and may be negotiated to a purchaser ignorant of the prior part payment, who would, it seems, recover from the maker in full. For analogous instruments, see note 108, *infra*. The note in *Protection Insurance Co. v. Bill* had an additional peculiarity, in that advance payments could be required "within thirty

### CONVERTIBLE INSTRUMENTS

Negotiable notes and bonds often provide that the holder may at his option, upon surrender of the instrument, receive instead of money certificates of stock or other securities. Thus Anglo-French notes are convertible into long-time bonds. If the conversion privilege may be exercised before maturity, it is an acceleration provision, similar to the holder's option to demand money and equally valid.<sup>48</sup> The time is clearly certain. The promise is not for "an act in addition to the payment of money," but incidental, and allowed by common law and the Negotiable Instruments Law.<sup>49</sup> The promise to deliver securities, though not in itself a negotiable instrument since not performed by the payment of money, acquires the negotiability of the principal obligation, by analogy with the principle that the security follows the debt. There can be no doubt that the bondholder can enforce the conversion privilege in his own name,<sup>50</sup> and mercantile custom certainly makes him free from

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days after demanded, or upon a notification of thirty days in any newspaper printed in Hartford." This provision also was held not to impair negotiability, *Dutton, J.*, dissenting. It is doubtful whether the acts of acceleration are incidental to the collection of the instrument, within the first principle of this article. However, a promise to pay on demand after six months' notice has been held a note, *Walker v. Roberts, Carr. & Marsh*, 590 (1842); *White v. Wadhams*, 170 N. W. 60 (Mich., 1918, N. I. L.); 1 AMES CAS. BILL AND NOTES, 88, note; but see 2 AMES, *Ibid.*, 831-23. Demand of payment by advertisement may perhaps be justified by the analogy of bonds, which are frequently redeemed by the obligor after advertisement. *Union Cattle Co. v. International Trust Co.*, 149 Mass. 492, 21 N. E. 962 (1889). See, also, *Stillwell v. Craig*, 58 Mo. 24 (1874). If the advertisement renders the note due in *Protection Insurance Co. v. Bill*, as against a maker ignorant thereof, is the note afterwards overdue as regards a subsequent purchaser who never saw the advertisement?

<sup>48</sup> *Hotchkiss v. National Banks*, 21 Wall. (U. S.) 354 (1874); *Loomis v. Chicago, M. & St. P. Ry. Co.*, 102 Fed. 233 (C. C. A. 2d, 1900); *Lisman v. Milwaukee, L. S. & W. Ry. Co.*, 161 Fed. 472, 475 (Wis. 1908), *semble*. *Hodges v. Shuler*, 22 N. Y. 114 (1860); *Welch v. Sage*, 47 N. Y. 143 (1872); *Denney v. Cleveland and Pittsburg R. R. Co.*, 28 Ohio St. 108 (1875).

<sup>49</sup> See note 48; also cases without acceleration provision. *Vermilye v. Adams Express Co.*, 21 Wall. (U. S.) 138 (1874); *Dinsmore v. Duncan*, 57 N. Y. 573 (1874). N. I. L. § 5 (4).

<sup>50</sup> *Dicta* in *Loomis v. Chicago, M. & St. P. Ry. Co.*, *supra*; *Hodges v. Shuler*, *supra*; *Welch v. Sage*, *supra*; *Denney v. Cleveland & Pittsburg R. R. Co.*, *supra*. *Contra*, 2 AMES, CASES ON BILLS AND NOTES, 829-16.

Other kinds of incidental provisions are transferable, so that the holder of the negotiable instrument can sue in his own name. Power to sell collateral at maturity: *Arnold v. Rock River R. R. Co.*, 5 Duer (N. Y.) 207, 214 (1856), *semble*. Waivers of exemption, etc.: *Zimmerman v. Anderson*, 67 Pa. St. 421 (1871). Power to confess

equities.<sup>51</sup> Otherwise, the marketability of convertible securities would be considerably impaired. However, the promise to deliver documents cannot bind indorsers, and even the maker is sometimes discharged from the conversion obligation by subsequent events, though still liable to pay money.<sup>52</sup> Probably the exchange of the instrument for the securities before maturity has no more effect than premature payment<sup>53</sup> if the instrument gets into circulation again before the stated maturity, and a *bonâ fide* purchaser can recover its value. However, indorsement of the election to convert upon the instrument operates as cancellation and terminates negotiability thenceforth, even if the indorsement is fraudulently and totally erased.<sup>54</sup>

A note convertible into merchandise at maturity is negotiable,<sup>55</sup> and the conversion can doubtless be permitted before maturity if the instrument must thereupon be surrendered. However, if goods or labor can be demanded from time to time, the instrument becomes little more than a running charge-account with unlimited room for disputes as to the value of the part performances, and should not be considered negotiable.<sup>56</sup>

All conversions must be at the option of the holder, and not of the obligor.<sup>57</sup>

judgment at maturity on behalf of "holder": *National Exchange Bank v. Wiley*, 195 U. S. 257 (1904), and cases cited. The authorities are divided as to guarantees written on the instrument, 2 DANIEL, *NEGOTIABLE INSTRUMENTS*, 6 ed., § 1776 *ff.*

<sup>51</sup> Citations in preceding note. *Contra*, *Lisman v. Milwaukee, L. S. & W. Ry. Co.*, 161 Fed. 472, 475 (Wis. 1908), *semble*, cited in *Gay v. Burgess Mills*, 30 R. I. 231, 242, 74 Atl. 714 (1909), *semble*. But a strong analogy for complete negotiability of the conversion privilege is found in mortgages, which pass with the notes free from equities. See W. E. Britton, "Assignment of Mortgages Securing Negotiable Notes," 10 ILL. L. REV. 337.

<sup>52</sup> *Lisman v. Milwaukee, L. S. & W. Ry. Co.*, *supra*; *Gay v. Burgess Mills*, *supra*; and Massachusetts cases cited therein.

<sup>53</sup> *State v. Wells, Fargo & Co.*, 15 Cal. 336 (1860). The cases *contra* are certainly unsound. *Board of Education v. Sinton*, 41 Ohio St. 504 (1885); *Branch v. Commissioners of Sinking Fund*, 80 Va. 427 (1885).

<sup>54</sup> *Dinsmore v. Duncan*, 57 N. Y. 573 (1874).

<sup>55</sup> *Mosely v. Walker*, 84 Ga. 274, 10 S. E. 623 (1889); *Preston v. Whitney*, 23 Mich. 260 (1871); *Hosstatter v. Wilson*, 36 Barb. (N. Y.) 307 (1862); *McDonell v. Holgate*, 2 Revue de Législation et de Jurisprudence, 29 (Quebec, 1818).

<sup>56</sup> *Dennett v. Goodwin*, 32 Me. 44 (1850); *contra*, *Owen v. Barnum*, 7 Ill. 461 (1845).

<sup>57</sup> *Merriwether v. Saline County*, 5 Dill. (U. S.) 265 (Mo. 1878).

## ACCELERATION BY DEFAULT OF INSTALLMENTS OR INTEREST

Another type of provision generally recognized as valid at common law, and under the Bills of Exchange Act <sup>58</sup> and the Negotiable Instruments Law <sup>59</sup> accelerates payment on default of an installment of principal <sup>60</sup> or even an interest payment.<sup>61</sup> Sometimes, several notes are issued, arranged to fall due on successive dates, and each stating that if one note is dishonored the whole series is payable at once.<sup>62</sup> It is clear that such instruments are not entirely certain as to amount or time, but the law plainly holds that they do not possess the kind of uncertainty which renders the paper unsuitable for circulation.

While the Negotiable Instruments Law recognizes such paper as negotiable, it does not decide certain difficult questions which arise about the operation of the acceleration clause. The first problem involves its meaning, whether or not it gives the holder an option to waive default.

1. *Automatic Acceleration on Default.*—Several cases hold that by its definite language the instrument automatically becomes due upon default, although the holder might prefer to overlook the failure to pay. The provision is said to exist for the benefit of obligor as well as obligee, and the courts refuse to make a new contract different from the expressed words of the parties.<sup>63</sup> If this

<sup>58</sup> § 9 (1) (c); like the N. I. L., except for the omission of the words "or of interest."

<sup>59</sup> § 2 (3): "The sum payable is a sum certain within the meaning of this act, although it is to be paid . . . by stated installments, with a provision that upon default in payment of any installment or of interest the whole shall become due."

The act does not expressly allow acceleration by default of interest in noninstallment notes, or acceleration of series notes, but they are clearly negotiable under the act. See cases in notes 61 and 62.

<sup>60</sup> *Carlton v. Kenealy*, 12 M. & W. 139 (1843); *Miller v. Biddle*, 13 L. T. R. 334 (1895). The American cases are in notes 63 ff., *infra*.

<sup>61</sup> *Gillette v. Hodge*, 170 Fed. 313 (Minn., C. C. A. 8th, 1909); *Belloc v. Davis*, 38 Cal. 242 (1869); and many cases in notes 63 ff., *infra*. *Contra*, *Meyer v. Weber*, 133 Cal. 681, 65 Pac. 1110 (1901), 3 JJ. dissenting; *Bell v. Riggs*, 34 Okla. 834, 127 Pac. 427 (1912), statutes prior to N. I. L. Under N. I. L., held valid, *First National Bank v. Garland*, 160 Ill. App. 407 (1911); *Newbern v. Duffy*, 153 N. C. 62, 68 S. E. 915 (1910). Oklahoma now has N. I. L., also California.

<sup>62</sup> *Chicago Ry. Equipment Co. v. Merchants' Bank*, 136 U. S. 268 (1890), is an example. Under N. I. L., *Schmidt v. Pegg*, 172 Mich. 159, 137 N. W. 524 (1912); *Bright v. Offield*, 81 Wash. 442, 143 Pac. 159 (1914), *semble*.

<sup>63</sup> *Moline Plow Co. v. Webb*, 141 U. S. 616 (1891), *semble*, construing Texas Statute of Limitations in view of Texas State case *infra*; *Ryan v. Caldwell*, 106 Ky. 543, 50

construction is correct the effect on all holders with notice of the default is clear. The Statute of Limitations begins to run at default;<sup>64</sup> the holder must give notice to secondary parties or discharge them as to the whole amount due,<sup>65</sup> and the paper is thenceforth subject to equities.<sup>66</sup> The holder must bring one action for the whole amount due; and if he sues for one portion only, judgment will bar further suits for the other portions.<sup>67</sup>

On the other hand, if the instrument is in the hands of a purchaser ignorant of the default, the fixed date is maturity for all purposes, and the acceleration is disregarded. While no cases precisely in point have been discovered, it is clear that this result must follow if the instrument is to circulate freely. Furthermore, we have the analogy, already mentioned, of *Dunn v. O'Keefe*.<sup>68</sup> A

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S. W. 966 (1899); *Buss v. Kemp*, 170 Pac. 54 (N. M. 1918); *Banzer v. Richter*, 68 Misc. 192, 123 N. Y. Supp. 678 (1910); *Harrison Machine Works v. Reigor*, 64 Texas, 89 (1885); *Kelly v. Kershaw*, 5 Utah, 295, 299, 14 Pac. 804 (1887); *Hodge v. Wallace*, 129 Wis. 84, 108 N. W. 212, N. I. L. (1906).

The same absolute effect was given to a mortgage securing serial notes and providing that default of one note should mature all, in *First National Bank v. Peck*, 8 Kan. 660 (1871); *Snyder v. Miller*, 71 Kan. 410, 80 Pac. 970 (1905); *Green v. Frick*, 25 S. D. 342, 126 N. W. 579 (1910); *San Antonio, etc. Association v. Stewart*, 94 Texas, 441, 61 S. W. 386 (1901); and to other default clauses in a mortgage in *Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466 (1887); *Lewis v. Lewis*, 58 Kan. 563, 564, 50 Pac. 454 (1897), *semble*; *Spesard v. Spesard*, 75 Kan. 87, 88 Pac. 576 (1907); and other Kansas decisions, *Manitoba Mortgage, etc. Co. v. Daly*, 10 Man. 425 (1895); *McFadden v. Brandon*, 8 Ont. L. Rep. 610 (C. A., 1904). And see *Pierce v. Shaw*, 51 Wis. 316, 8 N. W. 209 (1881), that if all the notes are accelerated, the first note does not have priority, but shares *pro rata*. If the note gives the holder an option, but the mortgage is absolute, the note will prevail. *Kennedy v. Gibson*, 68 Kan. 612, 75 Pac. 1044 (1904). And if the note is absolute, but the mortgage gives an option, the mortgage will prevail. *Moline Plow Co. v. Webb*, 141 U. S. 616 (1891).

Absolute effect was given to a simple contract for repayment of a loan. *Hemp v. Garland*, 4 Q. B. Rep. 519 (1843); *Reeves v. Butcher*, [1891] 2 Q. B. 509 (C. A.).

<sup>64</sup> Cases in note 63, except *Hodge v. Wallace*, *Kelly v. Kershaw*, and *Pierce v. Shaw*. 12 L. R. A. (N. S.), 1190, note; 51 L. R. A. (N. S.), 151, note.

<sup>65</sup> No authorities have been found, but the principle is clear.

<sup>66</sup> *First National Bank v. Peck*, 8 Kan. 660 (1871); *Lewis v. Lewis*, 58 Kan. 563, 564, 50 Pac. 454 (1897), *semble*; *Hodge v. Wallace*, 129 Wis. 84, 108 N. W. 212 (1906); *Merchants' Bank v. Brisch*, 154 Mo. App. 631, 136 S. W. 28 (1911). But in *Re Goye & Co.* [1900] 2 Ch. 149, it was held that where a debenture accelerated by winding-up of the corporation was negotiated thereafter, the purchaser was not subject to equities. The decision seems to rest on the express language of the instrument. Cf. *Hynes v. Illinois Trust*, 226 Ill. 95, 80 N. E. 753 (1907).

<sup>67</sup> *Banzer v. Richter*, 68 Misc. 192, 123 N. Y. Supp. 678 (1910); *Kelly v. Kershaw*, 5 Utah, 295, 14 Pac. 804 (1887).

<sup>68</sup> 5 M. & Sel. 282 (1816); see page, 761, *supra*.

bill of exchange is absolutely accelerated by nonacceptance; the holder has no option to waive the dishonor; yet the acceleration does not affect a subsequent purchaser ignorant of the nonacceptance. Therefore, the purchaser of an installment note after the date of one or more installments has passed should not be forced at his peril to inquire whether it has been dishonored, so long as he is without notice. Whether the absence of indorsements of payment on the instrument subjects him to notice will be considered presently.

Although some of the objections caused by uncertainty of time are thus absent from these instruments when construed as absolutely accelerated, the possible uncertainty of value may cause trouble. If the interest-rate is high, the instrument would normally command a premium, but a purchaser would not pay a business premium if the obligor can default an early installment of interest or principal, pay up in full next day, and deprive the holder forthwith of a supposedly long-time investment. The acceleration would be practically at the option of the obligor, who could take profitable advantage of his own wrong by cutting short his duty to pay high interest. One reply to this very serious objection is that the obligor is not necessarily wrongful. He may in fact have a defense to any and all liability on the instrument, and default the first payment of interest in order to bring the dispute to an early decision.<sup>69</sup> It is certainly a clumsy method of ascertaining rights; the law ought to allow the obligor to ask for a declaratory judgment as soon as the dispute arises,<sup>70</sup> without waiting till maturity, or having to break his contract and destroy the holder's investment. A much better reply is, that the holder need not lose his high interest in spite of the default. Suppose that an installment note provides for ten per cent interest, and the legal rate is six per cent. In some jurisdictions, interest continues to run at ten per cent after maturity until payment;<sup>71</sup> the holder could simply wait after default of the first installment, although the note then matured, and sue at the date originally fixed for the last installment, getting the

<sup>69</sup> *San Antonio, etc. Association v. Stewart*, 94 TEXAS, 441, 446, 61 S. W. 386 (1901).

<sup>70</sup> Edson R. Sunderland, "A Modern Evolution in Remedial Rights, — the Declaratory Judgment," 16 MICH. L. REV. 69, 77: "To use a homely figure, prior to 1883 the English courts were employed only as repair shops; since that time they have been operated as service stations."

<sup>71</sup> The authorities on both sides will be found in 1 SEDGWICK ON DAMAGES, 9 ed., § 325 ff.

*interim* ten per cent interest in his judgment. Even jurisdictions which ordinarily allow only the legal rate after maturity on the ground that the contract simply fixed a rate until maturity, ought in the installment cases to use the contract rate as the measure of damages, since the instrument provided for that rate until the maturity of the last installment. The loss of the stipulated high interest is an element of the damage caused by the maker's breach of contract which ought to be included in the judgment. The acceleration provision in installment notes is like a clause in a contract for the delivery of goods by installments, agreeing that on non-delivery of any installment, the whole contract may be canceled. The buyer can then recover for the loss of the future benefit which he would have received, if it had not been for the breach of contract.<sup>72</sup> If this reasoning be sound, the holder of the ten per cent note of which the first installment is defaulted will recover just as much interest in his judgment as he would have received if all installments had been regularly paid, subject of course to discount if the judgment is obtained before the date of the last installment. Consequently, he is not really deprived of his investment by the default, and the value of the note is certain. Therefore, automatic acceleration on default does not impair negotiability.

2. *Optional Acceleration on Default.* — The weight of authority and the better view construe the acceleration provision as giving the holder an option to declare the whole sum due, which he can exercise by demand, suit, foreclosure, and similar acts. Since the provision is primarily for his benefit, he can waive it if he wishes. Waiver may be shown by the subsequent acceptance of interest or by mere inaction. The obligor cannot take advantage of his own wrong and cause an automatic change of maturity, which would subject the paper to equitable defenses and start the Statute of Limitations running.<sup>73</sup> Such reading of an option into the instru-

<sup>72</sup> 2 SEDGWICK ON DAMAGES, 9 ed., § 636 b; *Cherry Valley Iron Works v. Florence Iron River Co.*, 64 Fed. 567 (C. C. A., 6th, 1894). Another analogy is damage for failure to accept a draft: 2 SEDGWICK, *Ib.*, § 707.

<sup>73</sup> *Chicago v. Merchants' Bank*, 136 U. S. 268, 284 (1889), *semble*; *Nebraska, etc. Bank v. Nebraska, etc. Co.*, 14 Fed. 763 (Neb. 1883); *Gillette v. Hodge*, 170 Fed. 313 (C. C. A. 8th, Minn., 1909); *Belloc v. Davis*, 38 Cal. 242 (1869); *Watts v. Hoffman*, 77 Ill. App. 411 (1898).

A similar provision in the mortgage was construed as giving only an option in *Richardson v. Warner*, 28 Fed. 343 (Neb. 1886); *Keene Five Cent Savings Bank v. Reid*, 123 Fed. 221 (C. C. A., 8th Kan., 1903), *certiorari denied*, 191 U. S. 567 (1903); *Mason v.*

ment is analogous to the interpretation of the usual clause in a lease, that the term shall cease and be absolutely determined or void upon a default in the payment of rent. It is well settled that the landlord waives the forfeiture by subsequent acceptance of rent, and that the tenant will not be allowed to say that he is discharged from his covenants by his own default, unless the landlord chooses to take advantage of the condition.<sup>74</sup> The word "void" in an insurance policy is also construed to render it voidable at the option of the insured. This construction of the acceleration clause reaches a just result. The interest and other terms of the loan are ordinarily arranged with reference to the normal life of the instrument with the expectation that the obligor will carry out his promises. The default clause does not give the obligor the right to break his contract. It is merely incidental to the main contract, affording the holder the right to take rapid action, at the first sign of trouble, to protect his entire investment instead of running future risks. He should be free to decide whether such protection is necessary under the circumstances of the default. Moreover, it is also for the benefit of the ordinary obligor to construe the provision as permissive and not mandatory. Extended credit has been given him because of his inability to pay in a short time from his usual resources. The dates for payment are adapted to his ability to pay. If every default automatically brings the whole loan down on his head at once, he will often be unable to remain solvent. The holder could not overlook even a slight delay of interest, but would

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Luce, 116 Cal. 232, 48 Pac. 72 (1897); *Watts v. Creighton*, 85 Iowa, 154, 52 N. W. 12 (1892); *Lowenstein v. Phelan*, 17 Neb. 429, 22 N. W. 561 (1885); *Cox v. Kille*, 50 N. J. Eq. 176, 24 Atl. 1032 (1892); *Core v. Smith*, 23 Okla. 909, 921, 102 Pac. 114 (1909); *Batey v. Walter*, 46 S. W. 1024 (Tenn., 1897); *First National Bank v. Parker*, 28 Wash. 234, 68 Pac. 756 (1902).

The holder's option need not be exercised immediately upon default. *Wheeler v. Howard*, 28 Fed. 741 (Mo. 1886). Bringing suit is exercise of the option without other notice to the debtor. *Swearingen v. Lahner*, 93 Iowa, 147, 61 N. W. 431 (1894); *Coad v. Home Cattle Co.*, 32 Neb. 761, 769, 49 N. W. 757 (1891). It is held that even if foreclosure proceedings were instituted and then dismissed, maturity was not accelerated, and the Statute of Limitations did not begin to run. *California Savings Soc. v. Culver*, 127 Cal. 107, 59 Pac. 292 (1899).

The Federal courts need not follow state decisions on the application of the local Statute of Limitations to these instruments. *Keene Five Cent Sav. Bank v. Reid*, 123 Fed. 221 (C. C. A., 8th, Kan., 1903), certiorari denied, 191 U. S. 567 (1903); *contra*, *Moline Plow Co. v. Webb*, 141 U. S. 616, 625 (Texas, 1891), *semble*.

<sup>74</sup> *Belloc v. Davis*, 38 Cal. 242, 250 (1869); *Rede v. Farr*, 6 M. & S. 121 (1817).



have to enforce the instrument in order to charge secondary parties and avoid the Statute of Limitations. Leniency now might be unexpectedly used against him years hence, unless the law permits it.<sup>75</sup> Consequently, the provision should be construed as optional. If the acceleration clause is impliedly or expressly optional, the time or times for payment remain as fixed by the instrument despite the default, unless the holder exercises his option. Therefore, the obligor cannot pay up the whole amount of the instrument at once against the holder's consent;<sup>76</sup> and the Statute of Limitations does not begin to run until the date fixed.<sup>77</sup> And the rules as to equitable defenses and notice to secondary parties are in this situation the same as if no acceleration clause existed.

At this point, however, special difficulties arise with installment paper. If a note is payable in several installments without any acceleration provision, and one installment is known to be overdue, then a purchaser, though ignorant of equitable defenses, will be barred by such a defense from recovering subsequent installments,<sup>78</sup> because he had ground to suspect some valid reason for the default. If due notice of the dishonor was not given to indorsers, this is an equitable defense which would prevent the purchaser who knew of the dishonor from charging them at all.<sup>79</sup> Therefore an installment note with an acceleration provision is in these respects overdue on default, even though the option has not been exercised, and a holder with notice of the default is affected.<sup>80</sup> The same result would follow if the option had been exercised, and a subsequent purchaser knew of the default, but not of the holder's election. In all these situations, the holder must have notice of the default. The absence of any indorsement on the instrument that installments have been paid is not *per se* notice and does not subject a

<sup>75</sup> *Belloc v. Davis*, 38 Cal. 242, 249 (1869); *Lowenstein v. Phelan*, 17 Neb. 429, 431, 22 N. W. 561 (1885).

<sup>76</sup> *Cox v. Kille*, 50 N. J. Eq. 176, 24 Atl. 1032 (1892).

<sup>77</sup> See the cases in note 73, *supra*, except *Cox v. Kille*; and also *Kennedy v. Gibson*, 68 Kan. 612, 617, 75 Pac. 1044 (1904), *semble*.

The authorities are reviewed in notes in 12 L. R. A. (N. S.), 1190; 51 L. R. A. (N. S.), 151.

<sup>78</sup> *Vinton v. King*, 4 All. (Mass.) 562 (1862).

<sup>79</sup> *Noell v. Gaines*, 68 Mo. 649 (1878). This would also follow from the analogy of nonacceptance of bills of exchange. *Whitehead v. Walker*, 9 M. & W. 506 (1842).

<sup>80</sup> *Hall v. Wells*, 24 Cal. App. Rep. 238 (1914).

purchaser to equities. It is, however, evidence of notice.<sup>81</sup> Payment of a price large enough to include the defaulted installment would also be evidence.

Therefore, known default, regardless of the holder's option, is enough to render an installment instrument completely overdue for purposes of equitable defenses and charging indorsers, though not for tender of payment and the Statute of Limitations. The reason is, that the default is at a maturity, for the instrument has several maturities. The earlier maturity does not result from acceleration; it is already there, specified by the language of the instrument. This distinguishes the installment type of acceleration provision from all the others considered in this article.

The same principle applies to a series of notes which show on their face that they are part of the same transaction,<sup>82</sup> but not to instruments which are accelerated by default of interest.<sup>83</sup> Failure to pay interest is as likely to result from temporary embarrassment as from an equitable defense; it does not entitle indorsers to notice; and therefore it is not equivalent to a dishonor for purposes of letting in equities.<sup>84</sup>

It is hardly necessary to state that a holder without notice of either default or exercise of the option is not affected by the acceleration provision.<sup>85</sup>

#### ACCELERATION BY AN EXTRINSIC FACT

Another type of acceleration clause provides for payment at a stated day or sooner upon the happening of an event entirely distinct from the collection of the instrument. Examples are: "ninety days after sight, or when realized";<sup>86</sup> "in twelve months, or before

<sup>81</sup> *National Bank of North America v. Kirby*, 108 Mass. 497 (1871); *Taylor v. American National Bank*, 63 Fla. 631, 649, 57 So. 678 (1912); *McCorkle v. Miller*, 64 Mo. App. 153 (1895); *Gillette v. Hodge*, 170 Fed. 313 (C. C. A. 8th, 1909).

<sup>82</sup> 25 HARV. L. REV. 286 collects the cases. The principle is the same whether the acceleration provision is present or not.

<sup>83</sup> *Gillette v. Hodge*, 170 Fed. 313 (C. C. A. 8th, 1909).

<sup>84</sup> *Cromwell v. Sac County*, 96 U. S. 51 (1877); the authorities are collected in 8 CORPUS JURIS, 478, which cites a few cases *contra*.

<sup>85</sup> *Lowenstein v. Phelan*, 17 Neb. 429, 431, 22 N. W. 561 (1885); *Core v. Smith*, 23 Okla. 909, 924, 102 Pac. 114 (1909), *semble*; *Gillette v. Hodge*, 170 Fed. 313 (C. C. A. 8th, 1909).

<sup>86</sup> Held bad in *Alexander v. Thomas*, 16 Q. B. 333 (1851).

if made out of the sale of a machine";<sup>87</sup> "one year after date . . . this to be paid when any dividends shall be declared on . . . shares";<sup>88</sup> "Dec. 1, 1905; if crop . . . is below 8 bushels per acre this note shall be extended one year."<sup>89</sup> If such a clause clearly does no more than give the maker a limited option to accelerate payment, then it is like the cases which permit him to pay a note off on any interest date. However, most of these instruments must be construed as making the instrument automatically due, if the machine is sold or the dividends declared or the crop sufficiently large, etc. Such instruments are not suitable for circulation. They violate the first principle of this article, because maturity is fixed by an act not incidental to the collection of the instrument. The "on or before" and installment cases do involve such an incidental act. Here we cannot say that there is a principal maturity with acceleration as an optional means of enforcing the principal obligation. There are two maturities of coequal importance, and one of them is uncertain and could not stand alone. The holder is under no duty to inquire into dishonor by nonacceptance or refusal to pay on demand, but here is an outside fact which obviously affects payment. Since purchasers of negotiable paper should not be required to investigate outside facts, these instruments are not properly negotiable. Also the value is speculative, for no one can tell in advance whether the contingent event will occur, yet if it does the investment is destroyed.

Such an instrument has consequently been held in England not to be a valid note,<sup>90</sup> but numerous decisions in this country repudiate the English case and uphold negotiability.<sup>91</sup>

The Negotiable Instruments Law provides that "instruments payable on or before a fixed or determinable future time specified therein" are negotiable.<sup>92</sup> It has been held in Iowa that this validates acceleration by a contingent event,<sup>93</sup> since the instrument is payable

<sup>87</sup> Held good in *Ernst v. Steckman*, 74 Pa. St. 13 (1873); *Cisne v. Chidester*, 85 Ill. 223 (1877); *Charlton v. Reed*, 61 Ia. 166, 16 N. W. 64 (1883).

<sup>88</sup> Held bad in *Brooks v. Hargreaves*, 21 Mich. 254 (1870).

<sup>89</sup> Held good in *State Bank of Halstad v. Bilstad*, 136 N. W. 204 (Iowa, 1912, N. I. L.).

<sup>90</sup> *Alexander v. Thomas*, 16 Q. B. 333 (1851).

<sup>91</sup> Cases in the preceding notes; and those collected in 1 DANIEL, *NEGOTIABLE INSTRUMENTS*, § 43 *ff.*; 8 *CORPUS JURIS*, 138, note 75. See, also, *Van Arsdale-Osborne Brokerage Co. v. Martin*, 81 Kan. 499, 106 Pac. 42 (1910).

<sup>92</sup> § 4 (2).

<sup>93</sup> *State Bank of Halstad v. Bilstad*, 136 N. W. 204 (Iowa, 1912). *Contra*, *Bright v. Offield*, 81 Wash. 442, 448, 143 Pac. 159, 162 (1914, N. I. L.).

either on a fixed day or before it. By this argument any acceleration provision would be valid, yet, as we shall see, many such provisions are held invalid under the Act, and the Iowa court itself has construed the Act to forbid a chattel note with an acceleration provision, because of uncertainty in time.<sup>94</sup> It seems impossible that the Act would be held to permit notes payable "in one hundred years or sooner when the peace conference is over"; "in twenty years or when an aëroplane crosses the Atlantic." This clause of the Act must be restricted to instruments which are literally payable "on or before" a day without further contingencies, so that the holder or maker accelerates by his election; or else we must construe the clause in the light of the law merchant to include other acts of acceleration, if they are business acts incidental to the collection of the instrument. The clause cannot authorize uncommercial acts of acceleration. Indeed, the instruments just considered bear the aspect of agricultural paper rather than commercial. They are open to all the objections which can be urged against notes payable on a contingency without any fixed time limit. They ought to be regarded as simple contracts for the repayment of a loan on peculiar conditions, and not as paper to circulate as a substitute for money.

#### JUDGMENT NOTES

Notes authorizing any attorney of record to confess judgment on behalf of the maker if he does not pay at maturity are negotiable, both at common law<sup>95</sup> and under the Negotiable Instruments Law.<sup>96</sup> However, if judgment can be confessed before maturity, negotiability is denied by decisions before<sup>97</sup> and after the Act.<sup>98</sup> A confession of judgment before maturity does not accelerate payment in some states.<sup>99</sup> It simply gives the holder an immediate judgment lien, which can be enforced by execution after maturity. In other

<sup>94</sup> *Iowa National Bank v. Carter*, 144 Iowa, 715, 123 N. W. 237 (1909).

<sup>95</sup> The cases are collected in 8 CORPUS JURIS, 128.

<sup>96</sup> § 5 (2).

<sup>97</sup> *Overton v. Tyler*, 3 Pa. 346 (1846), is the leading case. *Richards v. Barlow*, 140 Mass. 218, 6 N. E. 68 (1885), *accord*, is based on the old Massachusetts rule against acceleration provisions.

<sup>98</sup> *Milton National Bank v. Beaver*, 25 Pa. Sup. Ct. 494 (1904); *First National Bank of Elgin, Illinois v. Russell*, 124 Tenn. 618, 139 S. W. 734 (1911); *Wisconsin Yearly Meeting v. Babler*, 115 Wis. 289, 91 N. W. 678 (1902).

See other citations in 8 CORPUS JURIS, 128.

<sup>99</sup> *Overton v. Tyler*, *supra*.

states, execution can be levied at once.<sup>100</sup> In any case the note is changed before maturity into a non-negotiable judgment.<sup>101</sup> Is this rightly held to make the note itself non-negotiable? The decisions to that effect have been vigorously attacked.<sup>102</sup>

The fact that an obligation may become non-negotiable does not necessarily prevent negotiability at the outset. A restrictive indorsement, like "Pay A only," may prohibit the further negotiation of a negotiable note.<sup>103</sup> Acceleration by conversion into stock before maturity is analogous to conversion into a judgment, and is always held unobjectionable, as we have seen.<sup>104</sup> There are two distinctions, however, which will perhaps account for the failure to apply the analogy. When a note is exchanged for stock it is surrendered to the obligor and safely out of circulation, in the hands of the man who is most interested in canceling it. If judgment is entered on a note before maturity, the note will perhaps have to be filed with the clerk of court (this depends upon local rules), but it is not in the custody of the obligor. Access to records is easy, and the note may get out and into the hands of a *bonâ fide* purchaser without notice, so that the obligor would have to pay twice. However, this objection applies to notes payable on or before a fixed date at the option of the holder in whole or in part, which are held negotiable,<sup>105</sup> although a maker who had paid a large part to the payee might have to pay over again in full to an innocent indorsee. A further peculiarity of these judgment notes is that they oust the courts of jurisdiction, and, therefore, like arbitration agreements are regarded jealously and tied down within narrow limits.

#### ACCELERATION IF THE HOLDER DEEMS HIMSELF INSECURE

In view of the liberal attitude taken by the courts towards the acceleration provisions already considered, especially those dependent upon an outside fact, a note, payable at a fixed date or sooner "on demand at the option of the holder if he deems himself insecure"

<sup>100</sup> *First National Bank of Elgin, Illinois v. Russell, supra.*

<sup>101</sup> See "Are Judgments Quasi Negotiable?" *Roscoe Pound*, 43 *CENT. L. J.* 440 (1896).

<sup>102</sup> In the pamphlet, *Some Observations on the Negotiable Instruments Act*, William Trickett, Carlisle, Pa., 1916.

<sup>103</sup> *N. I. L.* § 36.

<sup>104</sup> *N. I. L.* § 5 (4); and *supra*, pages 762-63.

<sup>105</sup> See *supra*, notes 46, 47, and *infra*, note 108.

should create no difficulty. Such instruments simply express more fully the effect of paper payable on or before a fixed date at the option of the holder, which is clearly negotiable. It may be argued that the holder's insecurity is an objective fact which must be proved to accelerate payment. However, the phrase seems mere encouragement, and he can exercise his option to demand payment whether he really feels insecure or not. The point is, that insecurity is the usual state of mind accompanying a demand by the holder before maturity, and so is naturally written in here. And even if actual insecurity is necessary, it is not an extrinsic fact which the holder needs to investigate in order to determine whether he can exercise his option. Subsequent purchasers need not inquire about the exercise of the option if they have no notice that it was exercised, for it is incidental, and the analogy of *Dunn v. O'Keefe*<sup>106</sup> once more applies. However construed, the instrument is suitable for circulation, more so than the ordinary note without an acceleration clause. The value is certain, and even the danger of insolvency is to some extent overcome.

Yet the decisions at common law and under the act are almost unanimous against the negotiability of an instrument with this provision.<sup>107</sup> The argument from common-law principles is that the valid acceleration provisions give the maker some share in the acceleration. Either the note is payable "on or before" a date at his option, or else it is due upon his default in the installment and similar cases. The holder may have an option too in the installment cases, but the maker must do something first. Here the time of payment is dependent entirely upon the option of the holder. This distinction seems to me purely technical, especially when the maker's part consists in a breach of contract. There is no reason

<sup>106</sup> 5 M. & S. 282 (1816). See page 761, *supra*.

<sup>107</sup> Some of the following cases involved "chattel notes," and are indicated by *ch. semble*; *Kimpton v. Studebaker*, 14 Idaho 552, 94 Pac. 1039 (1908, N. I. L.) *ch. semble*; *Smith v. Marland*, 59 Iowa, 645, 13 N. W. 852 (1882); *Iowa National Bank v. Carter*, 144 Iowa 715, 123 N. W. 237 (1909, N. I. L.) *ch.*; but *cf.* *State Bank of Halstad v. Bilstad*, 136 N. W. 204 (Iowa, 1912, N. I. L.); *Third National Bank v. Armstrong*, 25 Minn. 530 (1879) *ch. semble*; *First National Bank of New Windsor v. Bynum*, 84 N. C. 24 (1881); *Reynolds v. Vint*, 73 Ore. 528, 144 Pac. 526 (1914, N. I. L.) *ch.*; *Carroll, etc. Bank v. Strother*, 28 S. C. 504, 6 S. E. 313 (1887) *ch.*; *Bright v. Offield*, 81 Wash. 442, 450, 143 Pac. 159, 162 (1914, N. I. L.), *semble*; *Puget Sound State Bank v. Paving Co.*, 94 Wash. 504, 162 Pac. 870 (1917, N. I. L.), approved in 15 MICH. L. REV. 512. See, also, 35 L. R. A. (N. S.), 392, note. *Contra*, *Heard v. Dubuque County Bank*, 8 Neb. 10 (1878).

why the holder should not have an option as well as the maker. In either situation, the acceleration is incidental and should not affect an innocent purchaser. (Even if my third principle is rejected with its *Dunn v. O'Keefe* analogy, the inquiry into whether a demand has already been made is much less objectionable than an inquiry whether the maker's father has died, or a machine has been sold. Yet such inquiries into outside facts are permitted by the courts, while a fact in the course of collection of the instrument is held fatal.) Furthermore, the authorities allow an option by the holder to accelerate payment on other instruments.<sup>108</sup> In an ordinary demand note the time of payment is entirely within his control. It is plain that the judgment note cases are too peculiar to have any bearing on this matter of holder's option.

The Negotiable Instruments Law with its general "on or before" clause<sup>109</sup> certainly seems to settle this point and allow the holder an option, but the decisions since the Act continue to argue that the "insecure" clause makes the "time of payment . . . dependent absolutely upon the will and election of the payee" and "'dependent on the future volition of' one 'other than the maker.'" <sup>110</sup> Therefore it is said to be "payable upon a contingency" <sup>111</sup> and invalid under the last sentence of section four.<sup>112</sup> That sentence has no proper application to these instruments, which fall within subdivision two of the same section.<sup>113</sup>

The decisions are particularly unfortunate in view of their effect upon the form of note sometimes used by savings banks, which fixes a date for payment and adds, "with the understanding that the said Bank may at any time before the expiration of said term call for the payment of the whole or any portion of said money, provided

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<sup>108</sup> See notes 46 and 47, *supra*. To these may be added cases of a note payable in such installments as the holder may demand, where the time of payment is entirely within his control, and yet is held certain. *White v. Smith*, 77 Ill. 351 (1875); *Stillwell v. Craig*, 58 Mo. 24 (1874); *President, etc. of the Goshen, etc. Turnpike Road v. Hurin*, 9 Johns. (N. Y.) 217 (1812); *Washington County Mutual Insurance Co. v. Miller*, 26 Vt. 77 (1853).

<sup>109</sup> § 4 (2), see note 113, *infra*.

<sup>110</sup> *Puget Sound State Bank v. Washington Paving Co.*, 94 Wash. 504, 515, 162 Pac. 870 (1917).

<sup>111</sup> *Ibid.*, 511; *Iowa National Bank v. Carter*, 144 Iowa, 715, 123 N. W. 237, 241 (1909).

<sup>112</sup> "An instrument payable upon a contingency is not negotiable."

<sup>113</sup> This allows instruments "payable . . . on or before a fixed . . . time."

the same is wanted to pay depositors.”<sup>114</sup> If the hostile attitude toward holder’s option is maintained, such a note would not be negotiable.

#### CHATTEL NOTES

The nature of these instruments and the form of the acceleration provision has already been discussed.<sup>115</sup> The effect is to give the holder a mortgage upon a chattel in the possession of the vendee as security for the note, and to accelerate payment if the maker does any specified acts which endanger the mortgage lien, such as sale, removal, or suffering a levy of execution. Very often the holder is expressly given an option to take advantage of the maker’s act, but such an option is to be implied in any case since the clause is clearly for his protection, if he thinks he needs it. The maker should not be regarded as having an option to accelerate payment by his own clear misconduct. Sometimes the holder is authorized to seize and sell the collateral, applying the proceeds upon the note, and being able to sue for the deficiency at once. Although, unlike the “insecure” cases, the maker does participate in the acceleration, it is clear that acceleration by this kind of option is more difficult to uphold than that in the installment cases when the holder merely sues. It is also clear that the maker’s act is less closely connected with the collection of the instrument than in the installment and other cases, where default of payment brings the acceleration provision into play. Consequently, it is harder to bring these notes within the first principle of this article, and say that the act of acceleration is incident to the collection of the instrument. Other questions arise as to the rights of subsequent purchasers. If the holder can make the note due at once by seizure of a chattel, extrinsic evidence is necessary to prove whether the chattel has been seized or not. Therefore, if the purchaser is bound to inquire whether there has been acceleration, he will have to go into extrinsic evidence.

Therefore, by the weight of authority these acceleration provisions are held to impair negotiability, as rendering the time uncertain and containing promises about the chattel which are “in addition to the payment of money.”<sup>116</sup> The time is said to be uncertain

<sup>114</sup> This form is used by the Boston Five Cent Savings Bank.

<sup>115</sup> Page 749, *supra*.

<sup>116</sup> *Kimpton v. Studebaker*, 14 Idaho, 552, 94 Pac. 1039 (1908, N. I. L.); *Iowa Na-*



because it is dependent upon the fact of whether the maker does sell or remove the chattel. The cases also show traces of a hostility to all chattel notes, with or without the acceleration provision.<sup>117</sup>

After considerable questioning, I have come to the conclusion that these notes are negotiable. The reasons for this view are like those presented in the discussion of the next topic on collateral, that the maker's promises and the breach are really incidental to the collection of the instrument because of the importance of the security. A few cases take the same position.<sup>118</sup>

A somewhat similar question arises with notes secured by a real-estate mortgage, which provides that if the maker shall do any act by which the value of the mortgaged property shall be impaired, the whole amount shall become due and payable. This would include suffering or committing waste, failing to keep up insurance, and so forth. Such a note has been held invalid in Washington,<sup>119</sup> but is regarded as valid in other decisions.<sup>120</sup>

#### ACCELERATION BY DEPRECIATION OR SALE OF COLLATERAL

This brings us at last to the validity of the provisions in the promissory note described on the first page of this article.<sup>121</sup> The problem is closely related to that of chattel notes. The provisions are frequently contained in the notes, secured by collateral, which banks require borrowers to sign. Some of these notes allow the holder to sell the collateral at once if it depreciates and sue forthwith for the deficiency, without giving the maker an opportunity to furnish more margin.<sup>122</sup> Others agree to deliver more collateral

tional Bank v. Carter, 144 Iowa, 715, 123 N. W. 237 (1909, N. I. L.); but see State Bank of Halstad v. Bilstad, 136 N. W. 204 (Iowa, 1912, N. I. L.); First National Bank v. Carson, 60 Mich. 432, 27 N. W. 589 (1886), probably overruled by Schmidt v. Pegg, 172 Mich. 159, 137 N. W. 524 (1912, N. I. L.); Third National Bank v. Armstrong, 25 Minn. 530 (1879), *semble*; Reynolds v. Vint, 73 Ore. 528, 144 Pac. 526 (1914, N. I. L.); Carroll, etc. Bank v. Strother, 28 S. C. 504, 6 S. E. 313 (1887); Kimball v. Mellon, 80 Wis. 133, 48 N. W. 1100 (1891), resting chiefly on other grounds. See 35 L. R. A. (N. S.), 392, note; L. R. A. 1915 B, 473, note.

<sup>117</sup> See note 3, *supra*.

<sup>118</sup> Schmidt v. Pegg, 172 Mich. 159, 137 N. W. 524 (1912, N. I. L.), probably overruling First National Bank v. Carson, 60 Mich. 432 (1886); Heard v. Dubuque, 8 Neb. 10 (1878); Joergensen v. Joergenson, 28 Wash. 477, 68 Pac. 913 (1902).

<sup>119</sup> Bright v. Offield, 81 Wash. 442, 143 Pac. 159 (1914, N. I. L.).

<sup>120</sup> See note 151, *infra*.

<sup>121</sup> Page 747, *supra*.

<sup>122</sup> See Mumford v. Tolman; Benny v. Dunn; Continental National Bank v. McGeoch; all *infra*, notes 126 to 128.

to the satisfaction of the holder when demanded; on failure to do so the note matures at once, and the holder may exercise his power of sale if he desires.<sup>123</sup> Occasionally, the maker is given the option of paying something on account instead of furnishing more security.<sup>124</sup> Sometimes, the note provides that the collateral also secures any other obligation of the maker due to the payee, or even of any firm of which he is a member. The peculiar acceleration provisions of the obligations of the National Salt Company will be discussed later.<sup>125</sup>

The weight of authority holds these provisions for acceleration by depreciation of collateral to be fatal to negotiability, whether accompanied by a promise to furnish more collateral<sup>126</sup> or not.<sup>127</sup> There is, however, good authority in favor of negotiability.<sup>128</sup>

The provisions are said to violate three formal requisites: certainty of amount, certainty of time, and the rule against a promise to do anything but pay money. Let us consider these in turn, remembering, as we do so, the words of Judge Barclay of Missouri:<sup>129</sup>

<sup>123</sup> *Lincoln v. Perry*; *Commercial National Bank v. Consumers' Brewing Co.*; *Holliday v. Hoffman*; *Hibernia Bank v. Dresser*; *Kennedy v. Broderick*; *Finley v. Smith*; all *infra*, notes 126 to 128.

<sup>124</sup> *Commercial National Bank v. Consumers' Brewing Co.*, *infra*, note 126.

<sup>125</sup> In note 156.

<sup>126</sup> *Lincoln v. Perry*, 66 Fed. 887 (C. C. A. 8th, 1895); *Commercial National Bank v. Consumers' Brewing Co.*, 16 App. D. C. 186 (1900); *Strickland v. National Salt Co.*, 79 N. J. Eq. 182, 81 Atl. 828 (1911); *National Salt v. Ingraham*, 122 Fed. 40 (C. C. A. 2d, 1903); but see *National Salt Co. v. Ingraham*, 143 Fed. 805 (C. C. A. 2d, 1906); *Holliday v. Hoffman*, 85 Kan. 71, 116 Pac. 239 (1911, N. I. L.); *Hibernia Bank v. Dresser*, 132 La. 532, 538, 61 So. 561 (1913, N. I. L.).

<sup>127</sup> *Benny v. Dunn*, 26 Pitts. Leg. J. (N. S.), 382, 2 Lack. Leg. N. 135 (1896), probably overruled by 260 Pa. 255, see note 128; *Continental National Bank v. McGeoch*, 73 Wis. 332, 41 N. W. 409 (1889). But see *Commercial National Bank v. Consumers' Brewing Co.*, 16 App. D. C. 186, 203 (1900), *semble*.

And several of the chattel notes held invalid allowed the holder to seize and sell the chattel before maturity, and sue for the deficiency, *e. g.*, *Smith v. Marland*, 59 Iowa, 645, 13 N. W. 852 (1882); *Kimpton v. Studebaker*, 14 Idaho, 552, 94 Pac. 1039 (1908, N. I. L.). *South Bend Iron Works v. Paddock*, 37 Kan. 510, 15 Pac. 574 (1887); but Iowa distinguishes a note allowing the holder to seize the chattel if he deems himself insecure, but not permitting sale till maturity. *Bank of Carroll v. Taylor*, 67 Iowa 572, 25 N. W. 810 (1885). See notes in 35 L. R. A. (N. S.), 392, and L. R. A. 1915 B, 473.

<sup>128</sup> *National Salt Co. v. Ingraham*, 143 Fed. 805 (C. C. A., 2d, 1906); *Kennedy v. Broderick*, 216 Fed. 137 (C. C. A. 7th, 1914, N. I. L.), — if in the judgment of the holder collateral depreciates and new collateral is not delivered on demand, note matures at once; *Finley v. Smith*, 165 Ky. 445, 177 S. W. 262 (1915); *Mumford v. Tolman*, 54 Ill. App. 471 (1894), 157 Ill. 258, 41 N. E. 617 (1895); *Empire Nat. Bank v. High Grade Oil Refining Co.*, 260 Pa. 255, 103 Atl. 602 (1918).

<sup>129</sup> *First National Bank of Springfield, Ohio v. Skeen*, 101 Mo. 683, 687, 14 S. W. 732 (1890).

"The law governing such paper is the outgrowth of the usages of commerce. In determining disputed questions in its application it is often useful to recur to the objects and purposes of the law and to observe how far they may be promoted or defeated by the acceptance of any proposed construction of it. The reason of any law is its life, and a correct conception of its reason is oftentimes essential to a proper understanding of the meaning and tendency of the law itself."

The real question, therefore, is not whether a formal requisite is violated in theory, but whether it is violated in such a way as to raise serious objections; whether the acceleration provisions render the instrument more or less suitable for circulation among business men as a substitute for money.

*Uncertainty of Amount.* — If the holder is authorized to sell the collateral before maturity, he must properly apply the proceeds of the sale toward the debt. Only the balance is then recoverable, and it is uncertain what that balance will be. The amount payable by the maker, either under a judgment or otherwise, is therefore said to be uncertain.<sup>130</sup> A further uncertainty is created by words authorizing the holder to pay all expenses of the sale out of its proceeds.<sup>131</sup>

A similar uncertainty as to the size of the deficiency is caused by a power to sell collateral at maturity, yet this is clearly valid.<sup>132</sup> A distinction has been suggested in that the power to sell after maturity operates when the instrument has become "an ordinary contract for the payment of money" subject to equities, while the power to sell before maturity operates while the bill has negotiable privilege and value.<sup>133</sup> This distinction overlooks the point, that the acceleration does cause maturity and render the note overdue as to persons with notice that it has occurred. Also, if the note mentions the collateral, all purchasers are put on notice that the collateral should accompany the note,<sup>134</sup> and, if it is missing, that it has been sold. A prior holder could have sold it anyway without express power to do so—a wrongful act, of course, but affecting a later purchaser with notice of the existence of the collateral and not

<sup>130</sup> *Lincoln National Bank v. Perry*, 66 Fed. 887, 892 (1895); *Continental National Bank v. McGeoch*, 73 Wis. 332, 337, 41 N. W. 409 (1889).

<sup>131</sup> *Continental National Bank v. McGeoch*, 73 Wis. 332, 338, 41 N. W. 409 (1889).

<sup>132</sup> *Arnold v. Rock River, etc. R. R. Co.*, 5 Duer (N. Y.) 207 (1856); N. I. L. § 5 (1).

<sup>133</sup> *Commercial National Bank v. Consumers' Brewing Co.*, 16 App. D. C. 186, 203 (1900).

<sup>134</sup> *Holmes v. Kidd*, 3 H. & N. 891 (1858).

impairing negotiability. There is no reason why the expression of the power should alter the result. In other words, sale before maturity has the same practical effect upon later purchasers as sale after maturity.

If the note provides that the collateral also secures other obligations,<sup>135</sup> then it may be that the absence of any collateral attached to the instrument would not be suspicious and would not throw a duty upon the purchaser to find out what had become of the collateral. Consequently, even though a prior holder had sold the collateral and applied the proceeds upon this very note, a subsequent purchaser ignorant of the rule would be able to recover in full. This is hard upon the maker, but ought not to prove fatal to negotiability. The same hardship might result in notes which give the maker or the holder an option for payment of the principal in parts before maturity. Such part payments would not affect a subsequent *bond fide* purchaser. Yet, as we have seen, such instruments are negotiable.<sup>136</sup>

The obligation of the maker to pay the expenses of sale does not create objectionable uncertainty in amount. The sum which the holder of the note at the time of the sale receives is not rendered uncertain, for he obtains only the face of the note. Indeed, the clause makes the value of the note more certain, for it is not liable to diminution by unforeseen expenses. It is indeed true that the maker will pay more than the face of the note, but this also happens if he agrees to pay exchange or attorney's fees, yet such agreements do not impair commercial certainty.<sup>137</sup>

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<sup>135</sup> Held fatal to negotiability, as an order to do an act in addition to the payment of money; and as showing an intention not to have the note transferable, since this promise runs to the payee alone. *Hibernia Bank v. Dresser*, 132 La. 532, 543, 61 So. 561 (1913). *Contra*, *Commercial Bank of Selma v. Crenshaw*, 103 Ala. 497, 15 So. 741 (1893); *Empire Nat. Bank v. High Grade Oil Refining Co.*, 260 Pa. 255, 103 Atl. 602 (1918). Difficult questions might arise about priority as to the collateral, should the payee hold several notes, and transfer them to different persons; but these might also arise if the agreement were oral and not on the instrument. This particular provision should not defeat negotiability, if the acceleration provisions do not. It does not *per se* put a purchaser on inquiry. For recent cases on such provisions see *Torrance v. Third National Bank*, 210 Fed. 806 (C. C. A. 3d, 1914); *Mulert v. National Bank of Tarentum*, 210 Fed. 857 (C. C. A. 3d, 1913).

<sup>136</sup> This analogy is pointed out in *Commercial National Bank v. Consumers' Brewing Co.*, 16 App. D. C. 186, 203 (1900). See pages 759 and 761, note 47, *supra*.

<sup>137</sup> N. I. L. § 2; *Cudahy v. Bank*, 134 Fed. 538 (C. C. A. 8th, 1904), quoted on page 751, *supra*.

In short, the provisions for a speedy sale of collateral do not create uncertainty in amount, but make it more certain that the holder will receive the full face value of the instrument, without reduction by either the insolvency of the maker, or the depreciation of the collateral, or the cost of collection.

*Uncertainty in Time.*—The acceleration provisions in these collateral notes do undoubtedly render the time of payment uncertain, but not more so than the other types of provisions already considered. It is objected that a note "which carries with it the probability, or even the possibility, that it may be partially or wholly extinguished before maturity" is not suitable for negotiation.<sup>138</sup> Every "on or before" note, every installment note which falls due at once upon default, every note which gives the holder or maker an option to make part payments is open to just the same objection. This argument would wipe out acceleration provisions altogether.

Another objection advanced to these collateral notes is that the acceleration is not caused by the maker, but "there is an uncertainty in the time of payment within the determination of the payee or his assignee."<sup>139</sup> This attempted distinction between holder's option and maker's option has already been considered,<sup>140</sup> and found to be baseless. Also, the instrument in question "is no more uncertain for practical purposes than a bill drawn, for example, 'at sight,' or 'on demand,' neither of which phrases has ever been held to diminish negotiability. Yet, with regard to bills so drawn, the holder exercises the unquestioned option of fixing the time when the direction to pay becomes absolute."<sup>141</sup> And, finally, the maker does participate in the acceleration in these collateral notes by his refusal to furnish more collateral, so that they would seem analogous to installment notes which are accelerated at the option of the holder after default by the maker. It may be argued, however, that the analogy is not sound, because the holder has unlimited discretion to determine when the security has depreciated, so that for all practical purposes maturity is within his sole

<sup>138</sup> Thayer, J., in *Lincoln National Bank v. Perry*, 66 Fed. 887, 893 (C. C. A. 8th, 1895).

<sup>139</sup> *Benny v. Dunn*, 26 Pitts. Leg. J. 382, 384 (1896).

<sup>140</sup> See page 774, *supra*.

<sup>141</sup> *Barclay, J.*, in *First National Bank v. Skeen*, 101 Mo. 683, 688, 14 S. W. 732 (1890).

control.<sup>142</sup> The general law as to drastic pledge agreements, however, requires the pledgee to act in good faith for the pledgor's benefit as well as his own,<sup>143</sup> so that a dishonest or wholly unreasonable determination that the security is depreciating or that the additional security is not satisfactory would not seem to bring about an acceleration which would have any legal consequences. Therefore, it seems incorrect<sup>144</sup> to say that the holder has arbitrary power to cause acceleration. The power is given him for the purpose of making payment as certain as possible, and not for oppressing the maker.

There are difficulties about certainty of time which are not raised by the cases to which we will return later.

*Furnishing More Collateral as an Additional Promise.* — A third formal requisite which is said in several decisions<sup>145</sup> to be violated by these collateral notes is the rule that a negotiable instrument must not contain an order or promise to do an act in addition to the payment of money. This is said to be the most serious objection to these collateral notes. One decision which was disposed to regard such a note as sufficiently certain in time and amount held it not negotiable, because of this power to demand more collateral and sell upon default.

"The power here conferred is so uncontrolled and uncertain, and its exercise so completely subject to the contingencies of every passing hour from and after the very moment of execution and delivery, that . . . it . . . ought not to be sanctioned."<sup>146</sup>

Another court says of this acceleration provision,

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<sup>142</sup> *Benny v. Dunn*, *supra*.

<sup>143</sup> See the article on "Drastic Pledge Agreements," Murray Seasongood, 29 HARV. L. REV. 277 (1916), which discusses many problems about these collateral notes outside the scope of my article.

<sup>144</sup> As in *Holliday Bank v. Hoffman*, 85 Kan. 71, 77, 116 Pac. 239 (1911, N. I. L.).

<sup>145</sup> See *Commercial National Bank v. Consumers' Brewing Co.*, 16 App. D. C. 186, 204 (1900); *Holliday Bank v. Hoffman*, 85 Kan. 71 (1911, N. I. L.); *Strickland v. National Salt Co.*, 79 N. J. Eq. 182, 188, 81 Atl. 828 (1911); and the chattel note cases.

<sup>146</sup> *Commercial National Bank v. Consumers' Brewing Co.*, *supra*, 204, 206. A special feature of the note in that case was that a third person was made the depository of the collateral, and was given the power to decide when there was depreciation in its value, and what additional security or payments on account in lieu thereof were required. It would seem that it is fairer to the maker to give the power to a disinterested bank than to the holder of the note. The trustee of a corporate mortgage occupies an analogous position.

"It would hardly be different if the note recited that it was secured by a chattel mortgage upon certain live stock and contained an agreement that in case their value should depreciate and the holder should deem the security insufficient the maker would on demand execute and deliver to the holder a mortgage upon certain real estate for such amount as would satisfy the holder, and that otherwise the note should mature at once."<sup>147</sup>

The installment notes are distinguished because there the acceleration is by the maker's failure to pay money, here to do something else.<sup>148</sup> Negotiable instruments are intended as a substitute for money, but here is a contract to deliver things, which is therefore considered to be a very different affair.

Nevertheless, it is well to remember that negotiable instruments do sometimes contain promises to do something else besides pay money. For instance, the maker may agree to let the holder sell the collateral, or to authorize any attorney of a court of record to enter judgment against him, or to deliver certificates of stock in exchange for the instrument.<sup>149</sup> In many jurisdictions he may agree to allow the legal title of a chattel to remain in the holder until payment of the instrument.<sup>150</sup> Some of these allowable promises are enforceable only at maturity, but not all. It is just the same sort of act, for instance, to deliver stock in exchange for a note as to deliver more stock to secure it. If one can be done before maturity, why not the other? The question in every case is not whether the act is technically "additional" to the payment of money, but whether it is substantially so. If its real purpose is to aid the holder to secure the payment of money and protect him from the risks of insolvency, if it steadies the value of the note, and makes it circulate more readily, then it should not be fatal to negotiability.

The promise to furnish more collateral is, it seems to me, such an incidental promise. The holder does not receive this collateral to keep after the instrument is paid. He gets it so as to be more certain that the instrument will be paid, to make assurance doubly sure. Both the old and the new collateral must be surrendered

<sup>147</sup> *Holliday Bank v. Hoffman*, *supra*, 75.

<sup>148</sup> *Ibid.*, 77.

<sup>149</sup> N. I. L., § 5. The well-known common-law cases have already been discussed. They will be found in 1 AMES, CASES ON BILLS AND NOTES, Chap. I, Sec. V.

<sup>150</sup> See note 3, *supra*.

when payment is received. If promises relating to the original security, *e. g.*, power of sale at maturity or reservation of title, are allowable, why not a promise to supplement that security and enable it to fulfill its essential purpose of covering the amount of the note?

The question whether the promise is enforceable before maturity does not determine whether it is additional, but only whether it renders the time uncertain, an independent problem already considered. A promise to furnish collateral at issue of the instrument may be included in it. Why not a promise to furnish it between issue and maturity? Such a promise for continued adequacy of the security is supported by authority, for example, a promise to insure mortgaged property or keep it free from waste,<sup>151</sup> or even to mortgage future crops.<sup>152</sup> Therefore, the formal requisite as to additional promises is not violated by a collateral note.

A strong argument for this view is made by Judge Baker in the United States Circuit Court of Appeals for the Seventh Circuit:<sup>153</sup>

"Two separate and distinct matters are involved. Each is to be considered and interpreted as a complete entity, whether they be written upon one paper or several. An unconditional promise to pay a certain sum at a certain time is a matter apart from security by way of deed of trust or mortgage of land or pledge or mortgage of chattels. One is governed by the law merchant, the other by property laws. The owner may rely, if he chooses, exclusively upon the promise to pay, according to its terms. Conditions for his benefit in the mortgage or pledge agreement may be availed of only in his capacity of mortgagee or pledgee; they are limited to the purposes of the mortgage or pledge; they cannot be read into the promise to pay, and so render a certain promise uncertain, convert a negotiable into a non-negotiable instrument. . . .

"But even if the two matters were to be read together, it is clear that the stipulations for additional collaterals and the sale of collaterals are pertinent only to the pledge part of the transaction, and that the only condition which could, in any event, be carried into the promise to pay part is the one by which maturity might be anticipated."

<sup>151</sup> *Hunter v. Clarke*, 184 Ill. 158 (1900); *Farmer v. First National Bank of Malvern*, 89 Ark. 132 (1909). *Des Moines Savings Bank v. Arthur*, 163 Iowa, 205, 143 N. W. 556 (1913, N. I. L.) distinguishing *Iowa National Bank v. Carter*, 144 Iowa, 715, 123 N. W. 237 (1909, N. I. L.), a chattel note case, which seems a close parallel.

<sup>152</sup> *Commercial Bank of Selma v. Crenshaw*, 103 Ala. 497, 15 So. 741 (1893). See note 156.

<sup>153</sup> *Kennedy v. Broderick*, 216 Fed. 137 (1914, N. I. L.)



And a similar position is taken by Judge Carroll in the Kentucky Supreme Court:<sup>154</sup>

"It is quite usual to pledge collateral as security for the payment of a negotiable note, and we do not think that any narrow construction of the law should be adopted that would have the effect of impairing the use of this kind of security or that would deny to the holder the right to insist that if the value of the collateral deposited should become impaired, the maker must strengthen it or else precipitate the maturity of the paper. This condition in the note is merely supplementary to the fixed and controlling promises and is really nothing more than additional security for the payment of the instrument. It is not, strictly speaking, 'an order or promise to do an act in addition to the payment of money,' but is rather an order or promise to do an act that will better secure the promise to pay the money stipulated at the time fixed in the note. If this condition or promise would disturb the negotiability of commercial paper the effect would necessarily be to lessen the usefulness of collateral as security, because holders of paper would not be disposed to accept collateral, much of which has a fluctuating value, if they were denied the right to insist that its value should be maintained in an amount sufficient to serve the purposes for which it was accepted."

These two decisions and the cases in accord<sup>155</sup> are therefore correct in holding that the acceleration provisions in the usual bank collateral note do not impair its negotiability. The result should be reached both at common law and under the Negotiable Instruments Law, which does little more in relation to this problem than declare broad common-law principles.<sup>156</sup>

The application of the three fundamental principles of this

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<sup>154</sup> *Finley v. Smith*, 165 Ky. 445, 453, 177 S. W. 262 (1915, N. I. L.).

<sup>155</sup> See note 128, *supra*.

<sup>156</sup> Interesting modifications of the usual collateral note problem are presented by the obligations which the National Salt Company of New Jersey issued in 1901. These were secured by stock of an underlying corporation, the United Salt Company. The maker agreed that until payment no contract or improvements of the underlying company for utilizing steam in the manufacture of salt should be mortgaged, encumbered, or disposed of; that no money borrowed or advanced by the maker for improving or operating the property of the underlying corporation should be a lien against the assets thereof; that the underlying corporation should not dispose of its patent rights except for licenses upon a stated royalty. As this was essentially an agreement to maintain adequate security, it was rightly held not to impair negotiability. *National Salt Co. v. Ingraham*, 143 Fed. 805 (C. C. A., 2d, 1906). *Contra*, *Strickland v. National Salt Co.*, 79 N. J. Eq. 182, 81 Atl. 828 (1911), non-negotiable as containing a promise to do an act in addition to the payment of money. And see *National Salt Co. v. Ingraham*, 122 Fed. 40 (C. C. A., 2d, 1903).

article <sup>157</sup> clear up any further difficulties attending the negotiability of these collateral notes. The first principle required the acceleration of a negotiable instrument to be by an act incidental to the collection of the instrument by business methods. It is clear that security is closely related to the life of a negotiable instrument. The return of collateral is a kind of implied condition of the promise to pay a note or the order to pay a bill.<sup>158</sup> The demand upon the maker to keep the collateral adequate or its sale upon depreciation may fairly be considered a part of its collection, as modern business goes, as much as presentation for acceptance or the demand for payment. Consequently acceleration by such acts or the accompanying default of the maker is as permissible as acceleration by nonacceptance or failure to pay on demand.

As a result the second and third principles govern these notes. Since there are not two coequal maturities, but one main maturity, the fixed date of payment, with a merely incidental provision for acceleration, a purchaser can rely on the fixed date, and regard the instrument as not overdue until then,<sup>159</sup> without troubling to inquire whether any act of acceleration has taken place. This is once more analogous to the rule of *Dunn v. O'Keefe* <sup>160</sup> regarding the acceleration of ordinary bills of exchange by nonacceptance, which does not affect subsequent purchasers without notice. On the other hand, holders having notice of the fact of acceleration, *e. g.*, from the absence of collateral which ought to be attached to the instrument, are bound to regard it as overdue from the day the act of acceleration occurred, for purposes of the Statute of Limitations, letting in equitable defenses, and charging indorsers. Thus, no difficulties about uncertainty of time arise.

It is worth noting that even when there is a duty to inquire about acceleration, the facts to be investigated are not truly extrinsic but part of the history of the instrument, very different from such events as the death of the maker's father, which is a permissible means of fixing payment. Furthermore, the collateral notes lack the uncertain value of the death notes, or those payable "on or before" a day at the maker's option, or installment notes absolutely

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<sup>157</sup> See page 756, *supra*.

<sup>158</sup> See note on produce bills of exchange in 32 HARV. L. REV. 560; also, 30 HARV. L. REV. 514.

<sup>159</sup> *Mackintosh v. Gibbs*, 79 N. J. L. 40, 74 Atl. 708 (1909).

<sup>160</sup> 5 M. & S. 282 (1816); see page 671, *supra*.

due on default. The purchaser of a collateral note, so long as he is ignorant of any prior acceleration, can determine the price upon the basis of a fixed maturity, for he cannot be deprived of his investment until then except by his own consent.

The fitness of collateral notes with acceleration provisions to find a ready market is obvious. Some courts have objected to their length, having in mind the well-known phrase of Chief Justice Gibson,<sup>161</sup> "A negotiable bill or note is a courier without luggage." Judge Thayer remarked in 1895:<sup>162</sup>

"Under existing decisions permitting negotiable notes to contain a stipulation authorizing the sale at maturity of collateral securities, and, in some states, authorizing the insertion of an agreement to pay exchange and attorney's fees, as well as a warrant to confess judgment, such instruments have already been burdened with all of the luggage which they can conveniently carry. . . . It is easy to foresee that, if parties are permitted to burden negotiable notes with all sorts of collateral engagements, they will frequently be used for the purpose of entrapping the inexperienced and unwary into agreements which they had no intention of making, against which the law will afford them no redress."

Judge Shepard<sup>163</sup> admits that "the simple, short documents of early custom have grown into elaborate documents full of collateral undertakings of every nature that the development of modern business and systems of credits could suggest" and that "many of these additions have clearly demonstrated their merits as beneficial aids to credit and commerce." Nevertheless, "there must, at last, be some limit," and he puts these acceleration provisions beyond the pale. Such reasoning is obviously unsatisfactory.

It would certainly be unfortunate if a promissory note contained as many clauses in fine print as an insurance policy, but it would seem that acceleration provisions are so advantageous to circulation that they should be retained, subject to judicial control over any clauses which operate as a forfeiture of the security.<sup>164</sup> The oft-repeated epigram of Gibson has indeed "lost much of its apt-

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<sup>161</sup> *Overton v. Tyler*, 3 Pa. St. 346, 347 (1846).

<sup>162</sup> *Lincoln National Bank v. Perry*, 66 Fed. 887, 894 (C. C. A., 8th, 1895).

<sup>163</sup> *Commercial National Bank v. Consumers' Brewing Co.*, 16 App. D. C. 186, 201 ff. (1900).

<sup>164</sup> See "Drastic Pledge Agreements," *Murray Seasongood*, 29 HARV. L. REV. 277.

ness since 1846,"<sup>165</sup> and the modern promissory note with its careful safeguards against insolvency is no longer comparable to a courier without luggage, but rather to an automobile, fitted with every conceivable contrivance to prevent or repair a breakdown on the road.<sup>166</sup>

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<sup>165</sup> *Holliday Bank v. Hoffman*, 85 Kan. 71, 77, 116 Pac. 239 (1911).

<sup>166</sup> Space prevents the discussion of two topics closely related to the subject of this article:

*Incorporation of Mortgages into Notes.* — The question whether the reference in a note to a mortgage or trust deed incorporates its acceleration provisions is unsettled. Properly it should not be incorporated unless the note is made subject to its terms. Mere mention is not sufficient. Many cases go further. In this article I have accepted for purposes of my discussion the view of a court that the acceleration provisions of the mortgage formed part of the note. If so, their effect upon its negotiability is the same as if actually written on the note. "Why should the courier who carries his luggage in a trunk be held to be not excluded from the negotiable class because he has no hand baggage?" *Brooke v. Struthers*, 110 Mich. 562, 574 (1896). Some references are: 32 L. R. A. (N. S.) 858, note; 15 MICH. L. REV. 165; *Lundean v. Hamilton*, 159 N. W. 163 (Iowa, 1916); *Westlake v. Cooper*, 171 Pac. 859 (Okla. 1918).

*Bonds.* — Acceleration provisions in bonds have been more liberally viewed than those in promissory notes and bills of exchange, because of the strong mercantile recognition of negotiability. § 2 MACHEN ON CORPORATIONS, § 1734 ff. There is reason to apprehend a narrower view, however, under the Negotiable Instruments Law, which apparently imposes its formal requisites on bonds, and so subjects them to the construction of the act which opposes acceleration by sale of collateral before maturity, etc., *Ibid.*, § 1740 A. For a recent decision against negotiability under a statute similar to the act, see *Crocker National Bank v. Byrne*, 173 Pac. 752 (Cal. 1918) criticized in 6 CAL. L. REV. 444.

## IMPOSSIBILITY OF PERFORMANCE OF CONTRACTS DUE TO WAR-TIME REGULATIONS

### I

#### INTRODUCTION

**T**HE far-reaching control which during the period between the declaration of war and the signing of the armistice with Germany it was found necessary for the government to exercise over the production, consumption, and movement of commodities brought about an unprecedented disturbance of the ordinary contract relations between producers and consumers of almost every conceivable article of commerce. Whether a particular commodity was found to be necessary for war purposes or was considered nonessential, the need of the government for the one and the need of preventing labor and capital from being absorbed in the production or transportation of the other led to a drastic interference with the contracts of private citizens relating to each. As a general rule the parties to such contracts appear to have treated losses thus caused them as part of the fortunes of war, and hence litigation between buyer and seller growing out of this situation has up to this time, — so far at least as the reported cases show, — been of extremely rare occurrence. It seems not improbable, however, that this reluctance to litigate may be diminished now that the period of active warfare has come to an end; and, in any event, the problems presented by the war-time interference with contracts, whether or not they are to lead to litigation and hence to judicial decisions, are of a sufficiently novel character to be of considerable interest to the student of the law of contracts.

Prior to the war, governmental interference with contracts was confined almost entirely to the enactment of laws, or of regulations and ordinances having the force of law, by virtue of which the making of certain subsequent contracts or the performance of certain preëxisting ones became illegal. That governmental action might render performance of a contract impossible rather than

unlawful was indeed recognized both by courts and by text-writers,<sup>1</sup> but the cases in which governmental action had had this effect were comparatively rare.

A somewhat different situation existed during the period of active warfare. Since the war was to an unprecedented extent an industrial as well as a military one, the control exercised over the industries of the country in the interest of war-making was of a sort for which no precedent can be found in the history of previous conflicts in which this country has been engaged. To some extent this was accomplished through the medium of regulations issued under some federal statute authorizing the executive to prohibit certain forms of business activity, such as hoarding of foods, exporting or importing without a license, etc., deemed to be detrimental to effective war-making. Such statutes and regulations may present important legal problems with regard to the scope of the war power, the right to delegate legislative power and the like, but they do not involve the question with which this article is concerned, namely, that of governmental prevention as contrasted with governmental prohibition.

Prevention, rather than prohibition, was however, in the main, the order of the day. Thus while it was illegal to hoard food or to trade with the enemy, it was, although not illegal, in general impossible to buy or sell tuluol or wool, substantially the entire supply of which was taken over by the government, or to fill orders for articles deemed nonessential where these articles could not be produced without large quantities of raw materials of a kind urgently needed for war purposes. It is with such cases of impossibility that we have to deal.

Impossibility of performance is, in general, recognized by our law as an excuse for failure to perform a contract in a limited class of cases only, impossibility in law being by no means coextensive with impossibility in fact.<sup>2</sup> How far, if at all, these limits should be extended by judicial decision where the impossibility is due to the act of the government, of which the judiciary is itself a part,

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<sup>1</sup> See WILLISTON ON SALES, § 661, and cases cited.

<sup>2</sup> Impossibility of performance has been recognized as a defense where due (1) to a change in the law; (2) to death or illness in contracts requiring personal service; (3) to a destruction or change in the character of the goods to which the contract relates; (4) to a failure of the contemplated means of performance, the limits of this latter doctrine being very ill-defined. See WILLISTON ON SALES, § 661.

is a question on which there is naturally but little authority in view of the fact that governmental interference has, as has been stated, been normally of such a character as to present problems with regard to illegality rather than impossibility. It would appear, therefore, that courts are free to regard the problems arising out of governmental interference in war time as to a large degree *sui generis*, and that they need not adhere strictly in cases of this sort to the precedents which have been established in the law of impossibility of performance in general, but are at liberty to reach the results most consistent with justice and public policy, as long as these results can be attained with due regard to the more fundamental principles of the law of contracts.

## II

### REMOVAL OF SUBJECT MATTER OF CONTRACT BY REQUISITIONING

The ordinary rules with regard to impossibility will, however, furnish an adequate solution to a number of the problems presented by war-time governmental interference with contracts. Thus where a contract for the sale of specific goods has been rendered impossible of performance by the requisitioning of those goods by the government, there would appear to be no difficulty in treating the requisitioning of these goods as equivalent to their destruction and hence as excusing failure to deliver them according to well-settled contract principles. A recent English case<sup>3</sup> which takes this view of the matter would, no doubt, be followed in this country.<sup>4</sup>

More difficult questions may, however, arise where the government has not taken over the title to property but has merely taken the right to its temporary use. A number of cases of this sort have arisen in England involving the effect on a charter party of the requisitioning of the use of a chartered ship by the government. Where the ship has been chartered for the purpose of making a particular voyage it appears to be the view of the English courts that a requisition which makes the voyage impossible puts an end

<sup>3</sup> *In re Shipton, Anderson & Co.*, [1915] 3 K. B. 676.

<sup>4</sup> A similar problem might arise in eminent domain cases in peace times, but eminent domain generally relates to real estate in regard to which the question is materially affected by the doctrine of equitable title.

to the charter party,<sup>5</sup> thus giving to the act of the government the same effect which would be given to an act of God which should bring about a similar "frustration of the adventure," to use the common English term.

A ship may, however, be chartered for a period of months or years rather than for a particular voyage. In such a case the use of the ship by the government would not necessarily be inconsistent with the object of the charter party any more than a temporary injury to the ship from perils of the sea would be. A majority of the House of Lords has accordingly held that the requisitioning of a ship which was under a charter having several years to run did not terminate the charter.<sup>6</sup> In view of the length of the war and the fact that requisitioned ships were seldom returned to their owners during the continuance of hostilities, the result reached in this case has not escaped criticism,<sup>7</sup> and in at least one case involving a time charter the English court of appeal has found it possible to distinguish rather than to follow it.<sup>8</sup>

### III

#### COMPULSORY GOVERNMENT ORDERS FOR PRODUCTION

Instead of taking possession of the property which is the subject matter of the contract, the government might order the owner to make some use of the property, or of some other property necessary to the performance of the contract, which use would render such performance impossible. Thus Congress conferred upon the President the power to place with a manufacturer or other producer compulsory orders for war material, and required that such orders be given precedence over all other business.<sup>9</sup>

If the government placed such an order with a manufacturer for a quantity of goods equal to the entire output of his factory, the effect of such order would be to render it impossible for him to perform any private contract he might have made which pro-

<sup>5</sup> See cases, cited *infra*, in connection with time charters.

<sup>6</sup> *F. A. Tamplin S. S. Co. v. Anglo-Mexican Co.*, [1916] 2 A. C. 119.

<sup>7</sup> See 34 LAW QUART. REV. 126.

<sup>8</sup> *Countess of Warwick S. S. Co. v. Le Nickel Société Anonyme*, [1918] 1 K. B. 372.

<sup>9</sup> See National Defense Act of June 3, 1916, 39 STAT. AT L., c. 134, §§ 120, 166. Naval Appropriations Act of March 4, 1917, 39 STAT. AT L., c. 180, 1168; General Deficiency Act of June 15, 1917 (Public — No. 23 — 65th Congress (H. R. 3971)); Emergency Shipping Fund provisions.



vided either expressly or by implication for the production of goods in that factory, except by denying to the government order the precedence to which it was entitled by statute. It may be argued, therefore, that the case is one in which performance had become illegal, but the legal objection is not due to any impropriety in the contract itself, but solely to the fact that, under the existing circumstances, performance could not be given consistently with the fulfillment of the legal duty of giving such preference to the government order as was necessary in order to carry it out on time. Should the contractor have found some means of so increasing the productivity of his plant as to perform both his contract and the government order the law would have had no objection to his doing so. It seems more accurate, therefore, to treat the case as one in which the government order, because of the legal consequences attaching to it, made performance impossible rather than as a case of illegality. The case is thus substantially similar to the requisitioning, or, apart from the temporary character of the impossibility, to the destruction of the factory by an act of God, and has properly been treated as at least a suspensive defense for failure to perform.<sup>10</sup>

In that case the court assumed that the defense was merely suspensive and that the defendant would have been compelled to perform after completing the government order, had the contract not been repudiated by the plaintiff prior to that time. It is believed, however, that performance is not merely suspended but entirely excused provided the delay is a material one, since to require performance after a long delay would be "not to maintain the original contract but to substitute a new contract for it."<sup>11</sup>

Frequently, however, a government order did not require even for a time the use of the entire machinery of a plant. Where such was the case it would frequently have been possible for the manufacturer to perform one or more of his private contracts without denying to the government order its statutory priority, but not to perform all such private contracts. It is believed that the

<sup>10</sup> *Moore & Tierney, Inc. v. Roxford Knitting Co.*, 250 Fed. 278 (1918).

<sup>11</sup> *Metropolitan Water Board v. Dick, Kerr & Co.*, [1918] A. C. 119. This case decides that a regulation of the Ministry of Munitions which made work on a reservoir impossible for a considerable length of time did not suspend the contract for the work but terminated it. See, also, *Andrew Millar & Co. v. Taylor & Co.*, [1916] 1 K. B. 402, dealing with the effect of a temporary embargo.

weight of authority in closely analogous cases supports the view that the proper course for a manufacturer to have pursued under such circumstances would have been to have offered to each customer with whom he had a contract his *pro rata* share of what could have been produced over and above the government order,<sup>12</sup> assuming the case to be one in which, for the reason just stated above, the fulfillment of the contracts after the completion of the government order would not have been required.

#### IV

##### INTERFERENCE BY THE GOVERNMENT WITH MATERIALS NEEDED IN PRODUCTION — COAL REGULATIONS

Without requisitioning either the subject matter of the contract or the seller's plant or tying up that plant by a compulsory order, the government might, however, make production no less impossible by interfering with the supply of some material essential to production. Thus the President was given the right to regulate the distribution of coal and coke,<sup>13</sup> and the Fuel Administration, to which this power was delegated, in the winter of 1918 issued the well-known "heatless days" order by which no coal could be burned on certain days except by those engaged in certain essential industries; and subsequently, through coöperation with other governmental agencies, a priority list was compiled, the effect of which was to make it impossible, in cases of shortage of coal, for industries classed as nonessential to obtain a supply adequate for normal production. Such regulations<sup>14</sup> were from a

<sup>12</sup> Such is the holding of a majority of the cases dealing with a similar question arising in connection with "strike clauses" in contracts. See *McKeefrey v. Connells-ville Coke & Iron Co.*, 56 Fed. 212 (1893); *Luhrig Coal Co. v. Jones & Adams Co.*, 141 Fed. 617 (1905); *Oakman v. Boyce*, 100 Mass. 477 (1868); *Jessup & Moore Paper Co. v. Piper*, 133 Fed. 108 (1902); *Con. Coal Co. v. Mexico Co.*, 66 Mo. App. 296 (1896). Some of these decisions are rested in part on an alleged custom of the coal business. A similar view has been taken by the House of Lords with regard to the effect of a clause relating to impossibility due to war. *Tennants, Ltd. v. C. A. Wilson & Co., Ltd.*, 1917 A. C. 495. The following are *contra*: *Hunter Finch & Co. v. Zenith Furnace Co.*, 146 Ill. App. 257 (1909) aff'd, 245 Ill. 586 (1910); *Coal Co. v. Ice Co.*, 134 N. C. 574 (1904).

<sup>13</sup> See Food Control Act of August 10, 1917, § 25. Public — No. 41 — 65th Congress [H. R. 4961].

<sup>14</sup> Such regulations are used merely for the purpose of illustration, and their validity under the act above cited is assumed.

practical point of view substantially equivalent to the temporary destruction of a factory dependent on coal for the running of its machinery, and yet inability to obtain coal would not in general be regarded as equivalent to the destruction of the factory in the eye of the law, even though such inability might be due to causes wholly beyond the manufacturer's control.

Ordinarily, however, a prudent manufacturer would at least have been able to obtain contracts for the supply of coal to him, and if the coal was not forthcoming would himself have had a remedy on those contracts; and where this was not the case the law, as between two innocent parties, allows the loss to fall upon the one who has agreed to give performance, the case not falling within the somewhat arbitrary classification of cases in which impossibility is recognized as an excuse.

It is submitted, however, that a wholly different situation exists where the failure of the coal supply was due to action of the government directed specifically at preventing the defendant from obtaining coal, or from using his own coal as in the case of the heatless day order. The question in such a case is not simply whether a party should be held liable on a contract which he has been unable to perform because of causes beyond his control, but whether the judicial branch of the government should hold him liable for failure to do an act which the executive branch, acting under legislative authority, had deliberately and designedly rendered impossible of performance. Such a holding would seem the *reductio ad absurdum* of the doctrine of the separation of powers.

No doubt a contractor takes the risk not only of a declaration of war and of the general disturbance of business caused thereby including a shortage of essential materials due to war conditions. Thus, if, owing to the government's war need for coal, the market was so restricted as to bring about a cut-throat competition between consumers, those who failed to obtain coal would probably be unable to plead such failure as a defense for their own breach of contract. Such consequential injury brought about by governmental action is however very different from a direct governmental prohibition, and a defendant should not be held liable for the results which flow necessarily and directly from the latter. At least where the contract was made prior to the enactment of the Food Control Act, performance should be excused on the ground that

the case is one, in the words of an English judge, "where British (American) administrative intervention has so directly operated upon the fulfilment of a contract for a specific work as to transform the contemplated conditions of performance."<sup>15</sup> Whether or not a different result should be reached in case of an unqualified contract made subsequent to the passage of that act will be considered later in connection with the discussion of priority certificates.

## V

NON-BINDING REGULATIONS ENFORCEABLE  
INDIRECTLY — PRIORITIES

Thus far we have dealt only with requisitions under authority of law and with orders and regulations which it would have been illegal for the contractor or for the persons dealing with him to have disregarded. It is believed, however, that a similar effect should be given, at least in some cases, to orders of another sort where disobedience would not have been a criminal or even a prohibited act, but where the administration had been granted by Congress a power of compulsion amply sufficient as a practical matter to necessitate compliance with the order in question. The recent English case of *Hulton & Co. v. Chadwick & Taylor*,<sup>16</sup> is an example of this sort of order. The defendant in that case was granted a license to import pulp on condition that he would agree to use the pulp imported for the purpose of supplying two-thirds of the pre-war requirements of each customer. The plaintiff had a contract for paper which would necessarily be made from imported pulp. The defendant refused to perform on the ground that he was prevented by the government from performing the contract according to its terms, and was under no obligation to perform a wholly different contract. The Court of Appeal accepted this argument, saying that, although his use of the amount of pulp actually imported by him in violation of the agreement on which he had obtained his import license would not have been illegal, such a violation would undoubtedly have caused the gov-

<sup>15</sup> McCardie, J., in *Blackburn Bobbin Co. v. T. W. Allen & Sons, Ltd.*, [1918] 1 K. B. 540, 548.

<sup>16</sup> 34 T. L. R. 230 (1918).

ernment to deny him the right to make further imports, "and thus he was practically prevented" from performing his contract.

It does not appear from the case whether or not the defendant could by using the first instalment of pulp imported by him for the purpose of performing the plaintiff's contract have performed that contract, even though subsequent imports would have been shut off by the government, and the language of the opinion is apparently broad enough to cover either alternative. If the refusal of further import licenses in case of noncompliance with the regulation would have made performance of the contract in question impossible, the decision is limited to a holding that impossibility of performance because of administrative prevention includes a case in which no prevention had actually taken place, but the administration had the power and the almost certain intention, if its regulations were disregarded, of taking action which would have prevented performance.

Even if so limited the case lays down a doctrine which, if followed by American courts, may prove to be of considerable importance in this country, since our own administrative regulations were frequently supported by a potential rather than by an actual exercise of statutory authority, such statutory authority being however sufficient if exercised to have rendered performance of the contract in question impossible.

It is by no means clear, however, that American courts will adopt this view of the matter. Such a view was in fact rejected in the only American case which has come to the writer's attention in which the point was raised, this being the case of *Mawhinney v. Millbrook Woolen Mills, Inc.*<sup>17</sup> In that case the defendant had delayed performance of a civilian contract because of demands by government officers that preference be given to work which the defendant had undertaken to perform for the Quartermaster Corps of the Army. It was admitted that the government might have placed an order with the defendant under section 120 of the National Defense Act, which order would have been entitled to priority under that act, and would have excused the defendant for his failure to carry out his contract, but the court held that what had been done did not amount to the placing of an order under that act and rejected the argument that the power of the execu-

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<sup>17</sup> 172 N. Y. Supp. 461 (1918).

tive to place a compulsory order was sufficient to justify the defendant's action. The language on this point is as follows:

"Nor do I accept the argument that since defendant was presumed to know that the government could commandeer its plant, the various requests for precedence, envisaged with the power to compel acquiescence, showed what would be attained by exercise of the power if denied or obstructed and so were a form of order. Some of the vigor of this argument seems to depart when it is seen how equally available it would be to a party, willing to exploit its possibilities of war profits with intended evasion or downright violation of his civilian contracts."<sup>18</sup>

It is possible to distinguish this case from the *Hulton* case since it is clear that in the *Hulton* case the government did not desire to cut off imports entirely but only to a limited extent. Apparently the only means of doing this was to enforce compliance with a nonmandatory regulation through an implied threat of complete prohibition, and hence the failure of the government actually to exercise its legal powers was no indication that the threat was not a genuine one. In the *Mawhinney* case on the other hand it might be argued that if the government had really needed priority it would have issued a statutory compulsory order. A very slight acquaintance with the actual practice of the government during the war is, however, sufficient to demonstrate that this latter suggestion is not in accord with the practical situation. For reasons which concern the administrator rather than the lawyer, the administration early adopted and rigidly adhered during the war to a policy of obtaining the priority urgently needed for governmental and other essential orders in the large majority of cases by nonmandatory directions based ultimately on the powers of compulsion rather than by the actual exercise of the statutory compulsive powers.

<sup>18</sup> The court also rejected the argument that what was done was valid as an exercise of the war power of the President. This power is vested in him as commander in chief, and, according to the Civil War cases, relates to the conduct of campaigns and the administration of martial law at the seat of war, rather than to the taking of measures not sanctioned by act of Congress for the procurement of military supplies. Cf., *Ex parte Milligan*, 4 Wall. (U. S.) 2 (1866); *Mitchell v. Harmony*, 13 How. (U. S.) 115 (1851). The changed character of modern war may have altered the situation somewhat, but it would still appear to be true that, the power to raise and support armies being vested in Congress by the Constitution it is the function of Congress rather than of the President to provide for the issuing of orders to members of the civilian population to produce war materials, and that presidential orders of this sort must have some statutory basis, direct or indirect, to have any validity.

After a preliminary period of uncertainty the plan was adopted in September, 1917, of determining priorities by means of certificates issued by the Priorities Committee of the War Industries Board under regulations drafted by that committee and approved by the Secretaries of War and of the Navy. These certificates were intended to be obeyed and were obeyed by the vast majority of the producers of the country, and the government possessed ample powers either by compulsory order or otherwise to compel compliance in any case in which compliance should be refused.

No doubt under ordinary conditions it would be the duty of a producer to let nothing stand in the way of the performance of his solemn engagement short of actual compulsion by authority of law, but, under the peculiar conditions existing during the war, a refusal to act as requested by the executive until actually compelled to do so would have merely subjected the person refusing to the imputation of obstructing the government by a failure readily to coöperate with it without in any way benefiting the other party to the contract. It would seem therefore that a court is taking an entirely artificial and unrealistic position in holding that a practice deliberately adopted by the executive and enforceable through the exercise of powers granted by the legislature will not be treated by the judiciary as governmental action which private citizens are justified in obeying. The refusal by the courts so to treat it will result, from the standpoint of defendants, in protecting only the unusually cautious and the unusually recalcitrant, and on the side of plaintiffs, in permitting the recovery by those few consumers only who had so little regard for the necessity of coöperation with the government as to refuse to acquiesce in such coöperation by the persons with whom they had made contracts.

It may be urged however that while this argument may be sound under such circumstances as those presented by the Hulton case, it is inapplicable to the case of a voluntary contract between a producer and the government, since so to apply it would, as Judge Kelby suggests in the Mawhinney case, *supra*, enable producers to take the initiative in obtaining profitable contracts with the government and then to use such contracts as an excuse for disregarding their lucrative orders from private customers.

It must be borne in mind, however, that it is not the mere existence of the government contract but the insistence on the part

of responsible officials of the government that it be given precedence which is relied on as a defense for the nonperformance of private contracts, and this only to the extent to which the giving of such preference made performance of those contracts impossible, the burden being on the defendant to prove that this impossibility existed. It is believed that where such was actually the case the question whether the initiative for the making of the contract came from the individual or the government should be immaterial. A court would scarcely refrain from holding a statutory compulsory order to be a defense because of proof that the defendant had not been unwilling to have the order placed with him; and it is the writer's view that priority certificates were, in so far at least as they were issued on government contracts, administrative substitutes for compulsory orders, substantially indistinguishable in coercive effect, and properly to be held indistinguishable in their legal effect so far as they affect actions for breach of contract.

Priority certificates were not, however, limited to direct or even indirect government orders but included under Class B priorities "orders and work which, while not *primarily* designed for the prosecution of the war, yet are of public interest and essential to the national welfare or otherwise of exceptional importance."<sup>19</sup> Thus, for example, orders for the manufacture of farm implements were given an automatic B-2 rating.<sup>20</sup> Such cases would appear to lie wholly outside the power to place compulsory orders under the war statutes previously referred to. The justification for the exercise of control by the administrative over the field could not, therefore, be based on those statutes. Its justification lay rather in the fact that the government had so far dislocated many important industries by the unprecedented requirements of the war machine that it was essential to see that the surplus was so directed as to provide for essential needs.

Legal means of enforcing priority certificates of this sort were not lacking, however. Thus few industries can exist without a supply of certain basic raw materials such as steel and copper, and control of these was early acquired by the government through agreement with the principal producers. Without questioning the

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<sup>19</sup> See Priority Circular, No. 4, issued July 1, 1918.

<sup>20</sup> See above circular.



voluntary character of the coöperation given to the government by these producers, it may be pointed out that the statutory powers of requisitioning, placing compulsory orders, and taking over plants furnished an ultimate legal basis for the control which was thus exercised. While there might in a particular case have been some question as to the power of the government to enforce by compulsory order the priority which a manufacturer was directed to give to an order from a private corporation for threshing machines, there could be little doubt of the government's power to control the country's entire production of steel, of which there was a serious shortage, by placing orders for the entire output of the steel mills or even by taking over the mills themselves. This potential control was amply sufficient to compel the steel mills to allocate steel as directed by the government.

In addition to this control over basic raw materials the government had an even more complete statutory control over coal,<sup>21</sup> transportation,<sup>22</sup> exports,<sup>23</sup> and imports,<sup>24</sup> and a very effective control over labor based in part on the administration of industrial exemptions under the draft laws,<sup>25</sup> and in part in the allocation of labor by the United States Employment Agency.

In times of peace it would no doubt be a violent distortion of legal principles for the various departments of the government to use their powers for the purpose of enforcing the rulings of a separate branch of the government. It must be borne in mind however that the powers granted by Congress in the acts passed to deal with the war emergency were conferred not for some specific purpose distinct from the activities of the government as a whole, but for the purpose of the national security and common defense, and further that these powers, although exercised by a number of

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<sup>21</sup> See Food Control Act of August 10, 1917, § 25. [Public — No. 41 — 65th Congress (H. R. 4961)],

<sup>22</sup> See Army Appropriation Act of August 29, 1916, 39 STAT. AT L., c. 418, p. 619; Amendment to Interstate Commerce Act of August 10, 1917, [Public — No. 39 — 65th Congress (S. 2356)]. Railroad Control Act of March 21, 1918 [Public — No. 107 — 65th Congress (S. 3752)].

<sup>23</sup> See Espionage Act of June 15, 1917 [Public — No. 24 — 65th Congress (H. R. 291)].

<sup>24</sup> See Trading with the Enemy Act of October 6, 1917, § 11 [Public — No. 91 — 65th Congress (H. R. 4960)].

<sup>25</sup> See Selective Service Act of May 18, 1917, 40 STAT. AT L. 76 and amendments thereto [Public — No. 29 — 65th Congress (S. J. Res. 123)].

different agencies, were conferred upon the President and thus united in him as a common head.<sup>26</sup>

Moreover, the commodities or services dealt with by the various agencies were in the main those in which a serious shortage was created by the increased demands due to war conditions, and hence these commodities or services had to be dealt with, in Justice Holmes' phrase, "like short rations in a shipwreck."<sup>27</sup> It thus became the duty of such agencies as the Fuel and Railroad administrations to distribute the supply of coal and railroad cars in such manner as to give priority to those who would use them for essential purposes. A determination by such a body as the Fuel Administration that one who was not coöperating with an important government agency in abiding by the rules laid down by it in an endeavor to build the proper industrial foundation for the Army and Navy program was not entitled to such priority would seem to be a proper use of a discretionary power given for war purposes. Conditions were in general such that a mere refusal of priority with regard to fuel, labor, transportation, and the like was practically equivalent to a complete denial of the use of such commodities or services, and hence the fear of such a denial was quite sufficient to make a manufacturer feel that a refusal by him to comply with a priority certificate issued by the War Industries Board was, from a practical business standpoint, impossible.<sup>28</sup>

If the arguments advanced above under IV are sound, such

<sup>26</sup> Even where the President was not given originally the right to delegate a particular power conferred upon him to any agency he might choose, this could be done by him after the passage of the Overman Act of May 20, 1918 [Public — No. 152 — 65th Congress (S. 3771)], authorizing him to make such redistribution of functions among governmental agencies as he might believe to be conducive to effective war making.

<sup>27</sup> See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 432 (1911).

<sup>28</sup> The following quotation from the *OFFICIAL BULLETIN* of November 2, 1918, page 3, although not relating to priority certificates, shows the manner in which War Industries Board regulations were linked up with the powers given to other agencies. "B. M. Baruch, chairman of the War Industries Board, authorizes the following: Manufacturers are prohibited from making any sales or deliveries [of lumber] except for essential uses. . . .

"Each manufacturer is required to file with the priorities division of the War Industries Board a pledge in writing. . . .

"Any manufacturer failing within 30 days after date to file the pledge above described, or to make application as provided, will thereby relinquish his right to the benefit of preferential treatment with respect to labor, or to assistance in obtaining fuel or to the automatic class rating for equipment, supplies and materials."

deprivation of fuel, labor, transportation, etc., would, so far at least as it rested upon statutory powers, be a defense for non-performance of contracts. For the reasons above stated it is believed that, under the doctrine of the Hulton case, the implied threat of such deprivation should be given the same effect, and that under war conditions it was immaterial that such an implied threat might be made by an administrative agency other than that to which the statutory power had been delegated, provided only that the circumstances were such as to cause a reasonable man to believe that the threat would if necessary have been carried out.

The effect of priority certificates and other regulations and orders of the character under discussion as a defense in actions of contract raises, however, the question, which has already been referred to in connection with the discussion of the Hulton case, *supra*, whether a contractor, in order to plead governmental compulsion as an excuse for failure to perform his contract, must show that the government had the power and apparent intention, in case of disobedience to its requests, not only to put him out of business for the future but to do so with sufficient dispatch actually to prevent performance of the contract in question.

A contractor clearly should not be compelled to gamble on the possibility that the government's action would be slow, but suppose, for example, that he needed nothing from the government but coal and had enough of that on hand to enable him to perform the plaintiff's contract even if by so doing he would have lost his right to obtain coal in the future. No doubt at first sight it may seem extraordinary to speak of a contract being made impossible of performance because of threatened action which would not if taken have prevented performance. Nevertheless, the effect of requiring performance of the contract in such a case would in general have been not only to put the defendant out of business and thus possibly to ruin him, but also to have made it impossible for him to perform his other contracts which might well have had a longer time to run and might have been capable of performance consistently with compliance with the order of the government if he obeyed that order instead of defying it. It is believed that under such circumstances it would have been, from a practical standpoint, impossible to perform the contract; and that such a

case should be held to fall within the general principle of governmental prevention above set forth.<sup>29</sup>

It may, however, be thought that the argument previously developed, as applied to such acts as the issue of priority certificates, must be limited to cases involving contracts entered into prior to the establishment of the priority system. One who, after that system had been put into operation and had become thoroughly familiar to the commercial world, made an absolute contract to make and deliver commodities of a kind on which priority certificates were issued might be said to have deliberately taken the risk of this sort of interference.

It may be doubted, however, if such was the real intention of the parties in the ordinary case. Business men no doubt frequently find it convenient to make sales in an informal manner without the drafting of elaborate contracts, and the absence of an explicit statement that the seller's obligation was subject to governmental interference or priority certificates should not be held to make the contract an absolute guaranty of delivery. As Holmes, J., said in a recent case (8) in which the doctrine of impossibility of performance was given a rather broad scope, "Business contracts should be construed with business sense, as they would naturally be construed by intelligent men of affairs."<sup>30</sup>

In a recent English case a contract to export aluminum made after war had begun and exports were restricted was treated as a contract to make reasonable efforts to obtain an export license.<sup>31</sup> It is true that to export without a license probably was illegal, which would not have been the case with regard to the giving priority to an order on which no priority certificate was issued. Nevertheless, if an agreement to export is not to be treated as a guaranty to obtain an export license,<sup>32</sup> it may fairly be argued that

<sup>29</sup> Cf. *The Kronprinzessin Cecilie*, 244 U. S. 12 (1917), in which the court held that a German ship was excused for failure to deliver a cargo of gold in England by the fact that, since war was imminent, there was grave danger that such a course would have resulted in the capture of the ship and in the detention of the German passengers.

<sup>30</sup> *Ibid.*, 24.

<sup>31</sup> *Anglo-Russian Merchant Traders v. John Batt & Co.* [1917] 2 K. B. 679. See also *Allan Wilde Transport Co. v. Vacuum Oil Co.*, Sup. Ct. Unoff. Jan. 13, 1919.

<sup>32</sup> Such a guaranty would not be illegal, although it might have some tendency to cause the use of improper means to obtain such a license. See English case cited in preceding note.

an agreement to produce is not a guaranty that government regulations such as those relating to priority will not make production impossible.

Wherever a court can thus find that a contract is not an absolute guaranty of performance, it is the contention of this article that performance should not be required by the courts of a defendant who had disregarded his contractual obligations because of administrative regulations aimed at the defendant or the class to which he belonged, where the government had the power and the apparent intention to enforce the regulations directly or indirectly in a manner which would either have made performance of the particular contract impossible or have interfered with the defendant's business so drastically as to constitute what could fairly be called administrative coercion.

It is possible that Congress may render the incorporation of such a doctrine in the common law unnecessary under present circumstances by passing an immunity act which will protect persons who have complied with administrative regulations irrespective of the existence of statutory authority for such regulations, and a precedent for so doing exists in the acts passed in 1863 and 1866 with regard to things done during the Civil War, the constitutionality of which acts was upheld by the Supreme Court in *Mitchell v. Clark*.<sup>33</sup> No doubt such a statute would simplify the situation and furnish a ready means of doing justice in cases where justice cannot be done by the courts in the present state of the law without straining that law. Nevertheless it is the writer's belief that the courts can, if the facts with regard to the true character and scope of governmental action in war time are properly brought to their attention, deal with the matter of contracts in a manner which will in general protect those who have obeyed administrative regulations during the war period.

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<sup>33</sup> 110 U. S. 633 (1884).

## JURISDICTION TO ANNUL A MARRIAGE

THE law has gone a long way from the theory that a valid matrimonial union is indissoluble. Whatever the church may say about remarriage of a party once married and divorced, the civil authority has no difficulty in saying that marriage bonds may be completely severed. It is now clear that power to dissolve a marriage relation by divorce belongs to the law where the parties are domiciled, and is based on the jurisdiction of a state to deal with the status of its citizens.<sup>1</sup>

Is the situation different when the relation of the parties is ended by a decree that the marriage was null and void, as distinguished from a divorce decree which dissolves it? In other words, does jurisdiction to annul a marriage differ from that of divorce? It is, of course, granted that any state if it pleases may treat two people as unmarried while within its borders. It may give a man a divorce whether he is domiciled there or not. Such procedure has been a national scandal. But his decree will not keep him out of trouble if he marries again in another state. In the same way a court could grant an annulment of marriage to any party before it, which, if in accordance with the local law, would entitle the party to the privileges and immunities of a single person within its borders. But this is not jurisdiction in what may be termed the international sense, in the sense in which the word is used in Conflict of Laws, a jurisdiction which will entitle the decree to recognition elsewhere. Does jurisdiction in this sense depend on domicile as does that for divorce? Eminent authority has so declared. Says Bishop:<sup>2</sup>

"A suit to declare a marriage void from the beginning concerns the marriage status precisely like one to break the marriage bond for a post-nuptial *delictum*. Therefore it may be and should be carried on in the courts of the domicile."

That a suit for annulment concerns the marriage status there is no doubt, that it concerns this relation precisely like one to break off the tie for a postnuptial *delictum* is not so clear. The effect of

<sup>1</sup> MINOR, CONFLICT OF LAWS, § 88.

<sup>2</sup> 2 BISHOP ON MARRIAGE, DIVORCE AND SEPARATION, § 73.

a divorce decree and one of nullity are certainly different. It is true that after a divorce decree the parties become strangers in the eyes of the law. Each may sue the other as though no marriage had existed;<sup>3</sup> the relationship by affinity is terminated;<sup>4</sup> the parties are no longer disqualified from testifying in a suit in which the other is concerned on the ground of interest;<sup>5</sup> the wife may be a competent witness in a criminal case against the former husband as to matters arising after the divorce.<sup>6</sup> But there is real significance in the statement that the relation is destroyed "as if by death."<sup>7</sup> It once had a lawful existence, of which the legal consequences continue even though the relation itself has terminated. Offspring born or conceived during the wedlock are legitimate;<sup>8</sup> personal choses of the wife, already reduced to possession by the husband remain his.<sup>9</sup> Communications between the parties made during the time of wedlock come within the rule excluding the admission in evidence of confidential communications between the husband and wife.<sup>10</sup>

An annulment cuts deeper. The woman, after such a decree, can sue a seducer notwithstanding a form of marriage between them, which if valid would have defeated the action.<sup>11</sup> Communications made between the parties after the marriage and prior to the decree are not treated as confidential communications between husband and wife, and there is no prohibition upon their admissibility in evidence.<sup>12</sup> The husband acquires no rights in the wife's property.<sup>13</sup> The woman may maintain an action against the man for the wrongful cohabitation.<sup>14</sup> She is not entitled to the homestead exemption given a divorced wife.<sup>15</sup> Unless a statute protects them, the children of the parties are illegitimate.<sup>16</sup> The divorce de-

<sup>3</sup> *Carlton v. Carlton*, 72 Me. 115 (1881).

<sup>4</sup> *Kelly v. Neely*, 12 Ark. 657 (1852).

<sup>5</sup> *State v. Jolly*, 3 Dev. & B. (N. C.) 110 (1838).

<sup>6</sup> *Long v. State*, 86 Ala. 36, 5 So. 443 (1888).

<sup>7</sup> 9 R. C. L. 486.

<sup>8</sup> *Wait v. Wait*, 4 N. Y. 95 (1850).

<sup>9</sup> *Lawson v. Shotwell*, 27 Miss. 630 (1854).

<sup>10</sup> *Griffeth v. Griffeth*, 162 Ill. 368, 44 N. E. 820 (1896).

<sup>11</sup> *Henneger v. Lomas*, 145 Ind. 287, 44 N. E. 462 (1896).

<sup>12</sup> *Wells v. Fletcher*, 5 Car. & P. 12 (1831).

<sup>13</sup> *Aughtie v. Aughtie*, 1 Phillimore Ecc. 201 (1810).

<sup>14</sup> *Blossom v. Barrett*, 37 N. Y. 434 (1868).

<sup>15</sup> *Floyd County v. Wolfe*, 138 Iowa, 749, 117 N. W. 32 (1907).

<sup>16</sup> 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, § 277; 2 *Ibid.* § 1602. See 3 CORNELL L. QUART. 51, for collection of New York cases under the provisions of the

cree, in short, cuts off and destroys the ill-favored marriage plant, annulment tears it up by the roots.

Through a great deal of the authority on this subject of annulment of marriage, there is nevertheless a failure to distinguish nullity and divorce suits. One judge has called an attempt to differentiate them a mere juggling with terms.<sup>17</sup> That courts should often use the terms interchangeably and apply statutes provided in divorce cases to suits for annulment is not surprising; nor is it to be wondered at that legislatures assume a common ground of jurisdiction for both. The common use of the terms is of long standing. Back in the time of Coke that venerable jurist, in commenting on a statement of Littleton's concerning the effect of a divorce in the law of estates, explains that there are two kinds of divorce:<sup>18</sup>

"One *à vinculo matrimonii*, and the other *à mensâ et thoro*. . . . Divorces *à vinculo matrimonii* are these; *Causâ praecontractûs*, *causâ metûs*, *causâ impotentiae seu frigiditatis*, *causâ affinitatis*, *causâ consanguinitatis*. . . . *A mensâ et thoro*, as *causâ adulterii*, which dissolveth not the marriage *à vinculo matrimonii*, for it is subsequent to the marriage."

Blackstone<sup>19</sup> also, instead of contrasting divorce and annulment, speaks of two kinds of divorce, and points out that a total divorce must be for some of the canonical causes or impediments existing before marriage. "For in cause of total divorce, the marriage is declared null, as having been absolutely unlawful *ab initio*, and the parties are therefore separated *pro salute animarum*." The issue of the marriage thus entirely dissolved are bastards.

Divorce in ecclesiastical law, and in the sense in which these writers are using the term, meant two things: first, divorce *a mensa*, or modern judicial separation, after which, as Coke says, "the coverture continueth;" second, annulment, which then as now was declared

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New York Domestic Relations law which seems to make nullity decrees in some cases speak from the time they are pronounced only.

<sup>17</sup> *Mitchell v. Mitchell*, 63 Misc. 580, 117 N. Y. Supp. 671 (1909). "A mere difference in form" it was called in *Turner v. Thompson*, 13 P. D. 37 (1888). Perhaps it was in the particular case, where a woman who had previously secured a divorce in the United States on the ground of her husband's incompetency, was seeking an annulment of the marriage, which had taken place in England. Being already free, she was in no need of a further decree.

<sup>18</sup> COKE ON LITTLETON, 235 a.

<sup>19</sup> 1 COMMENTARIES, 440 *et seq.*



for causes existing prior to the marriage. All matters pertaining to the marriage relation were adjudicated in the ecclesiastical courts, and the doctrine of the church was firm against the possibility of dissolving a valid marriage. The theory was preserved by giving wide scope to the doctrines by which a marriage could be avoided. While it accomplished for the party the same practical results as a modern divorce, freedom from a burdensome matrimonial yoke, and was perhaps easier to get, the theory was entirely different. A marriage, said the church court, had never existed.<sup>20</sup> Though in exceptional cases, beginning with the seventeenth century, marriages were dissolved by Act of Parliament, it was not until the Matrimonial Causes Act that an English court could decree a dissolution of a validly existing marriage.<sup>21</sup>

Coke and Blackstone were not confused on the difference between divorce and annulment, because divorce as we now have it in the law was unknown to them. If divorce in our day meant the same as in Coke's, perhaps we should have no need to distinguish divorce and nullity jurisdiction. Since it does not, it would be well to keep the difference clearly in mind. With characteristic felicity of statement, Mr. Justice Holmes has used, in another connection, language applicable here:<sup>22</sup>

"As long as the matter to be considered is debated in artificial terms there is a danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied."

It is clear that divorce and annulment do not affect marital relations in the same way. It is the contention here that as the results of the two differ, so jurisdiction for an action to nullify a marriage differs from that for divorce, and the difference is caused by the

<sup>20</sup> See the interesting discussion by J. W. Brodie-Innes, "Some Curiosities of Marriage Law," 13 ILL. L. REV. 183. See also Lord Bryce, "Marriage and Divorce," 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 782, 822 *et seq.*

<sup>21</sup> See Holdworth, "Ecclesiastical Courts," in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 297 *et seq.* Sir W. Page Wood, V. C., in *Wilkinson v. Gibson*, L. R. 4 Eq. Cas. 162, 166 (1867); "... Whenever such expressions as divorce *à vinculo* occur, they always refer to cases where there never existed a *vinculum*, and the so-called marriage was never a marriage at all." Sir William Scott in *Proctor v. Proctor*, 2 Hagg. Cons. 292, 296 (1819): "The obligations of marriage might be suspended but could not be extinguished, the parties might be released in certain cases from personal cohabitation, but the relations of husband and wife still subsisted."

<sup>22</sup> *Guy v. Donald*, 203 U. S. 399, 406 (1906).

fundamental distinction between the objects of the two suits. It seems worth while to analyze the situation as it appears on principle, then to ascertain how far court decisions and legislative enactments affect the result.

Suppose that parties resident in state A have married there, and have lived (that is, have been domiciled) successively in states A, B, C, and D. Now while they are domiciled in D one of them seeks to have the marriage annulled. It would be an anomalous doctrine that would permit state D to declare the relations of this pair were meretricious throughout, to go back and change the whole legal effect of their relations prior to the time they became citizens of D. The man might have married his deceased wife's sister, and the marriage might have been perfectly lawful in A, and in B and C as well. Is the effect of the D decree to proclaim the children forever bastards, to make confidential communications between these people subject to disclosure in any court, to render this man liable to an action by the woman? It is conceded, of course, that D can say, for whatever reasons that seem to it sufficient, that these parties, now domiciled within its borders, are no longer fit to live together as husband and wife, and can divorce them, free them from that time on. But how can it say that they never were married, when A, in which jurisdiction they lived when the contract took place, and which controlled their status then as fully as D does now, declared them husband and wife? Jurisdiction A would not and could not say that because a pair entered into the marriage relation as citizens therein, that another state in which they subsequently became domiciled could not put an end to the status.<sup>22</sup> But A has fully as much right to take this ground as D has to say the status never existed. A court having a thing before it may, by a decree *in rem*, change rights in the thing the validity of which will be recognized everywhere. But no one would contend that such a court could effectively say that rights vesting under a prior decree in a different jurisdiction where the *res* then was, had never existed. So here: the marriage relation is the *res*, and is so treated in divorce actions. The court having the domicile of the parties has jurisdic-

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<sup>22</sup> See *Harvey v. Farnie*, L. R. 8 A. C. 43 (1882); *Bater v. Bater*, [1906] P. 209; and as recognizing an opposite doctrine, *Hull v. Hull*, 2 Strob. Eq. (S. C.) 174, 177 (1848). The court there opines that a South Carolina marriage may not be dissolved, though that of another state may.

tion *in rem*. But it cannot set aside what the former sovereign controlling the *res* has done. The Supreme Court of South Dakota seems entirely correct in holding that when first cousins were married in California, where they lived, and where such a marriage was legal, a decree of annulment could not be granted in South Dakota, where such a marriage was forbidden, even after the petitioner has made a home there.<sup>24</sup> Corson, J., said:

"The courts in this state are clearly without authority under the general principles applicable to the law of marriages to annul a marriage legal and valid in a state where the same was contracted, and where the parties were domiciled."

The correctness of the actual result is emphasized by the cautious reservation, in a concurring opinion by Whiting, C. J., adopted by the remainder of the court, wherein he declined to express an opinion on the criminal liability of the parties for cohabitation in South Dakota. It could well be that while the California marriage could not be annulled, South Dakota could punish cohabitation of cousins, whether married or not, if such association was abhorrent to Dakota morals.

If this position is sound, and jurisdiction to annul a marriage is not to be assumed by the law of the domicile of the parties, what law can decree it null and void? The logical answer is, that since the annulment goes back to the question of inception of the marriage status, it ought to be the law by which the status would come into being that should say that despite the form this man and woman went through they never became husband and wife.<sup>25</sup> It would not matter whether the parties at the time the question arises had become domiciled in another jurisdiction. The state pronouncing the decree of nullity is not seeking to affect a *res* over which it no longer has control; it is saying that no *res*, that is, marriage relationship, ever came into being. It certainly can do that, as well as it can control a judgment pronounced in one of its own courts. Further, the question should be referred back to this jurisdiction. In the matter of dissolving a marriage status, state X, where the parties are personally present, will not give a divorce decree to

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<sup>24</sup> *Garcia v. Garcia*, 25 S. D. 645, 654, 127 N. W. 586 (1910).

<sup>25</sup> This view is taken in a well-written note on the point in 26 HARV. L. REV. 253. The note writer probably, and the present writer certainly, is indebted for the idea to a suggestion made by Prof. Joseph H. Beale in his course on the Conflict of Laws.

them if domiciled elsewhere, even applying the law of Y, their domicile. If they are to have a divorce they must go to Y to get it. A declaration of nullity is a more delicate matter than divorce, because of its effect on events between marriage and decree. The jurisdiction governing the marriage and no other should pronounce it annulled.

The determination of the original validity of a marriage may involve two laws, if the contracting parties are married in a state other than that of their domicile. It is said generally, especially by American authorities, that a marriage good where contracted is good everywhere.<sup>26</sup> And there are many extreme examples in the American cases where a marriage contracted out of the state has been declared valid, though expressly forbidden by the law of the contracting parties' domicile.<sup>27</sup> If the law of the state where people go through a marriage form is not complied with, the first essential to the creation of a marriage status is lacking. If the *lex loci celebrationis* demands certain forms, declares certain people unfit to marry, or makes other requirements, it has jurisdiction to declare that the failure of parties to comply with what it deems essential prevented them from becoming husband and wife, and to declare their attempt null and void.

But the place where a man and woman happen casually to be at the time of a marriage ceremony cannot have a final determination of this matter of marriage. The marriage status both in its creation and destruction is of great importance not only to the individual, but also to the state where he makes his home.<sup>28</sup> With the insistence of the law upon vigorous adherence to the right of domicile in ending the status, is it to be ignored entirely in the equal important creation? It is believed that the beginning of the marital relation is really a matter for the domiciliary law. But following a

<sup>26</sup> MINOR, CONFLICT OF LAWS, § 77; STORY, CONFLICT OF LAWS, § 113.

<sup>27</sup> *Dudley v. Dudley*, 151 Iowa, 142, 130 N. W. 785 (1911); *Commonwealth v. Lane*, 113 Mass. 458 (1873); *Medway v. Needham*, 16 Mass. 157 (1819); *Stevenson v. Gray*, 17 B. Mon. (Ky.) 193 (1856); *In re Wood's Estate*, 137 Cal. 129, 69 Pac. 900 (1902); *State v. Shattuck*, 69 Vt. 403, 38 Atl. 81 (1897); *Ex parte Chace*, 26 R. I. 351, 58 Atl. 978 (1904).

<sup>28</sup> That marriage relations are of consequence to the state has not always been the rule. In his interesting discussion on Marriage and Divorce, Lord Bryce shows how under the Roman law the entering and the leaving of the marriage relation was treated as the sole business of the parties themselves. 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 782.

general policy of encouraging marriage, and for reasons of convenience, the law of the domicile says, usually, if the parties' marriage is valid where contracted, that is sufficient to establish the marriage status.<sup>29</sup> Devolution of personal property is according to the law of the domicile of the deceased at the time of his death, but only because the law of the situs of the property permits it so to go.<sup>30</sup> The state of the situs can tax the passing by inheritance;<sup>31</sup> it can, and sometimes does, change the rule so that its own statute of distributions governs the succession.<sup>32</sup> So in marriage the sovereign of the marrying party's domicile may refuse to make him a married man despite a valid ceremony elsewhere. English courts say an Englishman will not be married by a ceremony of marriage valid where entered into, unless he has capacity to marry by English law.<sup>33</sup> They hold that where the marriage is of a kind abhorrent to their ideas of morality and forbidden by English law, no marriage relation is created by a foreign marriage of an Englishman, though valid where celebrated.<sup>34</sup> Southern states have said that a ceremony of marriage of one of their citizens with a member of another race forbidden by their laws created no relation of wedlock,<sup>35</sup> even if celebrated in another state where permitted. Statutes frequently declare invalid marriages contracted abroad by the citizens with intent to evade the marriage laws of their domicile.<sup>36</sup> And in the case of persons married where there is no law, or no law of nuptial contracts, how can following the form of the law of domicile be effective to make them husband and wife, as text-writers often say,<sup>37</sup>

<sup>29</sup> See a note on "Validity of Foreign Marriages," 26 HARV. L. REV. 536, containing about the same idea as that expressed here.

<sup>30</sup> See Prof. Charles E. Carpenter in 31 HARV. L. REV. 905, 920, 921.

<sup>31</sup> *Matter of Swift*, 137 N. Y. 77, 32 N. E. 1096 (1893). For a statute, so doing, IOWA CODE SUPP. § 1481 a.

<sup>32</sup> HURD'S REV. STATS. OF ILLINOIS, 1917, c. 39, § 1.

<sup>33</sup> See the valuable discussion of the English cases in an article, "Capacity and Form of Marriage in the Conflict of Laws," by Thomas Baty, 26 YALE L. J. 444.

<sup>34</sup> *Brook v. Brook*, 9 H. L. C. 193 (1861).

<sup>35</sup> *State v. Kennedy*, 76 N. C. 251 (1877); *Kinney v. Commonwealth*, 30 Gratt. (Va.) 858 (1878); *State v. Tutty*, 41 Fed. 753 (1890).

<sup>36</sup> D. C. CODE, § 1287 (1902); BURNS ANN., IND. STAT., Revision of 1908, § 8367; REV. STAT. MAINE, 1916, c. 64, § 10; MASS. REV. LAWS, c. 151, § 10.

<sup>37</sup> MINOR, *supra*, § 77. The opinion of Huber, who is declared by Professor Lorenzen to have had "a greater influence upon the development of Conflict of Laws in England and the United States than any other work," is interesting in this connection even though perhaps not of great importance. He says (translation by Professor Lorenzen): "It often happens that young people under guardianship, desiring to unite their secret

if it is not the law of that domicile after all, which is the real creator of the marital relation?

There are numerous cases in this country where, in various situations, the court at a person's domicile has refused to recognize a marriage contracted outside his own state, in evasion of its laws, where the legislature has expressly, or in the opinion of the court, impliedly, announced the state's policy against such union.<sup>38</sup> Such results are from one standpoint unfortunate, for they render uncertain the marriage relation. But the adoption of the policy of refusing to recognize the marriage is a matter for each state to determine for its own citizens,<sup>39</sup> and uniformity of ideas on this subject seems a long way off.

To recapitulate: since annulment of a marriage differs so fundamentally from divorce, in that while the latter severs the matrimonial bonds, the former declares they never existed, jurisdiction to render the nullity decree is not to be found where the parties at the time it is sought may be domiciled. Only the law by which the marriage came into being has power to annul it. If the place of contract, domicile at the time of the marriage and domicile at the time of annulment, are the same, no difficulty is presented. If the place of contract is another state, its law can say that the parties involved did not validly contract, and there is then nothing on which a marital status can be predicated. Despite a valid ceremony by *lex loci contractus*, the then domiciliary law may say that no marriage status is created. But if the marriage can successfully run this gauntlet, it stands until dissolved by death or divorce.

If there is jurisdiction over the subject matter as worked out in the above discussion, it would seem that the proceedings would be

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desires through the bonds of matrimony, go to Eastern Frisia or to some other place where the consent of their guardian is not necessary to marriage. . . . They celebrate their marriage there and presently return home. I consider this a manifest evasion of our law. Our magistrates are not bound therefore by the law of nations to recognize and give effect to marriages of this kind." 13 ILL. L. REV. 375, 410, 411.

<sup>38</sup> *Pennegar v. State*, 87 Tenn. 244, 10 S. W. 305 (1889). See cases cited in 26 HARV. L. REV. 536.

<sup>39</sup> WHARTON ON THE CONFLICT OF LAWS, 3 ed., § 165 b. "Each State or nation has ultimately to determine for itself what statutory inhibitions are by it intended to be imperative as indicative of the decided policy of the State concerning the morals and good order of society to that degree which will render it proper to disregard the *jus gentium* of 'valid where solemnized valid everywhere.'" *Pennegar v. State*, 87 Tenn. 244, 249, 10 S. W. 305 (1889).

as in any other action *in rem*, service on the respondent being necessary only for due process. The *res* would be the question of the marriage status, *maritatus vel non*. When the validity of a will is established by a court having jurisdiction, its determination is conclusive.<sup>40</sup> So here the existence or nonexistence of the marriage relation would be settled. Condemnation of goods in a revenue case, a grant of probate, and a decree in a matrimonial suit are all said to be judgments *in rem*, though the proceedings in form are *in personam*.<sup>41</sup>

When the authorities are examined, the conclusion is that the basis of jurisdiction has not been clearly enough marked out to establish any definite rule. Statements may be found to the effect that in annulment, as in divorce, jurisdiction depends on domicile.<sup>42</sup> These statements are practically all based on the same small group of cited cases, which will be examined in more detail.

English authorities state that the English courts have jurisdiction to declare a marriage a nullity in two situations: first, when the marriage was celebrated in England; second, where the respondent is resident in England at the date of the petition. The various text-writers state the rule in almost identical language and cite the same authorities in its support.<sup>43</sup> That the state where the marriage was celebrated has authority to declare it a nullity was the view contended for above. It is supported by the text-writers just cited and several English decisions squarely on the point. In *Linke v. Van Aerde*<sup>44</sup> the parties were not citizens, nor was either domiciled there when suit was brought, yet the court was clear it had jurisdiction. To the same effect are *Simonin v. Mallac*,<sup>45</sup> where both parties were French, and *Sottomayor v. De Barros*,<sup>46</sup> where they were

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<sup>40</sup> *Whicker v. Hume*, 7 H. L. C. 124 (1858); *Thomas v. Morrisett*, 76 Ga. 384 (1886); *WHARTON ON THE CONFLICT OF LAWS*, 3 ed., §§ 595, 644.

<sup>41</sup> 1 *HALSBURY'S LAWS OF ENGLAND*, 48, citing for probate proceeding *Noell v. Wells*, 1 Lev. 235 (1667); for matrimonial decree, *Dacosta v. Villa Real*, 2 Str. 961 (1734), and *Bater v. Bater*, [1906] P. 209.

<sup>42</sup> *BISHOP*, *supra*, note 2; *KEEZER ON MARRIAGE AND DIVORCE*, § 56; 19 *AM. AND ENG. ENCYC. LAW*, 2 ed., 1219; 26 *CYC.* 908.

<sup>43</sup> *DICEY ON THE CONFLICT OF LAWS*, 2 ed., 268; *WESTLAKE'S PRIVATE INT. LAW*, 5 ed., § 49; *FOOTE'S PRIVATE INT. JURISPRUDENCE*, 4 ed., 123; 6 *HALSBURY'S LAWS OF ENGLAND*, 265.

<sup>44</sup> 10 T. L. R. 426 (1894).

<sup>45</sup> 2 Sw. & Tr. 67 (1860).

<sup>46</sup> 3 P. D. 1 (1877).

Portuguese, but where in each case the marriage occurred in England.<sup>47</sup>

To say that the residence of the defendant gives jurisdiction for annulment is opposed to the reasoning above and seems hard to explain. Dicey takes the statement from Westlake. In the cases which Westlake cites,<sup>48</sup> the judges are trying to establish that residence as something less than domicile is sufficient to found the suit. In *Roberts v. Brennan* a decree of nullity was pronounced when the marriage had taken place in the Isle of Man, and respondent was domiciled, and served in Ireland. This case (which was undefended) does not seem to carry out the part of the rule requiring residence of the respondent, nor was the petitioner resident in England so far as the facts reported show. It will be remembered that the English Matrimonial Causes Act<sup>49</sup> vested in the royal courts all jurisdiction then vested in the ecclesiastical courts in respect to suits of nullity and other matters matrimonial. As pointed out by James, L. J., in the *Niboyet* case, the jurisdiction of the courts Christian was one over persons who by baptism became members of the church. Residence in the diocese, as distinguished from mere temporary presence was required to make one amenable to the orders of the spiritual authorities there, but nationality and domicile were not concerned. Furthermore, the diocese and the state were not necessarily coterminous. The Channel Islands, which are no part of England, the learned judge observes, are in the diocese of Winchester, and the Isle of Man is in the province of York; and many similar cases might be found on the Continent.

Jurisdiction for divorce in England is based on domicile.<sup>50</sup> This was not expressly required by the statute giving the court power to decree divorce, but with no precedents in ecclesiastical law to affect the question, the matter was decided on general principles. In the question of annulment, as in case of judicial separation,<sup>51</sup> ecclesiastical rules obtrude. Requirement of residence of a defendant might conceivably be treated as an additional municipal require-

<sup>47</sup> *Accord* Brett, L. J., in *Niboyet v. Niboyet*, 4 P. D. 1, 18 (1878), and *Sproule v. Hopkins*, [1903] 2 Ir. 133. See also *Bater v. Bater*, [1906] P. 209, 220.

<sup>48</sup> *Niboyet v. Niboyet*, 4 P. D. 1, 9 (1878); *Roberts v. Brennan*, [1902] P. 143.

<sup>49</sup> 20 & 21 VICT. c. 85, § 6.

<sup>50</sup> *Le Mesurier v. Le Mesurier*, [1895] A. C. 517.

<sup>51</sup> See *Armytage v. Armytage*, [1898] P. 178.



ment to what would be required for jurisdiction on general principles of law. An analogy for this could be found in divorce law. Residence for a given period of one, two, or three years is a frequent statutory provision. This, by the prevailing view, is interpreted as an addition to the common-law requirement of domicile.<sup>52</sup>

Presence of the respondent within the limits of the jurisdiction or his appearance in court seemed to be necessary in order for the ecclesiastical court to proceed.<sup>53</sup> This rule apparently has an historical foundation.<sup>54</sup> It is not a question of jurisdiction in the wider sense, but of the competency of this particular court.

Since the English authorities insist strongly that the capacity of an Englishman to marry is governed by English law, it would be expected that English courts would assert their power to determine annulment suits brought by persons domiciled there when the questioned marriage took place elsewhere. There is such authority both in England<sup>55</sup> and Ireland.<sup>56</sup>

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<sup>52</sup> Joseph H. Beale in 4 IOWA L. BULLETIN 3, 8, citing *Jenness v. Jenness*, 24 Ind. 355 (1865); *Johnson v. Johnson*, 12 Bush (Ky.) 485 (1877); *Tipton v. Tipton*, 87 Ky. 243, 8 S. W. 440 (1888); *Pate v. Pate*, 6 Mo. App. 49 (1874); *Hopkins v. Hopkins*, 35 N. H. 474; (1857) *Schonwald v. Schonwald*, 2 Jones Eq. (N. C.) 367 (1856); *Dutcher v. Dutcher*, 39 Wis. 651 (1876); *Long v. Long*, 18 Victorian L. R. 792 (1892).

<sup>53</sup> *Williams v. Dormer*, 2 Rob. Ecc. 505 (1852); *Chichester v. Donegal*, 1 Ad. Ecc. 5, 19 (1822).

<sup>54</sup> The following from 11 HALSBURY'S LAWS OF ENGLAND, 507, note, seems to explain this further. "The Consistory Court of London from the time of Queen Elizabeth down to January, 1858, . . . was the only ecclesiastical court of first instance in England which was accustomed to entertain matrimonial and divorce suits from all parts of England. The origin of this jurisdiction was as follows: Prior to the reign of Henry VIII, a person might cite to appear in the ecclesiastical court of his own diocese a party residing in another diocese. By STAT. (1531), 23 HEN. VIII, c. 9, parties were not to cite a defendant to appear in a court out of his diocese. The common law courts, however, held that this statute was intended to be merely for the benefit of the subject, and that if both parties to a suit were willing to have it tried in a court in a diocese in which one of them did not reside, they might do so. Suitors . . . in heavy and important causes preferred to have their case tried in the Consistory Court of London. . . . In these cases the practice was for the petitioner in the suit to take up a residence for twenty-one day's in the diocese of London, and then to apply to the Consistory Court to issue a citation to the proposed defendant in the suit. . . . If the defendant entered an appearance objecting under the Statute of Henry VIII to the jurisdiction of the court the suit was dropped; but if the defendant entered an appearance to the citation or took no notice of it, it was assumed that the party waived the objection to the jurisdiction, and the suit proceeded and was heard and decided in the London court in due course."

<sup>55</sup> *Bonaparte v. Bonaparte*, [1892] P. 402; *Bater v. Bater*, [1906] P. 209.

<sup>56</sup> *Johnson v. Cooke*, [1898] 2 I. R. 130, commented upon in 13 HARV. L. REV. 604

If the English law would recognize the validity of foreign decrees of nullity of marriage, pronounced under the conditions under which an English court would take jurisdiction, some general doctrine of the requisites for a nullity suit might be said to be established. But in the important case of *Ogden v. Ogden*<sup>57</sup> the Court of Appeals held that a decree of a French court annulling a marriage in England between a Frenchman and an Englishwoman was not entitled to recognition in England, and the woman's second marriage, entered into after the French decree, was rendered bigamous. But here the French court had as much basis for jurisdiction as did the court in *Bater v. Bater*, or the Irish court in *Johnson v. Cook*. In *Simonin v. Mallac*<sup>58</sup> a previous French decree of nullity was likewise disregarded. The citations in cases and texts go back to Sir William Scott's judgment in the case of *Sinclair v. Sinclair* in 1798.<sup>59</sup> To a suit by a wife the husband set up a decree of nullity of marriage, pronounced in Brussels on proceedings instituted by him. The marriage had taken place in Paris. Said the court:

"A sentence of nullity of marriage . . . in the country where it was solemnized would carry with it great authority in this country; but I am not prepared to say, that a judgment of a third country, on the validity of a marriage not within its territories, nor had between subjects of that country, would be universally binding."

This seems entirely right — but it does not say, as Sir Gorrell Barnes in *Ogden v. Ogden* seems to cite it to say, that a foreign nullity is of no effect in England. The learned judge intimates that if a decree of nullity on the ground of impotence were given in either the court of the domicile, or where the marriage was celebrated, it might be treated as universally binding. Why a decree on this ground is to be given special recognition is not explained. At any rate, the doctrine in the cases stated, that the decree of nullity of a foreign court is not conclusive in England is recognized to be the existing law.<sup>60</sup> The resulting situation is certainly an unfortunate one, but is not the only instance of the English law's refusing to recognize rights given under foreign law which it gives under similar conditions by its own.

<sup>57</sup> [1908] P. 46, 78 *et seq.*

<sup>58</sup> 2 Sw. & Tr. 67 (1860).

<sup>59</sup> 1 Hagg. Cons. 294, 297 (1798).

<sup>60</sup> 6 HALSBURY'S LAWS OF ENGLAND, 271; FOOTE'S PRIVATE INT. JURISPRUDENCE, 4 ed., 114; WESTLAKE, *supra*, 98.

Only a few American cases have raised the question of jurisdiction for annulment of a marriage, and they cannot be said, in spite of pretty flat statements of a rule in the texts, to establish any definite trend of authority. New York started out with a statement to the effect that

" . . . the *lex loci* which is to govern married persons and by which the contract is to be annulled, is not the law of the place where the contract was made, but where it exists for the time, where the parties have their domicile . . ."<sup>61</sup>

a perfectly true statement<sup>62</sup> as regards divorce, which the court was talking about, and which the reference to Story sustains. In a later case<sup>63</sup> New York citizens went into Canada and went through a marriage ceremony. The girl was under age and subsequently the marriage was declared a nullity by the New York court. The point emphasized was that the parties were residents of New York. While the distinction between annulment and divorce was not made, and divorce cases were cited and relied on, yet the result is not improper. New York law has the final word in saying whether a marriage status was created between New York people. A later case on similar facts was decided by the Court of Appeals the same way.<sup>64</sup> The policy of these cases may or may not be right. They do not fit the American doctrine that a marriage good where celebrated is good everywhere. But from a jurisdictional standpoint, if a state refuses to recognize a marriage status for its citizens when married outside the state in violation of its law, it has the power to do so. That is the only point here.

A Vermont case,<sup>64</sup> while relying on the statement found in Bishop, nevertheless presents the same facts, for the petitioner was a Vermonter when he married in Massachusetts. The New Jersey case of *Blumenthal v. Tannenholz*<sup>65</sup> denied the authority of a New Jersey court to annul a marriage which had taken place in New Jersey, which the complaining party alleged to have been

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<sup>61</sup> Church, J., in *Kinnier v. Kinnier*, 45 N. Y. 535 (1871).

<sup>62</sup> *Mitchell v. Mitchell*, 63 Misc. 580, 117 N. Y. Supp. 671 (1909).

<sup>63</sup> *Cunningham v. Cunningham*, 206 N. Y. 341, 99 N. E. 845 (1912). The case is criticized in 26 HARV. L. REV. 253; *Hall v. Hall*, 67 Misc. 267, 122 N. Y. Supp. 401 (1910), was to the same effect, though it is to be noted that it does not appear therein where the parties were domiciled at the time of the marriage.

<sup>64</sup> *Barney v. Cunes*, 68 Vt. 51, 33 Atl. 897 (1895).

<sup>65</sup> 31 N. J. Eq. 194 (1879).

fraudulently made to understand a mere betrothal. The complainant was at the time of the marriage and suit a resident of Canada; the defendant's residence was not shown. The court relied on Bishop's requirement of domicile. It is hard to say anything about the case further than respectfully to dissent from its conclusions. If New Jersey could not say that these parties had never gone through a marriage ceremony, no state could. The strongest case against the position taken in this discussion is another New Jersey decision, *Avakian v. Avakian*.<sup>66</sup> It was held that the New Jersey court had jurisdiction to annul a marriage contracted in England between a resident of Massachusetts and an Armenian, who at the time was on her way to New Jersey to take up her residence. Here was neither marriage in New Jersey, nor a party there domiciled at the time of the marriage. If the parties were in fact married at all, and the court assumes they were, there would not be a domicile in New Jersey at the time of the suit. Pitney, V. C., who delivered the opinion of the court, is not sure that domicile was necessary, since the defendant was present in court. This case would not support Bishop, either, and would seem to require only presence of the plaintiff and personal service on the defendant. It would have been a hard case on its facts to have decided against the petitioner.

If any case could show the undesirable results of Bishop's rule it is the Illinois court's decision in *Roth v. Roth*.<sup>67</sup> Roth, a subject of Würtemberg, came to Illinois, acquired a domicile, and there made his fortune. He was married, while in Illinois, to a woman who was also domiciled there. Later Roth went back to Würtemberg, where he secured a decree of nullity of the marriage because he, as a subject of Würtemberg, had married outside the country without the sovereign's consent. The Illinois court, while stating that the marriage was valid and binding there (as of course it very clearly was), held that the first wife was not entitled to a widow's share in Roth's Illinois property. Mulkey, J., said:

"It was therefore, according to the general current of authority on the subject, entirely competent for the courts of that kingdom having jurisdiction of such matters to give effect to that law by annulling and setting aside the marriage. . . ."<sup>68</sup>

<sup>66</sup> 69 N. J. Eq. 89, 60 Atl. 521 (1905).

<sup>67</sup> *Ibid.*, 50.

<sup>68</sup> 104 Ill. 35 (1882).

The dissenting opinion of Walker, J., is worth quoting from:

"Had any court having competent jurisdiction granted a divorce, then by abrogating the marriage contract she would have lost her rights to dower and heirship, because the contract was destroyed in all of its parts, and the parties absolved from its performance, and all rights under it destroyed and ended. But in this case there was no divorce, but it was decreed, in the teeth of our never doubted laws, to have been void."<sup>69</sup>

South Dakota, in a case already mentioned,<sup>70</sup> has clearly said it will not decree nullity of a California marriage, even though by the laws of the new domicile it would be invalid. Massachusetts has properly refused to recognize a nullity decree of a New York court, where the husband was domiciled, when the marriage took place in Massachusetts between parties at the time domiciled there.<sup>71</sup> While this decision does not decide on its facts where jurisdiction was to give a valid nullity decree, it opposes Bishop's statement that domicile is the foundation.

Finally, in *Lery v. Downing*<sup>72</sup> the Massachusetts court refused to annul a marriage entered into by Massachusetts parties in New Hampshire. No Massachusetts statute declared the marriage void, though a New Hampshire statute said it was voidable. The court said that the marriage would stand until avoided in New Hampshire. The case comes to a different result from that reached in the New York cases cited,<sup>73</sup> but is not necessarily opposed on principle. Here was no declared policy of Massachusetts which would refuse to create a marriage status for its citizens upon a marriage good until the state where it took place declared it avoided. In New York there was, or the court thought there was. The Massachusetts result is desirable, but since both the *lex loci contractus* and the *lex domicilii* are concerned in creation of the marriage state of these people, either could, by annulment, avoid the marriage.

A recent Wisconsin case can hardly be sustained on this theory set forth above. The parties, who resided in Wisconsin, were married in Minnesota. One of them was an epileptic, and the marriage, by the Minnesota statute, was voidable, but valid until

<sup>69</sup> Bishop of course approves this case. See vol. 2, 35, note, of his *MARRIAGE, DIVORCE AND SEPARATION*.

<sup>70</sup> *Garcia v. Garcia*, 25 S. D. 645, 127 N. W. 586 (1910).

<sup>71</sup> *Cumington v. Belchertown*, 149 Mass. 223, 21 N. E. 435 (1899).

<sup>72</sup> 213 Mass. 334, 100 N. E. 638 (1913).

<sup>73</sup> See *supra*, note 50.

avoided. In a suit for declaration of the validity of the marriage in Wisconsin a decree of nullity was pronounced.<sup>74</sup> It would seem that if this marriage was not contrary to Wisconsin law, the parties would be man and wife until Minnesota, the only state whose law was transgressed, set it aside. The Wisconsin court should have insisted, as did that of Massachusetts, that the parties go back to the state of the marriage if it was to be declared a nullity.

Statutory provisions regarding annulment and their interpretation by courts do not furnish much light as to the principle behind them. Early American statutes often used the term "divorce" as including both divorce and annulment, though the dissolution from legally existing bonds of matrimony was provided for at an early date.<sup>75</sup> Some of our states have no statutory provisions for annulment at all. Colorado makes a cause for divorce what would generally be treated as a basis for a nullity decree, but does not provide for annulment as such.<sup>76</sup> Without statute it has been recognized that there is general jurisdiction in a court of equity to decree null and void a marriage where the cause alleged is one of the well-known grounds on which equity gives relief in cases of contract.<sup>77</sup> The frequent situation is that certain causes for annulment are specified in a general chapter on "Divorce" or "Marriage and Divorce."<sup>78</sup> Whether or not a one-year residence requirement laid down for divorce suits is applicable to a nullity suit is the subject of a difference of judicial opinion.<sup>79</sup> Answering the question may be, as it was in the Minnesota case, a matter of statutory construction, rather than one concerning the nature of annulment. While domicile is enough to found jurisdiction for divorce, statutes generally require a person to be domiciled for a definite period before he can sue for a divorce. And when annulment is treated in the same connection, it may well be that such residence is required for this action too. On the ground that the

<sup>74</sup> *Kitzman v. Kitzman*, 166 N. W. 789 (Wis. 1918.)

<sup>75</sup> See 3 HOWARD, HISTORY OF MATRIMONIAL INSTITUTIONS, 5 *et seq.*

<sup>76</sup> See MILLS, ANNOTATED STAT. 1912, c. 46, 977.

<sup>77</sup> 26 CYC. 908, and cases cited.

<sup>78</sup> COMP. L. OF OKLAHOMA, 1909, c. 87; 1 BIRDSEYE, COMP. L. OF N. Y., 1016; KENTUCKY STATS. 1915, § 260 *et seq.*; KANSAS GEN. STAT. 1915, § 7585.

<sup>79</sup> That the statute does apply: *Eliot v. Eliot*, 77 Wis. 634, 46 N. W. 806 (1890); *Wilson v. Wilson*, 95 Minn. 464, 104 N. W. 300 (1905). *Contra*, *Montague v. Montague*, 25 S. D. 471, 127 N. W. 639 (1910), ANN. CAS. 1912 C. 591, and note collecting authorities.

legislatures had always treated the two together, the Washington court has held that a statute providing for service by publication in divorce actions applies to nullity suits.<sup>80</sup> Statutes of some states make requirements of annulment and divorce suits the same for both jurisdiction and procedure.<sup>81</sup>

In 1907 an act Regulating Divorce and Annulment of Marriage was approved by the Conference of Commissioners on Uniform State Laws and recommended for adoption. The first section of the act states the grounds for annulment. Section six provided for the court which is to hear the suits. Section seven says:

"For purposes of annulment of marriage, jurisdiction may be acquired by personal service upon the defendant within this state when either party is a *bonâ fide* resident of this state at the time of the commencement of the action."

Section nine provides that where the plaintiff is a *bonâ fide* resident of the state and the defendant cannot be served within the jurisdiction, there may be service by publication, followed where practicable by personal notice to the defendant. The draftsmen of this act were not troubled about the right of any other state than the one which created the marriage to annul it. But the difficulty is still present, is it not? If South Dakota annulled, because its table of degrees of consanguinity forbade a marriage contracted in California, where valid, would California or any other state<sup>82</sup> recognize the effect of this decree? If all the states would adopt the act, the matter would be conclusively settled, for section twenty-two provides that full faith and credit shall be given to a decree of annulment or divorce of another state when given in conformity with the jurisdictional requirements of the uniform statute. Recognition of another's annulment decree, no matter where the marriage was created would be compelled by the municipal law of each state. But even with the great effort which has been made, there are still states which have not even yet adopted the Negotiable Instruments Law, the best known and most

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<sup>80</sup> *Piper v. Piper*, 46 Wash. 671, 91 Pac. 189 (1907); *contra*, *Bisby v. Mould*, 138 Iowa, 15, 115 N. W. 489 (1908).

<sup>81</sup> IOWA CODE, § 3183, and CODE SUPP. § 3187 a; NEBRASKA COMP. STATS. 1903, § 3167; VIRGINIA CODE, 1904, § 2259.

<sup>82</sup> The act leaves to each state to establish its own table of degrees for consanguinity or affinity.

thoroughly discussed of all the uniform acts. It will be a long time before all legislatures get around to the Annulment and Divorce Act.

Providing for annulment jurisdiction where the complaining party lives has great advantages over compelling him to go to the place where the marriage was created. It is expedient, convenient, certain. Why would not the best way be to drop the doctrine of nullity, with its relation back and bastardizing of innocent children and otherwise ignoring the existence of a fact, and include the common causes of annulment under divorce? The state where the party lives can then say that the marriage is at an end. While the law requiring recognition of such a decree is unfortunately somewhat tangled, it probably is not as bad at its worst as what we may expect in the recognition of nullity decrees.

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INTERNATIONAL TRIBUNALS IN THE LIGHT  
OF THE HISTORY OF LAW

“WITH law shall our land be built up and settled, and with lawlessness wasted and spoiled.”<sup>1</sup> These words of Njal, the Icelandic lawgiver of the tenth century, might well come from the mouth of a twentieth-century advocate of international union. In those days, as in these, the problem was to put an end to fighting; only now the field is the whole world, and the fighting between nations.

With law courts newly established and of doubtful powers, with private warfare everywhere prevalent, the desire of every wise man among that primitive people was not so much that he or his neighbor should get their rights, as that the land should not be despoiled. And in the long run Njal prevailed. There were failures of the law; Njal himself was burnt in his own house for a blood feud. But his death was atoned for according to law, and the slayers banished. The popular demand was for more law, more courts, and stronger ones; gradually private warfare ceased, and the land was built up. A similar evolution can be discerned in the history of many countries, and is still going on wherever civilization is developing.<sup>2</sup>

As the establishment of law courts is usually one of the first steps in the organization of national life, because the most imperatively called for,<sup>3</sup> so the feature in the various plans for a league of nations, which makes the most urgent appeal, is the attempt to set up some tribunal to try disputes between states.

Most of the objections now made to international tribunals were applicable to courts of law when they first were set up in primitive communities. Some of the more important of them are as follows:

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<sup>1</sup> THE STORY OF BURNT NJAL (transl. by G. W. Dasent), 222.

<sup>2</sup> In a sketch dealing only with well-known facts, it has not seemed useful to give many references. Conclusions common to several authors have been stated without acknowledgment, even when the language of one of them has to some extent been borrowed.

<sup>3</sup> BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE, 281.

I. Lack of power in the league to prevent nations from making war without resorting to its tribunals, or from disregarding their decrees.

II. Difficulty in getting a fair trial.

III. Lack of principles on which to decide disputes.

IV. The impossibility of submitting what are commonly called questions of "honor or vital interest."

## I

Among the many plans for a league, some have attributed to it power both to compel its members to submit their disputes, and to enforce obedience to the decisions of the tribunals. Others have attempted only to give the league the former power, leaving the enforcement of the decisions to public opinion or the voluntary intervention of other nations. Others again do not authorize the use of military strength in any case, but rely on the operation of moral and economic forces. The critics of these plans argue that no league can stop war unless it wields an overwhelming physical force, and that under none of these schemes would the league prove able to do so. If the power to enforce decrees were given in theory, it could not, they say, be exercised in fact.

But here a glance at the history of legal institutions is instructive. Most of us live in surroundings so far removed from the primitive that it is hard for us to realize that courts of law flourished, and dealt with a multitude of cases in a manner satisfactory to the people, when their power of compelling obedience was so imperfect as sometimes to touch the vanishing point.<sup>4</sup> In many early legal systems the court had little or no power either of obliging the parties to submit to its jurisdiction, or of enforcing the acceptance of its decrees; and whatever the powers attributed to the court, they were frequently defied with success, not only by evasion, but by force of arms.

To prevent immediate bloodshed, by starting some sort of litigation as a substitute, and then to put pressure on the parties to

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<sup>4</sup> The condition of all law in primitive communities resembled that of international law at the present day. They are both examples of inchoate law, in process of emerging from the state of mere custom or ethical sentiment, and not yet fully effective. W. J. BROWN, *AUSTINIAN THEORY OF LAW*, § 157. GRAY, *NATURE AND SOURCES OF THE LAW*, §§ 285, 287.

come to an agreement, was all that was at first attempted. The whole process was founded on voluntary submission and ended in voluntary agreement; the pressure was that of public opinion.<sup>5</sup> These experiments succeeded only imperfectly in the beginning; but they succeeded more and more; and as time went on the courts acquired greater powers.

If the power to prevent resort to violence in the first place was very weak, the ability to enforce decrees was in most cases entirely absent. There was no sheriff, no police force. The power of the members of the community to enforce obedience stood in the background; they seldom acted. Even where there was a king, his aid in carrying out judgments was not readily obtained. Among the Franks, for instance, judgment in certain cases was never enforced, unless the parties had agreed that it should be, or a special petition was made to the king.<sup>6</sup>

The principal method by which the community acted was outlawry. In Iceland the declaration of outlawry ran thus: "He ought to be made a guilty man, an outlaw, not to be fed, not to be forwarded, not to be helped or harboured in any need."<sup>7</sup> The penalties denounced against the culprit are of the sort now called "economic." So was the confiscation of goods which he also suffered. He was not directly threatened with force; though the fact that any person who slew him could not be prosecuted put him in a dangerous position. In Iceland this decree of outlawry appears to have been the only means of enforcing obedience to the court.<sup>8</sup> In practice it was an extremely efficient means; but it was an indirect one.<sup>9</sup>

In much more highly organized states, after legal methods of enforcement were provided, powerful defendants ignored judgments with impunity. The records of the Court of the Star Chamber show that the repeated decrees of the courts were defied in parts of England as late as the end of the reign of Henry the Seventh.<sup>10</sup>

<sup>5</sup> POLLOCK, *FIRST BOOK OF JURISPRUDENCE*, 3 ed., 24. POLLOCK, *EXPANSION OF THE COMMON LAW*, 145. MAINE, *EARLY HISTORY OF INSTITUTIONS*, 38-41. On the power of public opinion in an imperfectly organized community, see JENKS, *LAW AND POLITICS IN THE MIDDLE AGES*, 297.

<sup>6</sup> JENKS, *HISTORY OF ENGLISH LAW*, 9. MAINE, *INSTITUTIONS*, 275.

<sup>7</sup> 2 BURTON NJAL, 235.

<sup>8</sup> BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE*, 281.

<sup>9</sup> 1 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW*, 26.

<sup>10</sup> SELDEN SOCIETY, *CASES IN THE STAR CHAMBER*, pref., 61, 90.

Not for a long time could the courts prevent private warfare. In England, and all over Europe, it persisted through the Middle Ages. The law had to compromise with the deep rooted feeling in favor of settling disputes with the sword. Trial by battle was adopted as a legal procedure; duelling flourished more or less openly. The former was not legally abolished in England until 1819, and is said to have been practiced in the American colonies.<sup>11</sup>

Yet even while the fighting continued, the courts served their purpose in preventing more widespread bloodshed. The fact that the law was often defied, as it is to-day in semicivilized regions, did not prevent its being effective; in the main the law held its course and prevailed. In Iceland, as a direct result of Njal's reforms, in the constitution and procedure of the courts, they became so much more effective that soon the right to decide one's disputes by combat, which popular feeling had forced the courts to recognize, was formally abolished.<sup>12</sup>

In short, the repression of private warfare was there and everywhere gradual, but met with considerable success from the first establishment of the courts, and more and more as they grew stronger. In all probability, war between nations will likewise be repressed only gradually; international tribunals will not for a long time, if ever, be completely successful in preventing war. Yet that may not prevent their effecting their purpose in great and ever-increasing measure.

## II

The difficulty of obtaining a fair trial is another objection frequently made to international tribunals. It is said that nations technically neutral are apt to be more favorably inclined toward some countries than toward others, or to be in fear of some powerful neighbor, so that their representatives are likely to be controlled by influences in favor of one side. It is also said that the members of the courts, as well as the advocates, will be persons trained in diplomacy, who will take narrow views of international law, and connive at trickery in the conduct of litigation.

This sort of argument proves too much. We all know how far

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<sup>11</sup> NEILSON, *TRIAL BY COMBAT*, 36, 328. LEA, *SUPERSTITION AND FORCE*, 205-16.

<sup>12</sup> BURNT NJAL, *pref.*, 158. CONYBEARE, *THE PLACE OF ICELAND IN THE HISTORY OF EUROPEAN INSTITUTIONS*, 61.

from impartial juries frequently are, how much legal trickery goes on, even at the present day. Rich and powerful persons have in all ages had an advantage in litigation. In England in the fourteenth century, at a time of peace, it was stated that because of threats of violence in a certain district, "no writs or orders of the king will be obeyed and no jurors will dare to do their duty in those parts."<sup>13</sup> The Court of Chancery was founded in that century to give relief from interference with justice by the powerful. So was the Court of Requests, called the Poor Man's Court, in the following century, and the Court of the Star Chamber, at first used by the king to bridle the strong and obtain justice for the weak, and later to establish his own arbitrary power.<sup>14</sup>

The preamble of the act of Henry the Seventh,<sup>15</sup> concerning the Court of the Star Chamber, recites that,

"by unlawful maintenances, giving of liveries, signs and tokens, and retainers by indenture, promises, oaths, writing or otherwise, embraceries of his subjects, untrue demeanings of sheriffs in making of panels and other untrue returns, by taking of money by juries, by great riots and unlawful assemblies, the policy and good rule of this realm is almost subdued, and for the none punishment of this inconvenience and by occasion of the premises little or nothing may be found by inquiry, whereby the Laws of the land in execution may take little effect, to the increase of murders, robberies, perjuries and unsurities of all men living, and losses of their lands and goods, to the great displeasure of Almighty God."<sup>16</sup>

In earlier days, with a weak executive or none at all, the difficulties of obtaining a fair trial were still greater. A peculiarity of primitive peoples, in which they resembled the "family of nations," increased these obstacles. The community consisted of a small number of persons, or rather families,<sup>17</sup> each one of which was connected with most of the others by the ties of blood or marriage,

<sup>13</sup> SELDEN SOCIETY, *CASES IN CHANCERY*, 39.

<sup>14</sup> SELDEN SOCIETY, *Ibid.*, pref., 22; COURT OF REQUESTS, pref., 15, 55. POLLOCK, *EXPANSION OF THE COMMON LAW*, 69, 81-85. <sup>15</sup> 3 HEN. VII, c. 1 (1487).

<sup>16</sup> SELDEN SOCIETY, *CASES IN THE STAR CHAMBER*, pref., 9. (English modernized.)

<sup>17</sup> The unit was not the individual, but the family. GOMME, *PRIMITIVE FOLK MOOTS*, 16. GRAY, *NATURE AND SOURCES*, §§ 277-78. 1 WESTLAKE, *INTERNATIONAL LAW*, 248. The proposal to effect a permanent union for any purpose between several families must have seemed a dangerous experiment to their heads, each the unquestioned master in his own house. There are those who say nowadays that the natural limit of combination among mankind is the nation. But the conservative of long ago took a more logical ground when he asserted that the limit was the family. Indisputably that is a natural unit; all combinations beyond it are more or less artificial.

which they considered more sacred than those which bound them to the state. To get a court no member of which was related to either suitor was difficult, and to exclude every person who was connected by friendship or interest with one of them was hardly attempted.

With the present reaction against everything savoring of diplomacy, there is little reason to fear that parties to international disputes will be entrapped in technicalities. Yet, if such a danger exists, we find that the same objections might have been justly raised to the early courts of law. In all primitive courts the merits of the case had apparently little to do with the decision. Everything depended on technicalities; the slightest slip in the procedure was fatal. There was no inquiry into the facts except by the oaths of the parties, or by ordeal. Yet such a trial was felt to be preferable to private warfare. Public opinion probably operated, more than now appears, to prevent false oaths and tricks of procedure; and these irrational ancient modes of trial were good, at least, for reaching the practical result of checking the desire to fight.<sup>18</sup> Notwithstanding glaring imperfections in the courts, few persons, from those early days to this, have proposed their complete abolition. The movement has always been in the direction of more law and more courts.

It is noticeable that objections to the establishment of new courts have usually come from the powerful.<sup>19</sup> No doubt in early times the man of great strength and skill in arms felt able to defend himself and avenge his injuries, without resort to the new-fangled devices of the law, with all their risks. So in international affairs, the greater our opinion of our ability to take care of ourselves the more critical our feeling will be toward any international union. The attitude of Germany before the war was an illustration of this tendency.<sup>20</sup>

The desire for some sort of league is probably more intense in small countries than among the subjects of the Great Powers; the small countries cannot fight, and need a league to secure their rights. Since the war, however, the subjects of the greatest nations are beginning to doubt the advantages of being left free to fight for whatever they may think their rights.

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<sup>18</sup> THAYER, *PRELIMINARY TREATISE ON EVIDENCE*, 10.

<sup>19</sup> SELDEN SOCIETY, *COURT OF REQUESTS*, pref., 15, 17.

<sup>20</sup> MUIR, *NATIONALISM AND INTERNATIONALISM*, 185, 186.

## III

A really serious objection to all international tribunals is the scarcity of principles on which to decide the disputes that may arise. Most plans for a league recognize this, and provide that certain classes of disputes, on subjects with regard to which recognized rules exist, are to be dealt with by a body acting as a court of law, while others are to go before a board of conciliation, which renders its conclusions in the form of recommendations.

It is interesting to observe that the judges in early times acted both as conciliators and as a court; and that the scantiness and indefiniteness of the laws which they administered seem to have interfered but little with the satisfactory operation of the tribunals. The difficulty was felt to be not so much in ascertaining a man's rights as in obtaining them. The procedure was everywhere more important than the substantive law; and with the procedure and the constitution of the courts most of the written law was concerned.<sup>21</sup>

With respect to substantive rights there was a body of customary law, pretty generally understood, but indefinite and not reduced to writing. Whenever it was necessary to lay down a legal principle the judges and the parties would accept the opinion of anyone whom they respected as a learned man.<sup>22</sup> This corresponds very nearly with the situation to-day in a vast domain of international law. More or less vague principles are generally recognized, which are not precisely stated anywhere except in text-writers of self-constituted authority. Yet in a large class of cases a decently impartial tribunal would find little difficulty in reaching a conclusion. The result often depends principally on the investigation of facts.

The history both of early courts of law and of modern international arbitrations shows that the legal rules to be applied, as well as the means of enforcing judgments, may be left somewhat indefinite without preventing the judicial machinery from working effectively. In international arbitrations, when once a question has been submitted, a conclusion has always been reached, and that conclusion, though frequently unsatisfactory to one side, and

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<sup>21</sup> MAINE, *INSTITUTIONS*, 252.

<sup>22</sup> 1 STEPHEN, *HISTORY OF CRIMINAL LAW*, 52.

sometimes rendered by a divided court, has almost always been accepted.<sup>23</sup>

It is important, however, in international disputes, just as it was in quarrels among a primitive people, that where the parties may be reluctant to submit the question in the first place, the procedure and the composition of the court should be fully and precisely regulated. The court and the procedure must be ready; no party must be given an excuse to refuse to submit on account of any doubt as to either of these requisites for the commencement of litigation. The existence of a well-known procedure which provides an honorable way of accommodation may make all the difference between a fight and no fight. When once the fight has been postponed and the dispute submitted to a tribunal, the danger is generally past.

In those cases which, for lack of rules by which to decide them, cannot be submitted to a court acting judicially, — and to the practice of early courts suggests that they need not be so numerous as is often supposed, — if submission is once made to a board of conciliators having a settled composition and procedure, their recommendations will seldom be disregarded in the end. That the recommendations of mediators or conciliators have frequently failed heretofore, may fairly be attributed to the fact that the mediator has been a single individual or government, and has not had behind it international public opinion, much less any machinery, even imperfect, for bringing such opinion to bear. If the recommendation of the board is not accepted as it stands, it will at least be apt to lead to a settlement.

#### IV

An objection to the judicial settlement of international disputes, less urged than formerly, is the alleged impossibility of submitting questions which are deemed to affect the "honor or vital interests" of a nation, — terms of a very indefinite scope.

To have exempted from the jurisdiction of early courts all disputes affecting the honor or vital interests of the parties would have reduced the courts to nullities. In the beginning, the submission of any question was more or less a voluntary matter; but

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<sup>23</sup> SENATOR KNOX, Speech in Senate on League of Nations, March 1, 1919.



it was with just that sort of disputes that the courts were intended to deal. Their great object was to prevent the blood feuds following on murder; and what could be more a point of honor than to avenge one's kinsman?

Doubtless the belief of one or both the parties that their honor or vital interests were concerned, often caused them to defy the courts; and often their defiance was successful, even after the courts had in theory power to compel obedience. Such a state of affairs has existed recently in Corsica and Kentucky. But that was not because the law gave immunity. Another kind of point of honor, that of the duelling code, came later into prominence, and was the occasion of much private warfare. But no court in English-speaking countries, at least, has recognized the duel as lawful. If duellists commonly escaped punishment, it was not because the law renounced jurisdiction.

In affairs between man and man, the importance of a claim seems a preposterous objection to submitting it to a court. As for questions of honor, there can never be disgrace in submitting to public authority. The point of honor, as something to fight about, has pretty well disappeared from private life in Anglo-Saxon countries.

That it is not necessary to exclude matters of "honor or vital interest" from the jurisdiction of international tribunals is shown by the fact that disputes alleged to involve such matters are frequently capable of being decided not only by some international body, but by a court acting judicially. As a matter of history, many affairs involving the honor and vital interests of a nation have been successfully submitted to arbitration. The question of sovereignty over certain territory, for instance, is usually felt to involve not only a vital interest but the honor of the nation. Yet disputes as to boundaries, as well as others touching the honor of nations, have often been settled by courts of arbitration.<sup>24</sup>

It is true there were many matters, now fruitful subjects of litigation, with which the courts in early times did not attempt to deal, but they were not, as a rule, matters of honor or vital interest. On many subjects there was no law, because in the existing state of civilization cases for the courts did not arise. There was also a large class of matters, comparable with the internal affairs of na-

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<sup>24</sup> MORRIS, *INTERNATIONAL ARBITRATION*, 95-100. GOLDSMITH, *LEAGUE TO ENFORCE PEACE*, 100, 123.

tions, that were considered to concern only the family, and with regard to which the head of the house was both lawgiver and judge.<sup>25</sup> The Roman law, for instance, reached a high development before it interfered with the *patria potestas* over children. Slaves formed a class, even in recent American legal systems, in whose behalf the law would not interfere. Similarly the preservation of the right of each nation to govern its own subjects need not be incompatible with the development of international law.

The world is now, in international matters, in a state of barbarism. Any international organization that is set up will necessarily be imperfect, and will fail, to some extent, in putting an end to the reign of violence. It can hardly be more imperfect, however, than were the beginnings of national organization from which have developed the civilized state. It has been a characteristic of all vigorous races in their early days, and in modern times especially of the English-speaking peoples, to go ahead with ill-constructed political machinery, without taking much heed of its defects, and improve it piecemeal as they went along. In this course they have been surprisingly successful. Will they be the leaders now in a world-wide experiment?

ROLAND GRAY.

BOSTON, MASS.

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<sup>25</sup> GOMME, passage above cited.

# HARVARD LAW REVIEW

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Published monthly, during the Academic Year, by Harvard Law Students

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SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER

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THE SPECIAL SESSION.—The attendance in the Special Session which is being held from February 3 to August 30 for the benefit of men who have been in the service is as follows: Third year, 67; second year, 66; first year, 153; unclassified, 21; total, 307. As there are 127 men in the regular session, the total registration in the school is now 434 as compared with 68 in November.

All the courses in the Special Session except three are being taught by the regular teaching staff. The courses in Suretyship and Mortgage and Evidence are being given by Mr. Morton C. Campbell, and in Constitutional Law (both the special and regular sessions) by Mr. Francis B. Sayre.

Mr. Campbell received the degree of A.B. from Washington and Jefferson College in 1896 and the degrees of LL.B. and S.J.D. from this school in 1900 and 1915, respectively. He has been a member of the faculties of the law schools of Tulane University and of the University of Indiana.

Mr. Sayre received the degree of A.B. from Williams College in 1907 and the degrees of LL.B. and S.J.D. from this school in 1912 and 1918. After leaving the school in 1912 he spent a year in the District Attorney's office in New York. Since then he has been Assistant to the President of Williams College and a teacher there of Government and International Law

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ABANDONMENT OF SHIP AT SEA. — It appears to be a settled rule of law in England as well as in this country that an abandonment of a ship at sea by the master and crew without any intention of returning to her has the effect of a renunciation of the contract of affreightment, and, if the cargo is afterwards brought into port by salvors, the cargo owner may

take possession of it there without paying any freight, although the ship owners may wish to take it on to its original destination.<sup>1</sup>

A curious question regarding the application of this rule lately arose in *Bradley v. Newsom, Sons & Co.*,<sup>2</sup> in which the judgment of the Court of Appeal was reversed by the House of Lords. The steamship *Jupiter*, on a voyage from Archangel to Hull with a cargo of timber, was attacked by an enemy submarine while crossing the Firth of Forth. The Germans by threats of sinking the ship compelled the crew to take to their boats, and then placed bombs in the ship, and explosions on board were afterwards heard. The submarine towed the boats about five miles and cast them adrift, and in the growing darkness of the evening the ship was lost sight of. Soon afterwards the crew were picked up by a trawler and taken to Aberdeen, where they arrived on the following morning. The master, supposing that the steamship had sunk, telegraphed to the owners to that effect, and they sent the information to the charterers. In fact, the ship was floated by the cargo and was found by a patrol boat and taken into Leith three days after and beached there. The charterers, having learned this, claimed possession of the cargo at Leith, and the ship owners insisted on the right to take it on to Hull and so earn the freight.

A majority of the House of Lords held that, as the crew in leaving the ship only yielded to force, there was not an abandonment without any intention of returning to her, but merely a temporary interruption of the voyage by the enemy submarine, and that the ship owners were entitled to carry on the cargo to Hull.

Lord Sumner dissented, on the ground that, although the master was induced by duress to quit the ship, yet after the boats were left free by the enemy he did not put back to look for the vessel, and after he had been picked up by the trawler he did not try to induce her commander to go back. "The real point of the case is the fact that the *Jupiter* was left for good at sea to fare as she might, and that the master and crew came ashore."<sup>3</sup> The master believed the *Jupiter* had sunk, but that did not prevent his action from being voluntary. "What is clear about the whole story is that in fact he then had neither animus nor spes revertendi, and if he left the ship to her fate for good and all, he did so all the more decidedly because he did actually think that she was no longer on the surface but was at the bottom."<sup>4</sup> In the court below, Pickford, L. J., also said,<sup>5</sup> "There is no doubt that he and the crew thought this to be the fact and that they had no intention of rejoining her."

It is remarkable that not one of the four law lords constituting the majority says anything as to the intention not to return to the vessel that was shown by the conduct of the master and crew after the Germans left them adrift in the boats. It is said that they were dispossessed by violence, and that it would be extravagant to impute to them the intention of leaving the ship for good. Lord Finlay says, "If a British destroyer had appeared on the scene and driven off or sunk the submarine, they would gladly have returned to the vessel." But they showed no

<sup>1</sup> *The Arno*, 72 L. T. 621 (1895); *The Cito*, 7 P. D. 5 (1881); *The Eliza Lines*, 199 U. S. 119 (1895).

<sup>2</sup> [1919] A. C. 16; [1918] 1 K. B. 271.

<sup>4</sup> *Ibid.*, 44.

<sup>3</sup> [1919] A. C. 16, 36.

<sup>5</sup> [1918] 1 K. B. 271, 274.

such alacrity to return, when the submarine took herself off and left them free from that menace. They thought the ship was sinking when they lost sight of her, but that is a common expectation when the crew abandon a ship. They afterwards inferred that she had sunk. It is plain that they had no intention of returning when they got to Aberdeen, and the master telegraphed to the owners that she had been sunk by a submarine. As the conduct of the master and crew after the departure of the submarine, which was emphasized by Lord Sumner, as well as by Pickford, L. J., is not considered by the majority of the lords, the case is left in rather an unsatisfactory state. J. L. THORNDIKE.

**RIGHT TO STRIKE IN WAR TIME.** — The effect of a national emergency, such as the war with Germany, on the administration of justice is perhaps most strongly felt in courts of equity, for here there is more room for the exercise of the court's discretion, and hence more opportunity than in courts of law for the influence of considerations of public welfare and even public opinion. A decree was recently issued by the Supreme Court of New York which decided a controversy between individuals largely on the basis of national needs arising out of the war.<sup>1</sup> The plaintiff corporation was a shoe manufacturer. Eighty per cent of its output was military equipment for the United States government. It sought an injunction against officers, members, and agents of a labor union who were instigating a strike in the plaintiff's factory. The strike was accompanied by violence, assaults, and mass picketing. The court issued a permanent injunction against the acts of violence, and also enjoined all strikes "for any cause whatever" for the duration of the war.

The acts of violence enjoined were, on the evidence, clearly unlawful, and it is not proposed to discuss that part of the decree. The remainder of the decree, against all strikes for any cause whatever, was based by the court on the contentions that "the principles announced in cases which arose before the war cannot be applied to the relation between workers and employers in war industries in so far as they conflict with the principles and policies of the United States government in the conduct of the war"; that the respective rights and relations of the parties "were modified and controlled by their obligations and duties to the United States government"; and that a labor union has no right "to induce or incite workmen in such industries to strike and not to work, and thereby jeopardize the successful outcome of our country's military operations, . . . even though to do so would have been lawful in times of peace."

It is fundamental that a court of equity protects individual interests only and not the interests of the state as such. It will, it is true, prevent public nuisances and purprestures upon public rights and property, but this jurisdiction of equity deals with the state as a property owner rather than as a sovereign.<sup>2</sup> Equity has, however, no jurisdiction to enjoin crimes.<sup>3</sup> It is therefore quite beside the point in the principal case that

<sup>1</sup> *Rosenwasser Brothers v. Pepper*, 172 N. Y. Supp. 310 (1918).

<sup>2</sup> *In re Debs*, 158 U. S. 564 (1895). See 2 STORY, EQUITY JURISPRUDENCE, 14 ed., § 1248 *et seq.*; 4 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 1349.

<sup>3</sup> *Cope v. District Fair Ass'n*, 99 Ill. 489 (1881). See 4 POMEROY, § 1347, note.

a strike by workers in a war industry is a wrong to the state, in that it interferes with the successful conduct of the war. If it is a wrong to the state it may be that a criminal court will punish it, or that the proper executive authorities will prevent it, but a court of equity cannot enjoin it as such, either at the suit of the individual or the state. With the exception above noted equity will enjoin wrongs to individuals only. Therefore, in order to invoke the aid of equity it must be shown that the injury is a tort at law.

The court in the principal case declared it to be the established law of New York that "a labor union may induce or persuade the employees of a manufactory or other business, which is conducted by the owners thereof as an open or a nonunion shop, to become members of the union, and to strike in order to compel the owner to conduct his factory or business as a union shop."<sup>4</sup> The point at which strikes or the inducing of strikes becomes unlawful is unimportant here; it suffices that these acts may be lawful.

The legality of strikes, which are intentional injuries to the employer and hence *prima facie* actionable, is a result of the balancing of the social interests in favor of and against this method of settling industrial questions.<sup>5</sup> The question raised by the principal case is whether a sudden increase in the national need for the product of an industry, caused by an emergency such as the war, is a social interest sufficiently powerful to make otherwise lawful strikes unlawful. It would seem that it is not. In the event of a national emergency it is the function of the legislature and the executive, not the judiciary, to determine what modifications in normal rights and relations are necessary to meet the exigencies of the situation. Thus it is for the legislature or the executive to decide whether the right to strike of employees in war industries is to remain the same as before the war, whether a patriotic appeal is to be made to workers not to strike, or whether strikes are to be forbidden.<sup>6</sup> For a court to enjoin all strikes against an employer for the duration of the war on the ground of national needs is to assume a jurisdiction to decide questions of political policy far beyond the constitutional power of the court. It is no more within the jurisdiction of the court to decide that war has changed the legal right of a worker to strike than that it has changed the legal right of an idler not to work. There may be a social interest in the successful conduct of the war, but there is no social interest in the pursuit of a definite war policy sufficiently strong to make unlawful an act otherwise lawful, when that policy has not been adopted by the proper governmental authorities.<sup>7</sup> Certainly no court has the power to declare

<sup>4</sup> The court cited *Bossert v. Dhuy*, 221 N. Y. 342, 117 N. E. 582 (1917); *National Protective Ass'n v. Cumming*, 170 N. Y. 315, 63 N. E. 369 (1902); *Auburn Draying Co. v. Wardell*, 178 App. Div. 270, 274, 165 N. Y. Supp. 469 (1917).

<sup>5</sup> See a note, "Boycotts on Materials," 31 HARV. L. REV. 482. See, also, the introductory paragraphs of an article by Dean Roscoe Pound, "Interests of Personality," 28 HARV. L. REV. 343.

<sup>6</sup> The validity of such a regulation, and even more the validity of the injunction in the principal case, would depend on its not being contrary to the Thirteenth Amendment. See Blewett Lee, "Thirteenth Amendment and the General Railway Strike," 4 VIRGINIA L. REV. 437.

<sup>7</sup> The only indication of the policy of the United States government on this question, cited by the court, is a pamphlet issued by the National War Labor Board, con-

such an act a wrong to the state, to say nothing of taking the further step and declaring it a tort.

Admittedly there is a social interest in the unhampered production of wealth, this interest being stronger when there is a great national need for the product in question. It is also true that such considerations of public interest will often induce equity to act where it would otherwise not act. Thus specific performance of contracts involving continuous performance and supervision of the most difficult sort has been decreed because there was a strong public policy in favor of having the contract carried out.<sup>8</sup> Equity has also enjoined an illegal quitting of work by railroad employees because they were in the public service.<sup>9</sup> It must never be lost sight of, however, that in these cases it was a legal right of the plaintiff which was enforced, and that the public interest involved went merely to the exercise of the court's discretion in granting the extraordinary remedies of equity. In the principal case there was no legal right in the plaintiff to have his employees refrain from striking during the war. It follows that an injunction should not have issued.<sup>10</sup>

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**RESTRAINT OF PRINCES.** — The "restraint-of-princes" clause, of ancient origin,<sup>1</sup> has since the beginning of the war been the subject of

taining recommendations as to the "Principles and Policies to Govern Relations between Workers and Employers for the Duration of the War." The pamphlet stated that "there should be no strikes and lockouts during the war." The court cited this as a "declaration by the United States Government of the principles which govern it in dealing with labor disputes in war industries." In so far as it is a declaration by the government it would seem to indicate that the government intended to limit itself to such an appeal and not to resort to compulsion to secure continuity of work in war industries. It is not for the court to alter this policy.

<sup>8</sup> *Union Pacific Ry. Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 163 U. S. 564 (1896); *Joy v. United States*, 138 U. S. 1 (1891); *Edison Illuminating Co. v. Eastern Pennsylvania Power Co.*, 253 Pa. 457, 98 Atl. 652 (1916); *Schmidt v. Railroad Co.*, 101 Ky. 441 (1897). In *Conger v. Railroad Co.*, 120 N. Y. 29, 23 N. E. 983 (1890), specific performance of a contract was denied because of the public interest in non-performance.

<sup>9</sup> *Toledo, etc. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 746 (1893).

<sup>10</sup> A recent case in New Jersey, *Driver v. Smith*, 104 Atl. 717 (1918), presents the reverse of the situation in the principal case, specific performance of a contract which interfered with war work being denied. In that case the defendant, an essential employee in a war industry, had contracted to leave his position and to work for the plaintiff. Upon his refusal to do so the plaintiff sought to enjoin breach of the negative side of the contract, not to work for anyone but the plaintiff. The court denied the injunction, on the ground that the evidence showed that the plaintiff had made this contract solely to injure the defendant's employer, and that he had no legitimate interest in its enforcement.

The court expressly denied that it would refuse relief merely because the defendant was essential to war work, saying in the course of the opinion: "It would be an intolerable situation if each court before whom the rights of individuals were litigated were permitted to determine whether relief should be granted or withheld upon its opinion as to whether the granting or withholding of its relief would aid or injure the government in its war activities. . . ."

<sup>1</sup> The origin of the clause, although obscure, was probably continental. See *EMERSON, INSURANCE*, c. 12, § 30 (Meredith's ed.), 420, and the citations of other continental writers in 1 *PHILLIPS, INSURANCE*, 5 ed., par. 1115. See, also, 1 *PARSONS, MARINE INSURANCE*, 575 *et seq.* Cf. the limited definition in 1 *CALVO, DICTIONNAIRE DE DROIT INTERNATIONAL*, 61, tit., "Arrêt de Prince."

construction by American and British courts in the three species of contracts in which it is still commonly employed, namely, charter-parties,<sup>2</sup> contracts of affreightment,<sup>3</sup> and contracts of marine insurance.<sup>4</sup> While the wording of this clause frequently varies, such minor verbal variations have not affected the construction given to it; indeed, it would seem that the clause has acquired a legal individuality, so to speak, which no mere change in verbiage can destroy. Thus, whether the classic formula of "arrests, restraints and detainments of all kings, princes and people, of what nation, condition or quality so ever,"<sup>5</sup> or the phrase, perhaps commonest nowadays, "arrests and restraints of princes, rulers or people,"<sup>6</sup> or some even more abbreviated modification is used,<sup>7</sup> the courts waste no time in attempting to gather from the words used the meaning of the parties, but give the various phrasings of the clause an identical effect, — a procedure which would seem to be wholly proper. Hence the varying results of their construction of it can hardly be attributed to any difference in subject matter.

While generally one of force, the restraint may be one of law alone. Although clearly a person subject to his jurisdiction could not be expected to proceed in violation of a law of a sovereign until forcibly restrained, only recently was it actually decided that such prohibition, in itself inducing obedience, was a restraint. This was perhaps due to the fact that when performance of a contract becomes illegal by domestic law, it is not necessary to rely on the restraint-of-princes exception as a defense for nonperformance.<sup>8</sup> But when the question arose on a policy

<sup>2</sup> *Embricos v. Sydney Reid & Co.*, [1914] 3 K. B. 45; *F. A. Tamplin S. S. Co., Ltd. v. Anglo-American Petroleum Products Co., Ltd.*, [1916] 2 A. C. 397, discussed and distinguished in *Metropolitan Water Board v. Dick, Kern & Co., Ltd.*, [1918] A. C. 119; *Scottish Navigation Co., Ltd. v. W. A. Souter & Co.*, [1917] 1 K. B. 222; *Modern Transport Co., Ltd. v. Duneric S. S. Co.*, [1917] 1 K. B. 370; *Chinese Mining & Engineering Co., Ltd. v. Sale & Co.*, [1917] 2 K. B. 599; *Furness, Withy & Co. v. Rederiaktiebolaget Banco*, [1917] 2 K. B. 873; *Watts, Watts & Co., Ltd. v. Mitsui & Co., Ltd.*, [1917] A. C. 227; *Countess of Warwick S. S. Co. v. Le Nickel Société Anonyme*, [1918] 1 K. B. 372; *The Athanasios*, 228 Fed. 558 (1915); *Atlantic Fruit Co. v. Solari*, 238 Fed. 217 (1916); *W. R. Grace & Co. v. Luckenbach S. S. Co.*, 248 Fed. 953 (1918); *Rederiaktiebolaget Amie v. Universal Transportation Co.*, 250 Fed. 400 (1918); *The Adriatic*, 253 Fed. 489 (1918); *Earn Line S. S. Co. v. Sutherland S. S. Co., Ltd.*, 254 Fed. 126 (1918).

<sup>3</sup> *Ciampa v. British India Steam Navigation Co., Ltd.*, [1915] 2 K. B. 774; *Associated Portland Cement Manufacturers v. Wm. Cory & Son, Ltd.*, 31 T. L. R. 442 (1915); *East Asiatic Co., Ltd. v. S. S. Tronto Co., Ltd.*, 31 T. L. R. 543 (1915); *St. Enoch Shipping Co., Ltd. v. Phosphate Mining Co.*, [1916] 2 K. B. 624; *The Svorono*, 33 T. L. R. 415 (1917); *The Kronprinzessin Cecilie*, 244 U. S. 12 (1917); *The Bris*, 253 Fed. 259 (1918); *The Gracie D. Chambers*, 253 Fed. 182 (1918), discussed in 32 HARV. L. REV. 581, and 28 YALE L. J. 279.

<sup>4</sup> *British & Foreign Marine Insurance Co., Ltd. v. Samuel Sanday & Co.*, [1916] 1 A. C. 650; *Becker, Gray & Co. v. London Assurance Corporation*, [1918] A. C. 101; *Russian Bank for Foreign Trade v. Excess Insurance Co., Ltd.*, [1918] 2 K. B. 123 (result approved in [1919] 1 K. B. 39). Cf. *Mitsui v. Mumford*, [1915] 2 K. B. 27.

<sup>5</sup> *Becker, Gray & Co. v. London Assurance Corporation*, *supra*. See 1 PHILLIPS, INSURANCE, 5 ed., par. 1108. A continental form given by Emerigon is "arrest and detention of prince and sovereign."

<sup>6</sup> *Furness, Withy & Co. v. Rederiaktiebolaget Banco*, *supra*; *The Kronprinzessin Cecilie*, *supra*.

<sup>7</sup> See *Ciampa v. British India Steam Navigation Co., Ltd.*, *supra*; *Russian Bank for Foreign Trade v. Excess Insurance Co., Ltd.*, *supra*.

<sup>8</sup> Thus the clause was not relied on in *St. Enoch Shipping Co., Ltd. v. Phosphate Mining Co.*, *supra*.



of insurance, it was held in *British & Foreign Marine Insurance Co., Ltd. v. Samuel Sanday & Co.*<sup>9</sup> that the abandonment by a British ship of a voyage to a German port, which had become illegal upon the outbreak of war, was a loss caused by the peril insured against. The decision was linked up with previous cases on the ground that behind law stands force whereby obedience is compelled. Applying this theory to another state of facts the Court of King's Bench held that the requisition of a vessel by an *ultra vires* order of the Admiralty was not a restraint, since the owner was under no obligation to obey.<sup>10</sup> The result seems questionable in any case and especially so where the authorities concerned have means of enforcing their regulations. For the pressure on the shipowner may be great, however unlawful its threatened application. If force is actually employed illegally by governmental agencies it constitutes a restraint.<sup>11</sup> The improper order in the case just cited should be placed in a similar category.

It is generally said that any forcible interference with a voyage or adventure by a constituted government or ruling power is covered by the restraint-of-princes clause.<sup>12</sup> The chief question then is as to what will constitute a restraint short of the actual physical application of force. A situation frequently arises where the master of a vessel deviates from his course to avoid a peril known to be in existence, such as an embargo at or blockade of the port of destination. Must the vessel attempt to run a blockade before the restraint-of-princes clause may be relied on? On this point a difference in result has developed between cases of insurance on the one hand and those of charter-parties and bills of lading on the other. The former were the first to arise, and the prevailing view expressed was that there had been no restraint of the vessel under such circumstances. In other words, a loss of the adventure through reason-

<sup>9</sup> *Supra*. Similarly, where a foreign shipowner, having entered into an English charter party, was prohibited by the law of his sovereign from carrying out the contract. *Furness, Withy & Co. v. Rederiaktiebolaget Banco*, *supra*, discussed in 31 HARV. L. REV. 799. But the owner of cargo on a foreign vessel, having no control over it, cannot rely on the clause on the ground of illegality through trading with the enemy. See *Becker, Gray & Co. v. London Assurance Corporation*, *supra*, 117. The clause does not apply to ordinary judicial proceedings. *Bradley v. Maryland Insurance Co.*, 12 Pet. (U. S.) 378, 402 (1838).

<sup>10</sup> *Russian Bank for Foreign Trade v. Excess Insurance Co., Ltd.*, *supra*. This point was questioned in the Court of Appeal, which affirmed the decision on another ground. See [1919] 1 K. B. 39, 40. *Cf. Brunner v. Webster*, 5 Com. Cas. 167 (1900); *Northern Pacific Ry. Co. v. American Trading Co.*, 195 U. S. 439, 468 (1904).

<sup>11</sup> *Lozano v. Janson*, 2 E. & E. 160 (1859); *Magoun v. New England Marine Insurance Co.*, 16 Fed. Cas. No. 8961 (1840). The courts generally will not consider the legality of official acts of a foreign government under its own law. *The Athanasios*, *supra*; *The Adriatic*, *supra*; *Earl Line S. S. Co. v. Sutherland S. S. Co., Ltd.*, *supra*.

<sup>12</sup> See CARVER, CARRIAGE OF GOODS BY SEA, 6 ed., § 82; MACLACHLAN, MERCHANT SHIPPING, 5 ed., 607; SCRUTTON, CHARTER-PARTIES AND BILLS OF LADING, 7 ed., 207. Doubt, expressed in early cases as to whether a party was protected under the clause upon a restraint by his own sovereign, was removed in *Aubert v. Gray*, 3 B. & S. 163 (1861). Usually the restraint arises out of conditions of war, but frequently this is not so. Detention under quarantine regulations is a common instance. *Miller v. Law Accident Insurance Co.*, [1903] 1 K. B. 712; *The Bohemia*, 38 Fed. 756 (1889); *Tweedie Trading Co. v. Geo. D. Emery Co.*, 146 Fed. 618 (1906). *Cf. Ciampa v. British India Steam Navigation Co., Ltd.*, *supra*. The restraint usually takes place on the sea, but may be on land. *Rodoconachi v. Elliott*, L. R. 9 C. P. 518 (1874); *Robinson Gold Mining Co. v. Alliance Insurance Co.*, [1901] 2 K. B. 619.

able action to avoid the peril insured against is not a loss within the terms of the policy.<sup>13</sup> Later arose the second line of cases involving similar circumstances, in which nonperformance of a charter-party or bill of lading was uniformly excused under the restraints clause. Nor is a formal blockade or embargo insisted upon, but the danger of seizure of a belligerent merchantman by enemy warships or of seizure of a neutral for carrying contraband is held sufficient.<sup>14</sup> This seems sound, for the difference between this and actual seizure is merely in the time and space through which the restraint may operate. The degree of apprehension reasonably entertained under the circumstances may be said to be an index of its extent. And surely the vessel should not be required to proceed to certain destruction, in order to establish a defense under this exception to the contract.

As is repeatedly stated by the courts, a phrase so commonly employed should be construed in the same way in every type of mercantile contract. Accordingly later cases have explained the apparent conflict between the two lines of authorities on the ground of causation, rather than on any difference in the interpretation of the phrase itself. Thus in the recent case of *Becker, Gray & Co. v. London Assurance Corporation*,<sup>15</sup> it was said that in insurance cases a stricter rule of causation must be applied. There insurance was issued on British goods bound for Hamburg on a German vessel. War broke out, and the captain to avoid capture, put into a neutral port to remain until the end of the war. The court held that the frustration of the adventure was caused, not by the peril insured against, but by the voluntary act of the captain in putting into port, this latter being the "direct cause." This strict rule may have arisen from a reluctance to allow a recovery as for a total loss under such circumstances. But it has been well settled that where goods are insured under such a policy from port of origin to port of destination, the owner may abandon to the underwriters as a total loss, if the adventure is frustrated by a peril insured against, although the goods are themselves undamaged.<sup>16</sup> The insurance is not merely of the merchandise from injury, but also of its safe arrival. There seems to be no reason therefore for applying any rule stricter than the normal principles of proximate causation. It is certainly to the best interests of all concerned to avoid a complete destruction of the property. One may wonder if the court would expect the captain to negotiate Scylla and Charybdis.

<sup>13</sup> *Hadkinson v. Robinson*, 3 B. & P. 388 (1803); *Lubbock v. Rowcroft*, 5 Esp. 50 (1803); *Blackenhagen v. London Assurance Co.*, 1 Campb. 454 (1808); *Richardson v. Maine Insurance Co.*, 6 Mass. 102 (1809); *Brewer v. Union Insurance Co.*, 12 Mass. 170 (1815). But in some American jurisdictions the opposite conclusion was reached. *Schmidt v. United Insurance Co.*, 1 Johns. (N. Y.) 249 (1806); *Thompson v. Read*, 12 Serg. & R. (Pa.) 440 (1820) (*semble*). See 1 PHILLIPS, *INSURANCE*, 5 ed., par. 1115. The federal courts drew a distinction between the failure to attempt to enter a blockaded port and the failure to attempt to leave such a port. *Smith v. Universal Insurance Co.*, 6 Wheat. (U. S.) 176 (1821); *Olivera v. Union Insurance Co.*, 3 Wheat. (U. S.) 183 (1818).

<sup>14</sup> *Geipel v. Smith*, L. R. 7 Q. B. 404 (1872); *The San Roman*, L. R. 5 P. C. 301 (1873); *Nobel's Explosives Co. v. Jenkins & Co.*, [1896] 2 Q. B. 326; *Embiricos v. Sydney Reid & Co.*, *supra*; *The Styria*, 186 U. S. 1 (1901).

<sup>15</sup> *Supra*. In *Kacianoff v. China Traders Insurance Co.*, [1914] 3 K. B. 1121, the peril insured against was capture and not restraint-of-princes.

<sup>16</sup> See *British & Foreign Marine Insurance Co., Ltd. v. Samuel Sanday & Co.*, *supra*, 656.

In all these cases the courts are careful to point out that there is an actual force in existence, and that the danger must be such that the vessel cannot reasonably be expected to proceed.<sup>17</sup> Thus there is no restraint, when the captain acts upon false intelligence as to the existence of the danger.<sup>18</sup> In the case of *The Kronprinzessin Cecilie*,<sup>19</sup> one question presented was whether a deviation, caused by reasonable fear that a force might come into existence, could constitute a restraint of princes. A German vessel, bound for European ports, turned back to America through fear of capture at a time when war, although threatened, had not yet broken out. Action was brought on a contract of affreightment, and the court refused to extend the restraint-of-princes clause to this situation, — a conclusion thoroughly sound, for the justification should be determined as of the time of deviation, and there was then no force in existence. Thus if the question arose on an insurance policy, and if the threatened war had never been declared, it could not be said that the loss was caused by any peril insured against. There is here mere apprehension, which of itself cannot constitute a restraint.<sup>20</sup>

It does not, however, follow that the captain's action in deviating is unreasonable or improper; and in *The Kronprinzessin Cecilie*, recovery against the shipowners was denied on the ground that the act was justified under an implied condition of the contract. This really rests on the proposition that the voyage is a joint maritime enterprise, that the captain is the agent of the respective owners of both ship and cargo, and that so long as he acts reasonably for the best interests of all concerned, no liability will be imposed upon his employers. This theory was also relied on in a number of the cases which held that reasonable avoidance of an existing force falls within the terms of the restraint-of-princes clause.<sup>21</sup> Indeed it probably did much to facilitate recognition of the latter principle. It may properly be applied in the case of a charter-party or bill of lading, but cannot apply to cases of insurance. It is of course independent of the restraint-of-princes clause, and seems to form the only proper basis for distinguishing insurance cases from the others.<sup>22</sup>

<sup>17</sup> "In the absence thereof [actual arrest], there must exist some actual restraint preventing performance, or the danger of capture, by reason of the prevalence of the war, that was imminent, apparently remediless and certain, and which would have operated to prevent the contract from being performed." *W. R. Grace & Co. v. Luckenbach S. S. Co.*, *supra*, 954. This is perhaps too strict a test. For another instance of unreasonable apprehension, see *The Svorono*, *supra*.

<sup>18</sup> *King v. Delaware Insurance Co.*, 6 Cranch (U. S.) 71 (1810); *Craig v. United Insurance Co.*, 6 Johns. (N. Y.) 226 (1810).

<sup>19</sup> *Supra*. The decision of the Circuit Court of Appeals, 238 Fed. 668, reversed by the Supreme Court in this case is discussed in 30 HARV. L. REV. 516.

<sup>20</sup> It should be noted that this was the situation in *Atkinson v. Ritchie*, 10 East, 530 (1809), which is often cited for the proposition that an act induced by fear of a restraint is never covered by the restraint-of-princes clause. The shipowner acted through apprehension of an embargo at the port of destination, which actually was not imposed until six weeks later. See, also, *Watts, Watts & Co., Ltd. v. Mitsui & Co., Ltd.*, *supra*.

<sup>21</sup> See *Nobel's Explosives Co. v. Jenkins & Co.*, *supra*, 332; *The Styria*, *supra*, 9, 10. The British courts have even said that the cargo owner cannot expect a foreign master to run greater risks than he would with a cargo of his own country. See *The Teutonia*, L. R. 4 P. C. 171, 179-80 (1872); *The San Roman*, *supra*, 307. For the application of the principle in the absence of a restraint-of-princes clause, see *Essex S. S. Co. v. Langbehn*, 250 Fed. 98 (1918), and *The Eros*, 251 Fed. 45 (1918).

<sup>22</sup> A difference in result also arises when negligence of the master or crew has con-

**TAX LIENS ON LAND HELD ADVERSELY FOR THE STATUTORY PERIOD.** — It is customary for the legislature to provide that there shall be a lien on land for taxes due. Even though no lien is expressly created, as long as the statute provides for the sale of real estate such taxes in effect impose an encumbrance on the land.<sup>1</sup> Such legislation may be divided roughly into two classes: the first makes the tax a lien on the *corpus* of the land without regard to the state of the title; the second subjects to the possibility of sale only the estate of the tax debtor.<sup>2</sup> Under the first type of statute a tax sale followed by a delivery of the tax deed after the period allowed for redemption would, provided all statutory requirements were exactly followed and the taxes in default were levied and assessed in accordance with law, pass a fee simple to the purchaser. But where only the estate of the tax debtor can be disposed of, *caveat emptor*.

It frequently happens that a tax lien attaches to the *corpus* of land held adversely to the holder of the legal title. If the tax lien attaches to the land after the Statute of Limitations has run, it is, of course, incumbent on the new owner of the land to discharge the tax thereon, even though the holder of the record title was named in the assessment. Where the lien attaches to the land *before* the adverse possession has ripened into title it may be asked whether such a lien will prevent the acquisition of title when the period prescribed by the statute has expired. There is no good reason why it should do so. An adverse possessor acquires a title independent of the former owner. But it is clear that the land remains subject to the lien, and that the owner under the statute must pay the taxes or suffer foreclosure.<sup>3</sup> It is sometimes said that twenty years' adverse possession creates a paramount title. This should be qualified. The land so acquired remains subject to an easement in favor of the owner of adjoining premises unless the holding has been adverse to the easement.<sup>4</sup> Where a lien is imposed on the very land itself, possession cannot be adverse to it, and no period of holding can destroy it any more than it can destroy the land.

The next question is whether a sale of land on foreclosure of such a lien interrupts the adverse possession, so that no title is acquired against the purchaser for taxes until the Statute of Limitations has run anew after the delivery of the tax deed. The answer is emphatically in the

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tributed to the subjection of the vessel to a restraint. In such event, the shipowner is not excused from performance of a contract by the restraint-of-princes clause. But unless he himself contributed to the loss, he can still recover upon a policy of insurance. See CARVER, *CARRIAGE OF GOODS BY SEA*, 6 ed., § 88; SCRUTTON, *CHARTER-PARTIES AND BILLS OF LADING*, 7 ed., 195-98. Cf. *Dunn v. Bucknall Brothers*, [1902] 2 K. B. 614.

<sup>1</sup> See 2 TIFFANY, *REAL PROPERTY*, § 573.

<sup>2</sup> See *Ibid.*, §§ 467-70. See BLACK, *TAX TITLES*, 2 ed., § 419.

<sup>3</sup> As long as the sovereign has something less than ownership of the land the proprietary right of the adverse possessor clearly should be protected. The state will recognize his right to compensation when the land is taken by right of eminent domain before the statute has tolled the entry. *Perry v. Clissold*, [1907] A. C. 73. See 20 HARV. L. REV. 563, 574. See, also, 27 HARV. L. REV. 496.

<sup>4</sup> Another situation where the adverse possessor may acquire land subject to encumbrance is found in the case of equitable servitudes, or restrictions enforceable only in equity. *Re Nisbet and Potts' Contract*, [1905] 1 Ch. 391, affirmed, [1906] 1 Ch. 386. See 18 HARV. L. REV. 608.

affirmative. It has been said that adverse possession is interrupted because of a policy of the law suggested by the principle *nullum tempus occurrit regi*. The argument is that as adverse possession does not deprive the sovereign of title, acquisition of title by the sovereign interrupts the continuity of the adverse holding.<sup>5</sup> The difficulty with this reasoning is in the premise, because a tax sale does not require "even a momentary title to the land" in the sovereign.<sup>6</sup> Where there is a forfeiture or purchase by the state for taxes the argument seems sound.<sup>7</sup> But ordinarily the state is only a lienholder. It disposes of its lien at the tax sale, and after the period for redemption expires, the purchaser gets his tax deed and with it a new, independent title. It is this independent title, giving a new right of entry, which splits the adverse possession.<sup>8</sup>

The foreclosure of a lien on an estate in the land as distinguished from a lien on the land itself does not give the purchaser an independent title. This rule has been illustrated recently in Virginia<sup>9</sup> where a statute makes the tax a lien on the interest of the party assessed.<sup>10</sup> The Statute of Limitations barred the right of entry of the party taxed (who was assumed to be the owner) before the foreclosure of the lien. Since the statute destroyed the estate, it was held that the lien fell with it, so that the subsequent purchase and conveyance by the state were nugatory. In the case *McClanahan's Adm'r et al. v. Norfolk & W. Ry. Co. et al.*<sup>11</sup> principally relied upon, possession adverse against a judgment debtor for the required period starved the judgment lien. It would seem immaterial whether the adverse possession began prior to the birth of the lien, as in this case, or after. Where the lien is a parasite on a particular estate, the same result must follow as long as possession is adverse to the owner of the estate, whether tax debtor,<sup>12</sup> judgment creditor, or mortgagor.<sup>13</sup> The grantee of an estate subject to a tax lien acquires no right against the lienor, or purchaser, at the foreclosure

<sup>5</sup> See *Davies v. Collins et al.*, 43 Fed. 31, 33 (1890).

<sup>6</sup> See *Harrison v. Dolan*, 172 Mass. 395, 396, 52 N. E. 513 (1899). The court intimated that even if the state had acquired title, the continuity would not have been broken, because by statute in Massachusetts adverse possession is efficacious against the Commonwealth. See 12 HARV. L. REV. 569.

<sup>7</sup> *Armstrong v. Morrill*, 14 Wall. (U. S.) 120 (1871). In this case lands forfeited for nonpayment of taxes were allowed to be redeemed, by statutory enactment. Strong, Davis, and Bradley, JJ., dissented from the decision that adverse possession before the forfeiture and after the redemption could not be tacked.

The reason for the rule *nullum tempus occurrit regi*, that it is against public policy that public rights and property should be prejudiced by the negligence of public officers, would not necessarily preclude the tacking of adverse possession enjoyed before and after the period in which the sovereign had title. For a discussion of the maxim, see BUSWELL, LIMITATIONS AND ADVERSE POSSESSION, § 97.

<sup>8</sup> This is the "subtle argument" suggested by Judge Holmes in *Harrison v. Dolan*, *supra*. There the disseisee purchased a quitclaim of the tax title from the purchaser of the tax deed. The argument was evaded on the ground that the purchaser of the tax title was disseised by the continued possession of the defendant and that prior to STAT. 1891, c. 354, 398, the common-law rule prevailed that a disseisee cannot assign his right of entry.

<sup>9</sup> *Virginia and West Virginia Coal Co. v. Charles*, 254 Fed. 379, 390 (1918).

<sup>10</sup> VIRGINIA CODE, § 661.

<sup>11</sup> 96 S. E. 453 (Va., 1918).

<sup>12</sup> *Jordan v. Higgins et al.*, 63 Texas, 150 (1885).

<sup>13</sup> *Le Roy v. Rogers*, 30 Cal. 229 (1866).

sale, by reason of possession, because the estate is preserved and with it the lien.<sup>14</sup> The tax lien is superior to all other liens, but must attach to the land itself, or it may be lost by limitation.

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FEDERAL ENCROACHMENT ON THE POLICE POWER: HARRISON ANTI-NARCOTIC ACT. — Strict constructionist and states' rights exponents have received a fresh defeat in the decision of the Supreme Court,<sup>1</sup> upholding as constitutional section 2 of the Harrison Anti-Narcotic Act.<sup>2</sup> The act in addition to laying an annual tax of one dollar on all registered "dealers" contains in section 2 regulations and restrictions governing the sale, dispensing and distribution of opium and its derivatives, and provides in section 9 a heavy penalty for the violation of the act. The defendant, a physician, was indicted for violation of the act in selling heroin, "not in pursuance of a written order," and "not in the regular course of his professional practice." Upon demurrer to the indictment

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<sup>14</sup> *Pratt v. Pratt*, 96 U. S. 704 (1877).

<sup>1</sup> *United States v. Doremus*, U. S. Sup. Ct., Oct. Term, 1918, No. 367. It is interesting to note that four of the justices dissented, adopting the opinion of the court below.

<sup>2</sup> 38 STAT. AT L. 785. Section 2 provides in part:

"It shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. Every person who shall accept any such order, and in pursuance thereof shall sell, barter, exchange or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section five of this Act. Every person who shall give an order as herein provided to any person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, and in case of the acceptance of such order, shall preserve said duplicate for a period of two years in such a way as to be readily accessible to inspection by the officers, agents, or employees and officials hereinbefore mentioned. Nothing contained in this section shall apply —

"(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon regularly registered under this Act in the course of his professional practice only: Provided, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act.

"(b) To the sale, dispensing or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under this Act: Provided, however, That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: And provided further, That such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned."

the district court held the section unconstitutional for the reason that it was not a revenue measure and was an invasion of the police power reserved to the states.<sup>3</sup> This judgment was reversed by the Supreme Court.

It is clear when Congress was given the express power to lay excise taxes, with the single limitation of uniformity, it was given the implied power to use reasonable means of effectuating this granted power.<sup>4</sup> That this results in regulation within the states of matters over which the federal government has no direct power of legislation is inevitable, nor is it fatal, provided only the enactment affecting these matters, lying solely within control of the states, has some reasonable relation to the exercise of the granted power. Tax legislation is not invalidated by reason of the fact that the same business is regulated by the taxing power of the federal government and by the police power of the state government,<sup>5</sup> nor by reason of the fact that motives other than revenue induced the government to act and the effect of its action accomplishes another end as well as the raising of revenue.<sup>6</sup> As Mr. Chief Justice Fuller points out in *In re Kollock*,<sup>7</sup> the controlling factor and real test of constitutionality is, whether or not the regulations are "means to effectuate the objects of the act in respect of revenue." If the answer be in the affirmative, though the incidental objects of the taxing measure be great and the encroachment on the states' sovereign power, marked, the enactments must still be declared within the federal taxing authority.

Applying this test, Mr. Justice Day, speaking for the court, says: "The provisions of § 2 to which we have referred, aim to confine sales to registered dealers and to those dispensing the drugs or physicians, and to those who come to dealers with legitimate prescriptions of physicians. Congress with full power over the subject, short of arbitrary and unreasonable action, which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic above-board, and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the Federal law."

Such an interpretation of the provisions as facilitating the collection of the revenue is far from easy. As the court below points out, we have a statute with a moral end as well as a revenue end, and "the responsibility is with the court to see that these ends are reached through a revenue measure and within the limits of a revenue measure." How does the requirement that a written order be given by a purchaser to the seller, which order must be preserved by the seller for two years, render effective the enforcement of the tax? Or the requirement that physicians keep for two years records of each distribution of the drug with the name and address of the distributee? Or that dealers file and

<sup>3</sup> *United States v. Doremus*, 246 Fed. 958 (1918).

<sup>4</sup> See *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316 (1819).

<sup>5</sup> See *License Tax Cases*, 5 Wall. (U. S.) 462 (1866).

<sup>6</sup> *In re Kollock*, 165 U. S. 526 (1897).

<sup>7</sup> *Ibid.*, 537.

keep for two years physicians' prescriptions for the drug? It seems that these provisions are not means to effectuate the object of the act in respect to revenue, but are police regulations not even incidental to the revenue end of the act, and tending only to protect against the misuse of the drugs. This being true, the provisions do not take on a constitutional gloss by reason of being appended to a revenue measure. The federal government under cloak of the granted power to tax cannot overstep the aim and spirit of that grant.

**MARRIAGE BY MAIL.** — Some of the problems of the American girl and her soldier fiancé on military duty abroad might be solved if a status of marriage could be created while the soldier is still on foreign soil.<sup>1</sup> Professor Lorenzen in a recent article<sup>2</sup> has considered whether this could be accomplished by means of marriage by proxy. It would be much simpler if it were possible to attain the result by direct communication by mail between the parties.<sup>3</sup> Whether this can be done involves the following questions: (1) whether or not a marriage is valid which consists merely of an exchange of promises without formal solemnization; (2) whether or not cohabitation in addition to the mutual promises is a necessary element of such an informal marriage; (3) whether or not it is essential that the promises be exchanged by the parties in the presence of each other; (4) and what law governs the effect of an exchange of promises of marriage when the parties are in different jurisdictions during the transaction.

1. Apart from statute, most courts in this country recognize as valid a marriage based on mutual consent without formal solemnization or the interposition of officials, civil or religious.<sup>4</sup> Although there are

<sup>1</sup> Such a marriage might be desired, not only for sentimental reasons, but also in some cases in order to legitimize children; in others, for such practical purposes as naming the woman as beneficiary with respect to government War Risk Insurance.

<sup>2</sup> "Marriage by Proxy and the Conflict of Laws," 32 HARV. L. REV. 473.

<sup>3</sup> An opinion was recently rendered by the Judge Advocate General to the effect that American soldiers abroad might marry women in the United States by interchanging a marriage contract by mail, provided that such marriage does not contravene any statute of the state in question.

This opinion is, of course, not controlling on the courts. *Deming v. McClaughry*, 113 Fed. 639 (1902). But it "should receive the careful consideration of the courts, and in doubtful cases . . . should be permitted to lead the way to their decisions." *Deming v. McClaughry*, *supra*. However, the opinion is not valuable, since it begs the question, whether such a marriage is contrary to the law of the various states.

<sup>4</sup> *Davis v. Pryor*, 112 Fed. 274 (1901); *Adger v. Ackerman*, 115 Fed. 124 (1902); *Campbell v. Gullatt*, 43 Ala. 57 (1869); *Graham v. Bennett*, 2 Cal. 503 (1852); *Caras v. Hendrix*, 62 Fla. 446, 57 So. 345 (1911); *Wynne v. State*, 17 Ga. App. 263, 86 S. E. 823 (1915); *Hutchinson v. Hutchinson*, 196 Ill. 432, 63 N. E. 1023 (1902); *Smith v. Fuller*, 108 N. W. (Iowa) 765 (1906); *Shorten v. Judd*, 60 Kan. 73, 55 Pac. 286 (1898); *Dumaresq v. Fishly*, 3 A. K. Marsh (Ky.) 368 (1820); *Hutchins v. Kimmell*, 31 Mich. 126 (1875); *State v. Worthingham*, 23 Minn. 528 (1877); *Howard v. Kelly*, 111 Miss. 285, 71 So. 391 (1916); *Gibson v. Gibson*, 24 Neb. 394, 39 N. W. 450 (1888); *Parker v. De Bernardi*, 40 Nev. 361, 164 Pac. 645 (1917); *State v. Thompson*, 76 N. J. L. 197, 68 Atl. 1068 (1908); *Fenton v. Reed*, 4 Johns. (N. Y.) 52 (1809); *Cheney v. Arnold*, 15 N. Y. 345 (1857); *Carmichael v. State*, 12 Ohio St. 553 (1861); *In re Love's Estate*, 42 Okla. 478, 142 Pac. 305 (1914); *Richard v. Brehm*, 73 Pa. St. 140 (1873); *Fryer v. Fryer*, Rich. Eq. Cas. (S. C.) 85 (1832); *Grigsby v. Reib*, 105 Texas, 597, 153 S. W.



statutes in most, if not all, jurisdictions, prescribing formalities for the solemnization of marriages, these statutes do not have the effect of nullifying otherwise valid informal marriages, unless the statute expressly so provides.<sup>5</sup> Consequently, in most states, common-law<sup>6</sup> marriages are still valid.<sup>7</sup>

2. On principle and by the better view of the authorities,<sup>8</sup> if the parties exchange promises, whether written or oral,<sup>9</sup> to presently<sup>10</sup> assume the

1124 (1913); *Hilton v. Roylance*, 25 Utah, 129, 69 Pac. 660 (1902); *Becker v. Becker*, 153 Wis. 226, 140 N. W. 1082 (1913).

*Contra*: *Furth v. Furth*, 97 Ark. 272, 133 S. W. 1037 (1911); *Johnson's Heirs v. Raphael*, 117 La. 967, 42 So. 470 (1906); *Denison v. Denison*, 35 Md. 361 (1871); *Milford v. Worcester*, 7 Mass. 48 (1810); *Dunbarton v. Franklin*, 19 N. H. 257 (1848); *Morrill v. Palmer*, 68 Vt. 1, 33 Atl. 829 (1895). Cf. *State v. Samuel*, 19 N. C. (2 Dev. & Bat. Law) 177 (1836).

<sup>5</sup> *Mathewson v. Phoenix Iron Foundry*, 20 Fed. 281 (1884); *Meister v. Moore*, 96 U. S. 76 (1877); *Travers v. Reinhardt*, 205 U. S. 423 (1907); *Tartt v. Negus*, 127 Ala. 301, 28 So. 713 (1900); *Taylor v. Taylor*, 10 Colo. App. 303, 50 Pac. 1049 (1897); *Warren v. Warren*, 66 Fla. 138, 63 So. 726 (1913); *Askew v. Dupree*, 30 Ga. 173 (1860); *Meehan v. Edward Valve, etc. Co.*, 117 N. E. (Ind. App.) 265 (1917); *Renfrow v. Renfrow*, 60 Kan. 277, 56 Pac. 534 (1899); *Hutchins v. Kimmel*, *supra*; *State v. Worthingham*, *supra*; *Dyer v. Brannock*, 66 Mo. 391 (1877); *University of Michigan v. McGuckin*, 62 Neb. 489, 87 N. W. 180 (1901); *State v. Zichfeld*, 23 Nev. 304, 46 Pac. 802 (1896); *Ziegler v. P. Cassidy's Sons*, 220 N. Y. 98, 115 N. E. 471 (1917); *Umbenhower v. Labus*, 85 Ohio St. 238, 97 N. E. 832 (1912); *In re Love's Estate*, *supra*; *Richard v. Brehm*, *supra*; *Ingersoll v. McWillie*, 9 Texas Civ. App. 543, 30 S. W. 56 (1895); *Becker v. Becker*, *supra*. See, also, *Rutledge v. Tunno*, 69 S. C. 400, 404, 48 S. E. 297, 298 (1904); *Svendsen v. Svendsen*, 37 S. D. 353, 362, 158 N. W. 410, 412 (1916). 1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, §§ 423, 424.

But, the statutes were held to invalidate common-law marriages in: *Robinson v. Redd's Adm'r*, 19 Ky. Law Rep. 422, 43 S. W. 435 (1897); *Grisham v. State*, 2 Yerg. (Tenn.) 589 (1831); *Offield v. Davis*, 100 Va. 250, 40 S. E. 910 (1902); *In re McLaughlin's Estate*, 4 Wash. 570, 30 Pac. 651 (1892); *Beverlin v. Beverlin*, 29 W. Va. 732, 3 S. E. 36 (1887). See 1917, ILL. REV. STAT., c. 89, § 4; 1907 UTAH, COMP. LAWS, § 1184.

In California and in South Dakota, although marriages may still be valid without formal solemnization, there must be, as a substitute for the latter, a "mutual assumption of marital rights, duties and obligations." *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26 (1889); *Svendsen v. Svendsen*, 37 S. D. 353, 158 N. W. 410 (1916).

<sup>6</sup> Informal marriages are generally termed "common-law" marriages, and the terms are here used as interchangeable, although there is, perhaps, some doubt as to whether marriages were ever wholly valid at common law without formal solemnization. The historically more accurate view is that the earlier English common law recognized informal marriages. *Dalrymple v. Dalrymple*, 2 Hagg. Con. 54 (1811). See 1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 405. But it was declared by a comparatively recent decision of the House of Lords that informal marriages were never valid in England. *Reg. v. Millis*, 10 Cl. & Fin. 534 (1844). This decision was, of course, too recent to be an authority for the courts of this country. The marriage acts in England now make informal marriages void. 26 GEO. II, c. 33; 6 and 7 WM. IV, c. 85. Informal marriages are valid in Scotland. *Dalrymple v. Dalrymple*, *supra*. *The Breadalbane Case*, L. R. 1 H. L. Sc. 182 (1867).

<sup>7</sup> See L. R. A. 1915 E, 19, 20, for a list of these states.

<sup>8</sup> *Dumaresny v. Fishly*, *supra*; *In re Hulett's Estate*, 66 Minn. 327, 69 N. W. 31 (1896); *Davis v. Stouffer*, 132 Mo. App. 555, 112 S. W. 282 (1908); *Jackson v. Winne*, 7 Wend. (N. Y.) 47 (1831).

<sup>9</sup> The promises may be oral. *Bissell v. Bissell*, 55 Barb. (N. Y.) 325 (1869). Indeed, they may be wholly inferred from the conduct of the parties. See cases cited in note 14, *infra*.

<sup>10</sup> The promises in an informal marriage must be *per verba de praesenti*. *Robertson v. State*, 42 Ala. 509 (1868); *Hebblethwaite v. Hepworth*, 98 Ill. 126 (1881); *Cheney v. Arnold*, *supra*; *Duncan v. Duncan*, 10 Ohio St. 181 (1859); *Fryer v. Fryer*, *supra*.

status of husband and wife,<sup>11</sup> this agreement without more creates a valid marriage.<sup>12</sup> But there are cases squarely holding that cohabitation is also essential.<sup>13</sup> However unfortunate these latter decisions,<sup>14</sup> they will probably be followed in the states in which they were rendered, and must be given appropriate consideration in connection with our main problem.

3. Personal presence of the parties at the time the agreement is made has been stated to be one of the requisites of a valid consensual marriage.<sup>15</sup> But marriages by proxy were possible in England when informal marriages were there recognized,<sup>16</sup> so that this requirement of

Where promises *per verba de futuro cum copula* are allowed to constitute a marriage, it is only because present promises are inferred at the time of the later copulation. *In re McCausland's Estate*, 52 Cal. 568 (1878); *Peck v. Peck*, 12 R. I. 485 (1880); *Stoltz v. Doering*, 112 Ill. 234 (1885).

<sup>11</sup> The mutual promises must be consistent with the recognized essentials of the marriage relation. *State v. Walker*, 36 Kan. 297, 13 Pac. 279 (1887). Thus, simply promising to live together is not enough. *Soper v. Halsey*, 85 Hun. (N. Y.) 464, 33 N. Y. Supp. 105 (1895). It must be intended that the relation be permanent. *Peck v. Peck*, 155 Mass. 479, 30 N. E. 74 (1892); *State v. Ta-cha-na-tah*, 64 N. C. 614 (1870). *Contra*: *Johnson v. Johnson's Adm'r*, 30 Mo. 72 (1860). Also, that it be mutually exclusive of marriage relations with others. *Riddle v. Riddle*, 26 Utah 268, 72 Pac. 1081 (1903). See 1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, §§ 301, 317.

<sup>12</sup> Of course an informal marriage may be invalid for any substantive reason, such as incapacity of the parties, and the like, which would make a regularly solemnized marriage invalid.

<sup>13</sup> *Hawkins v. Hawkins*, 142 Ala. 571, 38 So. 640 (1904); *Herd v. Herd*, 194 Ala. 613, 69 So. 885 (1915); *Grigsby v. Reib*, *supra*. See also *Lorimer v. Lorimer*, 124 Mich. 631, 635, 83 N. W. 609, 610 (1900). As to a statutory rule in California and South Dakota, see note 5, *supra*.

In *Davis v. Stouffer*, *supra*, it is said, "There are cases in which the statement is made that a contract *in praesenti* followed by cohabitation, or by intercourse, is a valid common-law marriage; but the latter clause of that statement was merely addressed to the facts which appeared in the particular case. It was not meant that the marriage would not be complete without that fact." Illustrating this statement, see: *Davis v. Pryor*, *supra*, 276; *Heymann v. Heymann*, 218 Ill. 636, 640, 75 N. E. 1079, 1080 (1905); *Shorten v. Judd*, 60 Kan. 73, 77, 55 Pac. 286, 287 (1898); *Floyd v. Calvert*, 53 Miss. 37, 44 (1876).

<sup>14</sup> Cohabitation may be a very important circumstance from which to infer mutual present promises to assume the marriage relation. *Haywood v. Nichols*, 99 Kan. 138, 160 Pac. 982 (1916); *Bey v. Bey*, 83 N. J. Eq. 239, 90 Atl. 684 (1914); *Rose v. Clark*, 8 Paige (N. Y.) 574 (1841). The *Breadalbane Case*, *supra*. It is possible to have a valid common-law marriage based on promises wholly so inferred. *Adger v. Ackerman*, *supra*; *Estes v. Merrill*, 121 Ark. 361, 181 S. W. 136 (1915); *Land v. Land*, 206 Ill. 288, 68 N. E. 1109 (1903). But cohabitation of itself does not constitute marriage; "*consensus, non concubitus, facit matrimonium*." *In re Boyington's Estate*, 157 Iowa, 467, 137 N. W. 949 (1912); *Marks v. Marks*, 108 Ill. App. 371 (1903); *Schwingle v. Keifer*, 135 S. W. (Tex. Civ. App.) 194 (1911). In fact, as is pointed out in *Davis v. Stouffer*, *supra*, and in *In re Hulett's Estate*, *supra*, except as evidence of mutual promises, cohabitation should be considered wholly immaterial. See 1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 315, 27 HARV. L. REV. 378.

<sup>15</sup> "It was . . . not . . . disputed that marriage can only be contracted in Scotland by the mutual agreement of both parties to become husband and wife. There is, however, no particular form or ceremony by which such agreement must be manifested except, indeed, that the parties must, in order to constitute a marriage *de praesenti*, be in the presence of each other when the agreement is entered into, and it must be an agreement to become husband and wife immediately from the time when mutual consent is given." Lord Cranworth, in the *Breadalbane Case*, *supra*, 199.

<sup>16</sup> See E. G. Lorenzen, *supra*, 480, 481.

personal presence, if it existed, was confined within very narrow limits. Swinburne has expressly declared that a valid marriage might be contracted by mail.<sup>17</sup> The opposing view seems to rest on the reasoning that, in a marriage contract, the consents must be given at the same instant, apparently an impossibility where the agreement is entered into by mail.<sup>18</sup> But the theory of the law of contracts, — that an offer sent by mail continues to be made during every moment of its travel, so that when accepted, the offer and acceptance are contemporaneous,<sup>19</sup> — seems as applicable to contracts creating the marriage status as to ordinary contracts.<sup>20</sup> It is true that the marriage status is of such vital importance that its creation should be closely guarded.<sup>21</sup> But, on the other hand, the public policy favoring the legitimation of children and lawful, in preference to illicit, relations militates against the requirement of formalities of any sort.<sup>22</sup> The fact that the promises must be *per verba de praesenti* furnishes a substantial safeguard against the possibility of contracting marriage "accidentally." Therefore, where the parties during the exchange of promises are in the same jurisdiction, assuming that it is one where informal marriages are valid, it is safe to assert that a valid marriage may be contracted by mail.<sup>23</sup>

4. But where the parties are in different jurisdictions during the exchange of promises, there arises the further question of what law determines the effect of the transaction. This was the situation in *Great*

<sup>17</sup> SWINBURNE, SPOUSALS, 2 ed., 162, 181-83. Bishop accepts Swinburne's statement as the correct common-law doctrine. 1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 325.

<sup>18</sup> See *Campbell v. Sassen*, 2 Wils. & S. 309, 317-319 (1826); 1 FRASER, DOMESTIC RELATIONS, 155, 156.

<sup>19</sup> "The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs and then the contract is completed by the acceptance of it by the latter." *Adams v. Lindsell*, 1 B. & Ald. 681, 683 (1818).

<sup>20</sup> The argument that the offeror of marriage may change his mind between the time of mailing the offer and the time of its acceptance, with the serious consequence that, if the offer was accepted, a marriage would be created which was not based on real mutual consent, is not of much consequence practically, since it would be a rare case indeed where so rapid a change of heart took place as to so momentous a decision. Also, the decision is, in the first place, more likely to be a well-deliberated one when arrived at away from the presence of the enchantress. Moreover, an analogous argument applies with equal force to marriages by proxy, should the party desire to revoke the proxy's authority. See E. G. Lorenzen, *supra*, 482, 483.

<sup>21</sup> Willing assent is given to a proposition that the transactions on which a claim of a common-law marriage is based should be subjected to the careful scrutiny of the courts, especially after the death of one of the parties. See *Bishop v. Brittain Investment Co.*, 229 Mo. 699, 724; 129 S. W. 668, 675 (1910). And it would seem that this is a sufficient protection against any possible danger of promoting blackmail or perjury that might arise out of the practice of allowing letters to be held to constitute a binding marriage.

<sup>22</sup> See *In re Sanders' Estate*, 168 Pac. (Okla.) 197, 198 (1917); *Houston Oil Co. of Texas v. Griggs*, 181 S. W. (Tex. Civ. App.) 833, 836 (1915); 1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 77.

<sup>23</sup> A search of the American authorities has failed to reveal any case in which the validity of a marriage by mail has been under consideration, with the exception of the recent case discussed in the text, *infra*. There is, however, a case decided under the Scotch law, in which a valid marriage was based primarily on a letter, addressed to the woman, but delivered to a third party, although there was no direct evidence that the woman knew of the letter's contents before the man's death. *Hamilton v. Hamilton*, 9 Cl. & Fin. 327 (1842).

*Northern Ry. Co. v. Johnson*,<sup>24</sup> a recent case in the Circuit Court of Appeals. In this case, an exchange of promises *de presenti* by mail between a man residing in Minnesota and a woman residing in Missouri was held to constitute a valid marriage. Both Minnesota<sup>25</sup> and Missouri<sup>26</sup> allow common-law marriages, however, so that the decision of the question of what law governed the formal validity was not necessary to the result. The principle of the conflict of laws is unquestioned, that, at least as to formal validity, the law of the place of celebration controls.<sup>27</sup> The difficulty here is to determine which jurisdiction is the place of celebration. As to an ordinary contract, the settled rule, whatever its theoretical difficulties,<sup>28</sup> is that the *locus contractus* is the place where the acceptance is mailed.<sup>29</sup> A marriage, it is true, is not merely a contract; it is the creation of a status.<sup>30</sup> However, there seems to be no good reason for the application of a different rule.<sup>31</sup> The court in the principal case proceeded on this reasoning,<sup>32</sup> since it was held that the marriage was governed by the laws of Missouri, where the acceptance was mailed. Consequently, it would presumably have upheld the marriage, even if informal marriages were not recognized in Minnesota. Although there is no direct authority precluding this result, some doubt has been expressed as to its correctness, apparently based on the idea that a state or country cannot impose a status on a person who is neither domiciled nor present within its territorial limits.<sup>33</sup> Even admitting this premise,

<sup>24</sup> 254 Fed. 683 (Cir. Ct. App.).

<sup>25</sup> *State v. Worthingham*, *supra*; *In re Hulett's Estate*, *supra*; *Shattuck v. Shattuck*, 118 Minn. 60, 136 N. W. 409 (1912).

<sup>26</sup> *Dyer v. Brannock*, *supra*; *State v. Bittick*, 103 Mo. 183, 15 S. W. 325 (1891); *Nelson v. Jones*, 245 Mo. 579, 151 S. W. 80 (1912).

<sup>27</sup> *Kent v. Burgess*, 11 Sim. 361 (1840); *Brinkley v. Attorney-General*, 15 P. D. 76 (1890); *Meister v. Moore*, *supra*; *Lando v. Lando*, 112 Minn. 257, 127 N. W. 1125 (1910); *Clark v. Clark*, 52 N. J. Eq. 650, 30 Atl. 81 (1894); *Nelson v. Carlson*, 48 Wash. 651, 94 Pac. 477 (1908). See STORY, *CONFLICT OF LAWS*, § 113; 25 HARV. L. REV. 374; 26 HARV. L. REV. 536.

<sup>28</sup> See WALD'S *POLLOCK ON CONTRACTS* (WILLISTON'S ed.), 37, 38.

<sup>29</sup> *Adams v. Lindsell*, *supra*; *Dunlop v. Higgins*, 1 H. L. C. 381 (1848); *Newcomb v. De Roos*, 2 E. & E. 271 (1859).

<sup>30</sup> See *Bishop v. Brittain Investment Co.*, 229 Mo. 699, 726; 129 S. W. 668, 676 (1910); *Hilton v. Roylance*, 25 Utah 129, 137, 69 Pac. 660, 663 (1902).

<sup>31</sup> "Marriage being a civil contract, the rules to be applied must be to a great extent the same as are applied to ordinary contracts." *Coad v. Coad*, 87 Neb. 290, 292; 127 N. W. 455, 457 (1910).

The rule of ordinary contracts, if applied to contracts of marriage, would carry with it, as a necessary consequence the result that, if the acceptance was never received at all, there would be a binding marriage, nevertheless. *Household Fire Ins. Co. v. Grant*, 4 Exch. Div. 216 (1879). The practical dangers of this result do not seem to justify the adoption of a special rule for marriage contracts; *vis.*, that the marriage is made where the acceptance is received. But even if such a rule were adopted, it would not change any of the conclusions reached herein, except as indicated in note 34, *infra*.

<sup>32</sup> Missouri has a statute expressly declaring marriage to be a civil contract. 1909, REV. STAT., c. 76, § 8279. But this simply means that marriage is made independent of religion; it does not dispense with any of the ordinary requisites of an informal marriage. See cases cited in note 26, *supra*. Moreover, even if this statute put marriages in Missouri on exactly the same basis as commercial contracts, it could not have the effect of appropriating to Missouri a jurisdiction which Missouri would not otherwise have had. Consequently, the decision in *Great Northern Ry. Co. v. Johnson*, *supra*, does not depend on any peculiarity of the law of Missouri.

<sup>33</sup> See *In re Lum Lin*, 59 Fed. 682, 683; 1 BISHOP, *MARRIAGE, DIVORCE, AND SEPARATION*, § 326.

it does not follow that the absentee may not *voluntarily* assume such a status. *Great Northern Ry. Co. v. Johnson* seems sound, and there is no sufficient basis for doubt that it will be followed in a case where informal marriages are not valid in the jurisdiction where the proposer is present.<sup>34</sup>

Applying the foregoing to our case of the American soldier abroad,<sup>35</sup> he should be able to enter into a valid marriage by mail, if the proposed wife to whom he addresses his offer of marriage accepts it in a state—whether her domicile or not<sup>36</sup> which recognizes common-law marriages, and which does not require cohabitation as an essential element of the informal marriage.

## RECENT CASES

**ADMIRALTY — JURISDICTION — TEST OF JURISDICTION OVER CONTRACTS.** — The plaintiff ship building company, in pursuance of an agreement made with the owners of the steamship *Yucatan*, towed the vessel to its shipyard, and, having hauled her out on land, repaired her. For a claim under the contract the plaintiff instituted a libel *in personam*. The defendant filed a motion to dismiss the cause for want of jurisdiction in admiralty. *Held*, that admiralty has jurisdiction. *North Pacific Steamship Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, U. S. Supreme Court, October Term, 1918, No. 53.

In the fourteenth century the jurisdiction of admiralty, which until that time had been extended to all cases partaking of a maritime flavor, was greatly curtailed by successive enactments. GODOLPHIN, A VIEW OF ADMIRALTY JURISDICTION, c. 12. See *De Lovis v. Boit*, 2 Gall. (C. C.) 398, 418. Thereafter the court could not take cognizance of a contract made on land, even if to be performed at sea. *Susano v. Turner*, Noy, 67; *Craddock's Case*, 2 Brownl. & Gold. 39. Nor if made at sea to be performed on land. *Bridgeman's Case*, Hobart 11. These restrictions upon admiralty jurisdiction were rejected in the United States from an early date. *The Lottawanna*, 21 Wall. (U. S.) 558; *Waring v. Clarke*, 5 How. (U. S.) 441. The civil jurisdiction was made to depend, not as in matters of tort upon locality, but upon the subject matter of the contract, which must be essentially concerned with maritime services, transactions, or casualties. *New England Marine Ins. Co. v. Dunham*, 11 Wall. (U. S.) 1. See BENEDICT, AMERICAN ADMIRALTY, § 256. Contracts for the building of vessels, not being maritime contracts, are not within the scope of admiralty. *The Winnebago*, 205 U. S. 354; *Roach v. Chapman*, 22 How. (U. S.) 129. But contracts for the repair of vessels, being maritime, are subject to maritime jurisdiction. *The J. E. Rumbell*, 148 U. S. 1; *Peyroux v. Howard*, 7 Pet. (U. S.) 324. The element necessary to the distinction is not the *locus* of the work, but its reference to a vessel engaged in navigation and commerce. *Tucker v. Alexan-*

<sup>34</sup> If it were thought preferable to adopt the rule that the place of celebration was the place where the acceptance was received, there would be no valid marriage, unless informal marriages were good in the jurisdiction where the proposer was present. But, then, the law of the acceptor's jurisdiction would be immaterial. Therefore, if either jurisdiction permitted informal marriages, that could be made sufficient in any given case, since the rôle of the respective parties could be interchanged accordingly.

<sup>35</sup> The conclusions reached are based on the least favorable assumption as to the law of the jurisdiction in which the soldier is present; *vis.*, that informal marriages are not there valid.

<sup>36</sup> It would be sufficient if the woman was present within this jurisdiction only long enough to accept the offer. *Cf. Lorenzen, supra*, 487, 488.

*droff*, 183 U. S. 424; *The Manhattan*, 46 Fed. 797. This jurisdiction is not lost though incidental repairs are performed while the vessel is hauled out on land, the criterion being that the contract relates to repair, not to the use of the marine railway or dry dock. *The Steamship Jefferson*, 215 U. S. 130; *Warman v. Griffith*, 3 Blatchf. (C. C.) 528.

**ADOPTION — CONTRACT TO ADOPT — RIGHT OF INHERITANCE — SPECIFIC PERFORMANCE.** — The defendant's intestate and her husband contracted with the paternal grandmother of the plaintiff to adopt the plaintiff's father, "according to the statutory law" and "to do for him in every respect as if he were their offspring." Under this contract, the plaintiff's father entered the home of the defendant's intestate, and until the day of his death, the assumed ties of mother and son were maintained. The defendant's intestate did not, however, legally adopt the child. The latter's daughter sought to take under the laws of intestacy and inheritance. *Held*, that she might take. *Barney v. Hutchinson, et al.* 177 Pac. 890 (New Mexico).

Adoption is universally authorized in this country by statute, being unknown to the common law. *Matter of Zeigler*, 82 Misc. 346, 143 N. Y. Supp. 562. The resulting relation is therefore statutory, not contractual. *Calhoun v. Bryant*, 28 S. D. 266, 133 N. W. 266. Such statutes generally confer a right to inherit from the adopting parent. *Gilliam v. Guaranty Trust Co.*, 186 N. Y. 127, 78 N. E. 697; *Ryan v. Foreman*, 262 Ill. 175, 104 N. E. 189; 31 HARV. L. REV. 488. Accordingly a contract to adopt carries with it the incidental right of heirship. *Thomas v. Malone*, 142 Mo. App. 193, 126 S. W. 522. | This right descends to the children of the adopted child. *Gray v. Holmes*, 57 Kan. 217, 45 Pac. 596. The right of the adopting parent to disinherit naturally follows unless the contract definitely states otherwise. The relation alone will not ground a contract of inheritance. *Odenbreit v. Utheim*, 131 Minn. 56, 154 N. W. 741; *Steele v. Steele*, 161 Mo. 566, 61 S. W. 815. In the principal case, the adoption proceedings did not conform to statutory requirements, but the contract was fully performed by the child. In such a case, the child or his heirs may recover. *Crawford v. Wilson*, 139 Ga. 654, 78 S. E. 30. The measure of damages for the breach of such a contract is the value of the service performed, with interest, not the value of the share of the promisor's estate which would have been inherited by the child, had the contract been performed. *Sandham v. Grounds*, 94 Fed. 83. Where the consideration executed on the part of the child consists of services, companionship, and a change of domestic relations, its value cannot be adequately compensated in damages. *Crawford v. Wilson, supra*. The court, regarding that as done which ought to have been done, in decreeing that the child, and therefore its heir, was entitled to the fruits of legal adoption, is in accord with the great weight of authority. *Thomas v. Malone, supra*; *Chehak v. Battles*, 133 Iowa, 107, 110 N. W. 330. But see *contra*, *Davis v. Jones' Adm'r*, 94 Ky. 320, 22 S. W. 331.

**ADVERSE POSSESSION — TAX LIENS — WHETHER CONTINUITY OF POSSESSION AFFECTED BY.** — In an action of ejectment the plaintiff based his claim in part upon a tax deed from the state which had purchased the land for the delinquent taxes of X. The defendant claimed under an adverse possession, which was running when the tax lien attached, but which had not ripened into title. The statutory period had run at the time of the purchase by the state. *Held*, the tax deed was invalid because the tax lien was extinguished by adverse possession. *West Virginia & Virginia Coal Co. v. Charles*, 254 Fed. 379.

For a discussion of this case, see NOTES, page 844.

**BANKRUPTCY — ADJUDICATION — INSOLVENCY — RES JUDICATA.** — A trustee in bankruptcy sued to recover a preference and offered as evidence of the

debtor's insolvency at the time of the preference the petition and adjudication in involuntary bankruptcy. The petition alleged that the defendant had received a preference, and the adjudication found that the bankrupt had been insolvent for four months preceding the filing of the petition. The defendant did not appear in the bankruptcy proceedings. The trial court ruled this evidence conclusive on the grounds that the proceedings were in a sense *in rem* and that all creditors were parties. *Held*, that the evidence is not conclusive against the defendant. *Gratiot State Bank v. Johnson*, U. S. Supreme Court, October Term, 1918, No. 148.

It is held that an adjudication, being *in rem*, determines the debtor's status as a bankrupt against everybody. *Michaels v. Post*, 21 Wall. (U. S.) 398, 428; *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U. S. 656. The question of what other determinations, if any, will be *res judicata* has given rise to difference of opinion. See 1 REMINGTON, BANKRUPTCY, 2 ed., §§ 444, 445. Thus, a finding of insolvency has been held conclusive because it is *in rem* and because creditors are parties since they may appear under sections 18*b* and 59*f* of the Bankruptcy Act. (ACT OF JULY 1, 1898, c. 541, §§ 18*b*, 59*f*, 30 STAT. 544. ACT OF FEBRUARY 5, 1903, c. 487, § 6, 32 STAT. 797, 798.) *Cook v. Robinson*, 114 C. C. A. 505, 194 Fed. 785; *In re American Brewing Co.*, 50 C. C. A. 517, 112 Fed. 752. *Cf. Sheppard-Strassheim Co. v. Black*, 128 C. C. A. 147, 151, 211 Fed. 643, 647. *Contra, In re McCrum*, 130 C. C. A. 555, 214 Fed. 207; *Silvey & Co. v. Tift*, 123 Ga. 804, 51 S. E. 743. See *Mansen v. Williams*, 213 U. S. 453, 455. Parties in interest are considered creditors and are therefore allowed to appear. *Jackson v. Wauchula Mfg. & Timber Co.*, 144 C. C. A. 551, 230 Fed. 409; *In re Everybody's Store*, 125 C. C. A. 290, 207 Fed. 752. *Cf. In re Eureka Anthracite Coal Co.*, 197 Fed. 216. See 17 HARV. L. REV. 131. And such parties might similarly have been held bound. The principal case ends this confusion and establishes that only the condition of bankruptcy is, by the adjudication, binding on those not actually parties. This is the correct view, for the adjudication creates only the condition it decrees. Furthermore, section 59*f* merely provides for validating the petition. *In re Mackey*, 110 Fed. 355. See 23 HARV. L. REV. 479. Section 18*b* merely provides, as is pointed out in the principal case, that the creditors may, if they choose, protect themselves. Whether a finding is admissible in evidence, however, has been left open. It is submitted that it is not admissible, since a judgment, except so far as it may be *in rem*, affects only the parties or their privities. *Lewis v. Sloan*, 68 N. C. 557; *Silvey & Co. v. Tift*, *supra*.

**BILLS AND NOTES — PURCHASER FOR VALUE WITHOUT NOTICE — RIGHTS OF A PAYEE AGAINST AN IRREGULAR INDORSER.** — The defendant indorsed an incomplete note for the accommodation of the maker, which was later improperly filled in by the latter and transferred to the plaintiff, the payee. The note was dishonored at maturity and the plaintiff sues the defendant as indorser. *Held*, that he may recover. *Johnston v. Knipe*, 105 Atl. 705 (Pa.).

Under the Bills of Exchange Act, a payee is not a holder in due course. *Herdman v. Wheeler*, [1902] 1 K. B. 361. See BRANNAN, NEG. INST. LAW, § 14 (c). In a later case, however, the English court allowed recovery by a payee on the theory that the maker was estopped from setting up that a third party had filled up the blanks in excess of his authority. *Lloyd's Bank v. Cooke*, [1907] 1 K. B. 794. The theory of estoppel does not extend to the case where the blanks were filled in without any authority from the maker. *Smith v. Prosser*, [1907] 2 K. B. 735. Under the Negotiable Instruments Law, a payee has also been held not a holder in due course. *Vander Ploeg v. Van Zuuk*, 135 Iowa, 350, 112 N. W. 807. But the New York and Massachusetts courts have declined to follow the latter decision, giving "negotiation" a broader interpretation than is warranted by a literal construction of

the act. *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646; *Brown v. Rowan*, 91 N. Y. Misc. 220, 154 N. Y. Supp. 1098. Strangely, however, the New York court has held that transference by a thief is not such a "negotiation" as will constitute a payee a holder in due course. *Empire Trust Co. v. Manhattan Co.*, 97 Misc. 694, 162 N. Y. Supp. 629. See 30 HARV. L. REV. 515. The question arises for the first time in Pennsylvania, and the court also repudiates the Iowa decision. The fact that the defendant was an irregular indorser and not the maker, as was true in all the preceding cases, can create no basis for any substantial distinction. See also *Thorpe v. White*, 188 Mass. 333, 74 N. E. 592; *Liberty Trust Co. v. Tilton*, 217 Mass. 462, 105 N. E. 605.

**CARRIERS — DUTY TO TRANSPORT — LIABILITY OF CARRIER FOR ACT OF FOREIGN AGENT IN ACCORDANCE WITH FOREIGN LAW.** — The defendant, a common carrier running freight steamers between the United States and Shanghai, China, employed as agent in Shanghai a British firm, which was, by English law, forbidden to deal with parties on the British "black list." In 1916 the plaintiff, an American citizen, agent for German subjects and therefore on the "black list," tendered goods for carriage to the defendant's agent. In accordance with his legal duty, the latter refused to accept them for transportation. The plaintiff brought an action to recover for this refusal. *Held*, that the defendant is liable. *Swayne v. Hoyt*, 255 Fed. 71.

One of the duties of a common carrier is to receive for carriage, subject to reasonable limitations, any goods offered it, the nature of which corresponds to those which it professes to carry. *Ill. Cent. R. R. Co. v. Frankenberg*, 54 Ill. 88. Accordingly, the refusal to serve the plaintiff, unless justified, rendered the defendant liable. A common carrier must serve without discrimination every member of the class it professes to serve. *Pittsburg, etc. Ry. Co. v. Morton*, 61 Ind. 539; *Brown v. Memphis & C. Ry. Co.*, 5 Fed. 499. See WYMAN, PUBLIC SERVICE CORPORATIONS, § 344. Refusal to serve must be based on the possibility of performing the service, not on the character of the shipper. See WYMAN, PUBLIC SERVICE CORPORATIONS, § 550. The mere refusal of a carrier's employees to serve does not relieve the carrier of liability. *Seasongood, etc. Co. v. Tennessee, etc. Transp. Co.*, 21 Ky. L. Rep. 1142, 54 S. W. 193. On the other hand, subserviency to governmental authority is a defense. *Palmer v. Lorrillard*, 16 Johns. 348; *Phelps v. Ill. Cent. R. R. Co.*, 94 Ill. 548. In the principal case, however, the law bound the agent alone and not the defendant principal. It is submitted that the defendant's duty to render reasonable service to the public required the maintenance of a competent agent. It was reasonable to expect the situation which arose, and the defendant should have provided for it. *St. Louis, etc. Ry. Co. v. State*, 85 Ark. 311, 107 S. W. 1180. Hence the incompetency of the agent was no excuse.

**CONSTITUTIONAL LAW — DUE PROCESS — POLICE POWER — LIMITATION OF FEES OF EMPLOYMENT AGENCIES.** — An ordinance limited fees of employment agents to five per cent of the first month's wages and board. An employment agent charged a larger fee for furnishing a clerical position, and was convicted of violating the ordinance. *Held*, that the conviction be reversed. *Wilson v. City & County of Denver*, 178 Pac. 17 (Colo.).

For the protection of the public welfare private employment agencies are subject to regulation under the police power. *Brazee v. Michigan*, 183 Mich. 259, 149 N. W. 1053; *Brazee v. Michigan*, 241 U. S. 340; *Price v. People*, 193 Ill. 114, 61 N. E. 844. Legislation under this power will be overthrown only when utterly and grossly unreasonable. *Rast v. Denman*, 240 U. S. 342, 357. See 32 HARV. L. REV. 173. A prohibition of fees has been held unreasonable. *Adams v. Tanner*, 244 U. S. 590. See 31 HARV. L. REV. 490. And the same has been



held in regard to a limited maximum fee, because it regulated a harmless business. *Ex parte Dickey*, 144 Cal. 234, 77 Pac. 924. Cf. *City of Spokane v. Macho*, 51 Wash. 322, 98 Pac. 755. The principal case, however, recognizes the incidental evil of the business, exorbitant rates charged to the necessitous, but holds that laborers need protection while clerical and technical applicants do not. Accordingly the court, in order to render the ordinance constitutional, construes "wages" to include only the former. *Grenada County v. Brogden*, 112 U. S. 261; *Chesebrough v. City & County of San Francisco*, 153 Cal. 559, 96 Pac. 288. The term "wages" has received various constructions. See *Boward v. K. C., Ft. S. & M. Ry. Co.*, 83 Mo. App. 498, 501; *In re Stryker*, 158 N. Y. 526, 528, 53 N. E. 525; *South & North Alabama Railway v. Falkner*, 49 Ala. 115, 118. But each case should depend on its own subject matter and object. *Gordon v. Jennings*, 9 Q. B. D. 45, 46. And it is submitted that the ordinance in the principal case applies to all and is constitutional. It is, and was intended as, a regulation similar to usury laws to protect the necessitous, regardless of their employment. It seems that "wages and board" was used merely to afford a basis for computing the fee chargeable. See, dissenting opinions, *Ex parte Dickey*, 144 Cal. 234, 242, 77 Pac. 324, 327; *Adams v. Tanner*, 244 U. S. 590, 597.

CONSTITUTIONAL LAW — POWERS OF LEGISLATURE: TAXATION — POLICE POWER — ENCROACHMENT THEREON. — Section 2 of the Harrison Anti-Narcotic Act provides certain regulations and restrictions governing the sale, dispensing and distribution of opium and its derivatives. The Circuit Court of Appeals held the provisions unconstitutional as an invasion of the police power reserved to the states. On error to the Supreme Court, *held*, that the provisions were valid. *United States v. Doremus*, U. S. Sup. Ct., Oct. Term, 1918, No. 367.

For a discussion of this case, see NOTES, page 846.

CONTEMPT OF COURT — CONSTRUCTIVE CONTEMPT — PUBLIC ASSAULT ON ALLEGED INFORMER. — The defendant, in violation of an injunction, removed liquor from his saloon. Pending an application against him to punish for contempt, the defendant publicly but outside the presence of the court assaulted and battered a person supposed by him to have given the information as to removal of the liquor. In fact, the defendant was mistaken in the identity of his victim. *Held*, that the defendant is guilty of contempt of court. *In re Hand*, 105 Atl. 594 (N. J.).

In general, any conduct which obstructs the due administration of justice constitutes contempt of court. See *Adams v. Gardner*, 176 Ky. 252, 257, 195 S. W. 412, 414; *Ex parte Clark*, 208 Mo. 121, 145, 106 S. W. 990, 996; OSWALD, CONTEMPT OF COURT, 3 ed., 6. Thus it is contempt to procure one already subpoenaed as a witness to absent himself from the trial. *Commonwealth v. Reynolds*, 80 Mass. 87. See *State v. Moore*, 146 N. C. 653, 61 S. E. 463; 2 BISHOP, CRIMINAL LAW, 8 ed., § 258. Nor would the fact that the subpoena had not yet been served make such acts any less an obstruction of justice. *Rex v. Carroll* (1913), Vict. L. R. 380. See 2 WHARTON, CRIMINAL LAW, 7 ed., § 2287; 27 HARV. L. REV. 166. Even the use of threatening language toward an intended witness for the purpose of intimidating him in giving his evidence is a contempt of court. *Shaw v. Shaw*, 8 Jur. (N. S.) 141. See *Rex v. Gray*, 23 N. Z. L. R. 52 C. A. *A fortiori* an assault and battery upon a witness to influence his testimony in a future trial constitutes a contempt. *Brannan v. Commonwealth*, 162 Ky. 350, 172 S. W. 703. See 32 HARV. L. REV. 174. The principal case, in holding as a contempt an act of this nature done outside the presence of the court, the battery being committed upon one who is not a witness, goes beyond the prevailing authorities. The policy of the law, it appears, is to confine the doctrine of constructive contempt to cases falling within

the established rules. *Haskett v. State*, 51 Ind. 176. Since, however, the assault here operated as a warning to others that anyone testifying against the defendant was in danger of suffering the same consequences, it would seem that the free course of justice was thereby obstructed sufficiently to constitute a contempt of court. See Beale, "Contempt of Court, Criminal and Civil," 21 HARV. L. REV. 161.

**EVIDENCE — DOCUMENTS — REJECTION OF A MEMORANDUM PROCURED BY FRAUD.** — In defense to an action for breach of oral warranty, the defendant pleaded that the contract had been reduced to writing, and gave in evidence a written memorandum which apparently restricted the alleged warranty so as to defeat the plaintiff's recovery. The plaintiff proved that his signature to the memorandum had been procured by a fraudulent misrepresentation as to its contents, and the lower court did not admit the writing. *Held*, that the memorandum was properly excluded. *Whipple v. Brown Bros. Co.*, 121 N. E. 748 (N. Y.).

If a specialty fails to express the true intention of the parties on account of mistake, clerical error, or fraud, equity may reform it. *Pickens v. Pickens*, 72 W. Va. 50, 77 S. E. 365; *Kinman v. Hill*, 156 N. W. 168 (Iowa); *Jones v. Johnston*, 193 Ala. 265, 69 So. 427. In such cases equity merely makes it possible for the parties to perform the contract actually made. See 4 POMEROY, EQUITY JURISPRUDENCE, §§ 1375-76. In determining whether there is a contract the law now regards, not the hidden intentions, but the inferences that one party reasonably draws from the words and acts of the other. *Stoddard v. Ham*, 129 Mass. 383; *Williams v. Burdick & Co.*, 63 Ore. 41, 126 Pac. 603. If a written memorandum of a sale does not express the true intention of the parties on account of the fraud of one of the bargainors, the writing is not evidence of a contract either on the old theory of a meeting of minds or the modern theory of expressed mutual assent. *Shea's Appeal*, 121 Pa. 302, 15 Atl. 629; *Shores-Mueller Co. v. Lonning*, 159 Iowa, 95, 140 N. W. 197. In the principal case, therefore, the memorandum procured by fraud was properly rejected. It seems that if the plaintiff, although wishing to postpone action on the contract, had desired to have the memorandum so modified as to avoid future prejudice, he could have had it reformed in equity on a bill *quia timet*. See *Brown v. Statter*, 206 Mass. 119, 122, 92 N. E. 78, 79.

**ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — AGREEMENT OF OFFICER OF A CORPORATION TO PROCURE A CONTRACT FROM THE CORPORATION.** — The defendant agreed to form a corporation of which he should be a director and to procure a contract whereby all the goods of the corporation were to be bought from the plaintiff at a price named by him and to be sold at prices fixed by him. The corporation was organized with the defendant as director, but he failed to procure the contract from the corporation. The plaintiff then brought action for the breach of the original agreement. *Held*, that the agreement is illegal. *Rosenthal v. Light*, 173 N. Y. Supp. 743.

The general principle is well established that a contract by the directors or stockholders of a corporation which tends to influence their action to the prejudice of the corporation, its creditors, or the other stockholders is illegal. Such contracts usually consist of promises of employment by the corporation to incorporators or purchasers of stock. *West v. Camden*, 135 U. S. 507; *Guernsey v. Cook*, 120 Mass. 501. This rule has been relaxed somewhat in cases where the parties to the contract were the only ones interested in the corporation or where all those interested have consented, and it does not appear that the performance of the contract will lead to a breach of the duties owed the corporation. *Drucklieb v. Harris*, 209 N. Y. 211, 102 N. E. 599; *Kantler v. Bensinger*, 214 Ill. 589, 73 N. E. 874. See *Fabre v. O'Donohue*, 173 N. Y. Supp.

472. *Cf. Woodruff v. Wentworth*, 133 Mass. 309, 314. The principal case is a further application of the general rule. In addition to there being stockholders unaware of the contract, it is manifest that the agreement by the corporation would not inure to its advantage. The corporation is to be made a mere selling agency subject to the will of the plaintiff, who is to reap the profits.

**INJUNCTIONS — ACTS RESTRAINED — INJUNCTION AGAINST HOLDING ELECTION ON UNCONSTITUTIONAL AMENDMENT.** — Plaintiff sued to enjoin the submission to popular vote of a proposed state constitutional amendment alleged to be in conflict with the Constitution of the United States. *Held*, that an injunction should not be granted. *Weinland v. Fulton*, 121 N. E. 816 (Ohio).

If plaintiff sued as an elector or citizen the court would refuse an injunction on the ground that equity does not protect political rights. *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683. Equity will protect a taxpayer, however, from misuse of public funds. *Crampton v. Zabriskie*, 101 U. S. 601. In a few states a taxpayer may enjoin the holding of an election where the statute or ordinance under which it was called is *ultra vires*. *De Kalb County v. Atlanta*, 132 Ga. 727, 65 S. E. 72; *Solomon v. Fleming*, 34 Neb. 40, 51 N. W. 304; *Cascaden v. Waterloo*, 106 Iowa, 673, 77 N. W. 333. See *Layton v. Monroe*, 50 La. Ann. 121, 23 So. 99. But the weight of authority is against this. *Pfeifer v. Graves*, 88 Ohio St. 473, 104 N. E. 529; *Duggan v. Emporia*, 84 Kan. 429, 114 Pac. 235; *Dubuisson v. Election Supers.*, 123 La. 443, 49 So. 15; *McAlester v. Millwee*, 31 Okla. 620, 122 Pac. 173. Some courts say a taxpayer's interest is too remote and conjectural. *Duggan v. Emporia*, *supra*. Others lay down the general rule that equity will never interfere with elections. *Copeland v. Olsmuth*, 124 Pac. 33 (Okla.). And where an election on an initiated measure was sought to be enjoined on the ground that the petitions calling the election were not regular, the court said an injunction would be an interference with the legislative department of the government. *Pfeifer v. Graves*, *supra*. The principal case differs from any of the above in that the authority for holding the election is perfectly valid, the alleged unconstitutionality being in the subject matter. The interference with legislative processes would therefore be much plainer than in the Pfeifer case. Hence even if plaintiff was a taxpayer and the election was a special one, neither of which appears in the report, the decision seems absolutely sound.

**INJUNCTIONS — ACTS RESTRAINED — INJUNCTION OF STRIKES IN WAR TIME.** — The defendants were instigating and conducting strikes in plaintiff's shoe factory. The strikes were accompanied by unlawful violence. The plaintiff was engaged in manufacturing military supplies for the United States government. Plaintiff sought an injunction. *Held*, that "all strikes for any cause whatever be enjoined for the duration of the war." *Rosenwasser Bros. v. Pepper*, 172 N. Y. Supp. 310.

For a discussion of this case, see NOTES, page 837.

**INSURANCE — MARINE INSURANCE — "HOSTILITIES," MEANING IN F. C. AND S. CLAUSE.** — The plaintiff reinsured a cargo with the defendant under a policy containing the usual f. c. and s. clause, the relevant words of which were, "warranted free from all consequences of hostilities or warlike operations." The cargo was damaged by the explosion of a bomb placed in the vessel while in a South American port by a German. No authorization or ratification of this act by the German government was shown. The plaintiff sued on the policy. *Held*, that he could not recover. — *Atlantic Mutual Insurance Co. v. King*, 35 T. L. R. 164.

The court states correctly that the reinsurer has the burden of proving that the loss falls within the warranty. *Munro, Brice & Co. v. War Risks Association*, [1918] 2 K. B. 78. See *Compania Maritima of Barcelona v. Wishart*, 34

T. L. R. 251. The court further recognizes the principle that this warranty does not cover the acts of a private individual acting on his own initiative. If the warranty covers only the acts of agents of sovereign powers, the decision is wrong on primordial doctrines of agency. But the court holds that it includes acts done by a man when, "knowing that the settled and concerted policy of his government is to avail itself of the efforts of all its subjects to destroy enemy life and property as occasion offers, he uses such opportunity as presents itself in furtherance of that policy." Though this is not construing the policy against the underwriter, the result reached might well be the intent of the parties. This clause has always been construed liberally. Cf. *Stoomvaart Maatschappij Sophie H. v. Merchants' Marine Insurance Co., Ltd.*, [1918] Weekly Notes, 322; *Henry & MacGregor, Ltd., v. Marten*, [1918] Weekly Notes, 224; *William France, Fenwick & Co. Ltd. v. North of England Protecting Association*, [1917] 2 K. B. 522. See 2 ARNOULD, MARINE INSURANCE, 9 ed., § 905.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — HOURS OF SERVICE ACT: APPLICATION TO TERMINAL COMPANY. — The Hours of Service Act applies to "any common carrier or carriers, their officers, agents, and employees" engaged in interstate commerce. (34 STAT. AT L. 1415.) The defendant operated a union freight station at Brooklyn under contracts with ten interstate railroads, receiving freight at their termini and transporting it by ferry and rail to its freight houses, and receiving likewise freight from Brooklyn shippers and transporting it to the docks of the several railroads. It was not chartered as a common carrier, did not hold itself out as such, and filed no tariffs with the Interstate Commerce Commission. Held, that the Hours of Service Act applies to the defendant. *United States v. Brooklyn Eastern District Terminal*, U. S. Sup. Ct., No. 155, October Term, 1918.

The decision is manifestly correct. The act would have applied to the carriers themselves in performing these services; the defendant is the agent of the carriers, and the act expressly includes agents. It has long been settled that the fact that all the acts done by a company are within one state does not excuse it from the regulation of interstate commerce. *United States v. Colorado & Northwestern Railroad Co.*, 157 Fed. 321. See 21 HARV. L. REV. 447. The court, however, points out clearly that the defendant is itself a common carrier, that the nature of the company does not depend upon how it was chartered, nor upon what it professes, but upon what it does, and that the services of the defendant were of a kind ordinarily performed by a common carrier. There is ample authority for this position. *United States v. Baltimore & Ohio Railroad Co.*, 231 U. S. 274; *Union Stockyards Company of Omaha v. United States*, 169 Fed. 404. See *United States v. Sioux City Stockyards Co.*, 162 Fed. 556. Cf. *Tap Line Cases*, 234 U. S. 1. The Hours of Service Act has been liberally applied, in the light of its "humane purpose." *Topeka & Santa Fe Railway Co. v. United States*, 244 U. S. 336.

INTERSTATE COMMERCE — CONTROL BY STATES — RIGHT OF INTERSTATE NATURAL GAS COMPANY SUPPLYING GAS TO LOCAL DISTRIBUTING COMPANIES TO ENJOIN ENFORCEMENT BY STATE COMMISSIONS OF CONFISCATORY RATES TO CONSUMERS. — The corporation of which plaintiff was receiver was engaged in producing natural gas, chiefly in Oklahoma, transporting it through pipelines, and selling it to local distributing companies in Kansas and Missouri, receiving a percentage of their gross profits as its return. The state utilities commissions of Kansas and Missouri fixed rates to the consumers which were so low that the return to plaintiff would be wholly inadequate, and plaintiff sued to enjoin the enforcement of these rates on the ground that they constituted a burden on interstate commerce. Held, that no injunction should be granted, on the ground that the distribution by the local companies was no

part of the interstate commerce and therefore there was no direct burden on interstate commerce. *Public Utilities Commission v. Landon*, 39 Sup. Ct. Rep. 268.

The proposition that the interstate transportation ceases on delivery to the local companies would seem untenable. Cf. *Werner Sawmill Co. v. Kansas City Southern R. Co.*, 194 Mo. App. 618, 186 S. W. 1118, and *Re Pipe Lines*, 24 I. C. C. 1. Consequently there is a sufficiently direct burden on interstate commerce. But Kansas had a right under its police power to regulate the sale of natural gas within its borders, and the fact that some of this gas happened to be imported from Oklahoma constituted a merely incidental interference with interstate commerce. Such an interference will not invalidate state regulation. *Standard Stock Food Co. v. Wright*, 225 U. S. 540; *Minnesota Rate Cases*, 230 U. S. 352. In Missouri, however, all but an inconsiderable percentage of the natural gas consumed is imported from other states. Regulation by the Missouri commission therefore hardly appears to be an incidental burden, and the decision as to the Missouri rates would seem at least doubtful.

**LEGACIES — ABATEMENT — DEFICIENCY DUE TO WIDOW'S ELECTION BORNE PROPORTIONALLY BY RESIDUARY AND SPECIFIC LEGATEES.** — A testator left a number of specific legacies and the residue to his son. The widow refused to abide by the provisions of the will and chose under statute to take what she would have received had her husband died intestate. *Held*, the specific and residuary legacies abate *pro rata*. *In re Davison's Estate*, [1919] 1 Western Weekly Rep. 497 (Saskatchewan).

When a widow is put to an election to take either under or against her husband's will, and she elects to do the latter, the rest of the estate should be distributed according to the testator's wishes if possible. *Dunlap v. McCloud*, 84 Ohio St. 272, 95 N. E. 774; *In re Grobe's Estate*, 101 Neb. 786, 165 N. W. 252; cf. *Fennell v. Fennell* 80 Kan. 730, 106 Pac. 1038. *Contra*, *Gordon v. Perry*, 98 Miss. 893, 54 So. 445. Thus the renunciation of a life estate in a trust does not deprive the remaindermen of their interest, but they are allowed to enjoy their estate at once unless such acceleration defeats the testator's intention. *In re Disston's Estate*, 257 Pa. 537, 101 Atl. 804; *Smith v. Patch*, 77 N. H. 75, 87 Atl. 252. But if the election to take against the will is detrimental to the estate, the loss is primarily to be borne by the residuary legatees. *Lewis v. Sedgwick*, 223 Ill. 213, 79 N. E. 14; *Pitman v. Pitman*, 81 Kan. 643, 107 Pac. 225; cf. *Meek v. Trotter*, 133 Tenn. 145, 180 S. W. 176. *Contra*, *Devcon v. Kuykendall*, 89 Md. 25, 42 Atl. 963. And if it is possible to give the disappointed parties partial compensation out of the property renounced, the legatees other than those of the residue are preferred. *Pace v. Pace*, 271 Ill. 114, 110 N. E. 878; *Adams v. Legroo*, 111 Me. 302, 89 Atl. 63. The court in the principal case, in imposing the loss proportionally on all legatees alike, seems to overlook the general principle.

**LIMITATION OF ACTION — COMPUTATION OF TIME — INCLUSION AND EXCLUSION OF FIRST AND LAST DAYS.** — By a deed executed on April 14, 1902, the defendant granted a period of ten years in which to cut and remove timber from his land. The deed also provided that if such timber were not removed at the expiration of the ten years the grantee was to have the option of extending the period. On April 15, 1912, April 14 having fallen on Sunday, the plaintiff, a mesne grantee, gave notice of his desire to extend. *Held*, that the option was exercised in time. *United Timber Co. v. Bivins*, 253 Fed. 968.

As a general rule, in the computation of time from a date or an event, the first day is excluded and the last included. *Blake v. Crowninshield*, 9 N. H. 304; *Seward v. Hayden*, 150 Mass. 158, 22 N. E. 629; *McCulloch v. Hopper*, 47 N. J. L. 189. Some courts hold, however, adopting an old common-law distinction, that where the period is to be reckoned from an event, as distin-

guished from a date, both days are to be included. *Bellasis v. Hester*, 1 *Ld. Raym.* 280; *Chiles v. Smith*, 52 *Ky.* 460; *Leavenworth Coal Co. v. Barber*, 47 *Kan.* 29, 27 *Pac.* 114. On the other hand, to prevent hardship or forfeiture, the general rule has often been discarded, the first and last days being included or excluded as the case required. *Lester v. Garland*, 15 *Ves.* 248; *Pugh v. Duke of Leeds*, *Cowp.* 714; *Price v. Whitman*, 8 *Cal.* 417; *Taylor v. Brown*, 5 *Dak.* 335, 40 *N. W.* 525. The law is even more uncertain when the last day falls on Sunday. With respect to contracts the Sunday is generally excluded, and performance may properly occur on Monday. *Campbell v. Life Assurance Society*, 41 *Bosw.* 299; *Hammond v. Life Ins. Co.*, 10 *Gray (Mass.)* 306; *Everett v. Stewart*, 2 *Conn.* 69. But in the computation of statutory periods there can be no extension of time. *Alderman v. Phelps*, 15 *Mass.* 225; *Patrick v. Faulke*, 45 *Mo.* 312; *Harrison v. Sager*, 27 *Mich.* 476. *Contra*, *West v. West*, 20 *R. I.* 464, 40 *Atl.* 6. Statutes providing for the exclusion of Sunday have changed the latter rule in many jurisdictions. *U. S. REV. STAT.*, § 5013; *N. Y. CODE CIV. PROC.*, § 788; *KY. CIV. CODE PROC.*, § 681. But curiously, these statutes have been considered as requiring performance on Saturday instead of permitting an extension until the following Monday. *Frankfort v. Farmers' Bank*, 20 *Ky. L.* 1635, 49 *S. W.* 811; *Allen v. Elliott*, 67 *Ala.* 432. Again, it has been held that these statutes have no application where the period in question covers a number of years. *Williams v. Lane*, 87 *Wis.* 152, 58 *N. W.* 77; *Haley v. Young*, 144 *Mass.* 364. The many fine-spun distinctions drawn by the courts relative to this question seem unjustifiable. Computation of time is a matter purely of technical construction, and no reason appears why a definite principle should not be formulated to apply equally to all cases. The rights and liabilities of parties with respect to a matter which so often leads to important consequences should be fixed and certain.

**MARRIAGE — VALIDITY — MARRIAGE BY MAIL.** — In a statutory action to recover damages for death caused by wrongful act, it was necessary for the plaintiff to show that she was the widow of the deceased. The deceased, while residing in Minnesota, had sent to the plaintiff, who was living in Missouri, a written agreement in duplicate, signed by him, whereby the parties undertook to assume from that date henceforth the relation of husband and wife. The woman had signed the papers and had sent one back to the man. *Held*, that this constituted a valid marriage. *Great Northern Ry. Co. v. Johnson*, 254 *Fed.* 683 (*Circ. Ct. App.*).

For a discussion of this case, see NOTES, page 848.

**MUNICIPAL CORPORATIONS — LICENSES — VALIDITY OF ORDINANCES ALLOWING CONSTRUCTION OF BRIDGE OVER STREET AND VACATING STREET.** — The city council by ordinance authorized the defendant refining company to build a bridge across a public street connecting its syrup house with its can factory. Later the council passed another ordinance vacating that portion of the street within the limits of the defendant's property. The company constructed the bridge and fenced off both ends of the street. The plaintiffs petition to have the street reopened and the bridge and fences removed. *Held*, that the petition be granted. *People ex rel. Burton v. Corn Products Refining Co.*, 121 *N. E.* 574 (*Ill.*).

It is settled that a municipality holds its streets in trust for the use of the public. *Wiehe v. Pein*, 281 *Ill.* 130, 117 *N. E.* 849; *Winter Brothers v. Mays*, 170 *Ky.* 554, 186 *S. W.* 127. Without express legislative authority a municipality may not grant to a private person the right to obstruct that use. *Royster Guana Co. v. Lumber Co.*, 168 *N. C.* 337, 84 *S. E.* 346; *Porche v. Barrow*, 134 *La.* 1000, 64 *So.* 918. See 2 *ELLIOTT, ROADS AND STREETS*, 3 ed., § 836. In holding that a city has no power to authorize the construction of a bridge over

a public street solely for private use, the court in the principal case follows the weight of authority. *Tilly v. Mitchell & Lewis Co.*, 121 Wis. 1, 98 N. W. 969; *Bybee v. State*, 94 Ind. 443. But see *Rothschild & Co. v. Chicago*, 227 Ill. 205, 81 N. E. 407. See also 3 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1176. It is submitted, however, that the overhead bridge relieves street traffic *pro tanto* and so is not an obstruction but is rather a legitimate highway use. *Leitchfield Mercantile Co. v. Commonwealth*, 143 Ky. 163, 136 S. W. 639; *Kellogg v. Cincinnati Traction Co.*, 80 Ohio St. 331, 88 N. E. 882. As regards vacation of streets, power to authorize the same is customarily vested by the legislature in some municipal body. *Lowden v. Starr*, 171 Iowa, 528, 154 N. W. 331; *Curtiss v. Charlevoix Golf Ass'n*, 178 Mich. 50, 144 N. W. 818. This power, while discretionary with public officials, cannot be exercised arbitrarily. See *People ex rel. Brooklyn Cooperage Co. v. Gokey*, 177 App. Div. 61, 163 N. Y. Supp. 693; *City of Goldfield v. Golden Cycle Mining Co.*, 60 Colo. 220, 152 Pac. 896; 3 ABBOTT, MUNICIPAL CORPORATIONS, §§ 939, 940. Furthermore, the vacation of a street must be primarily for public, not for private benefit. *Sherwood v. City of Paterson*, 88 N. J. L. 456, 94 Atl. 311. See *Stevens v. City of Dublin*, 169 S. W. 188 (Tex. Civ. App.); TIEDEMAN, MUNICIPAL CORPORATIONS, § 308. In the principal case there was no evidence of benefit to the public through vacation of the street; the sole benefit accrued to the refining company. In fact, upon passage of the ordinance, the company fenced off the street. It seems, therefore, that the court properly declared this ordinance void.

**PRINCIPAL AND SURETY—DEFENSES OF SURETY—CREDITOR'S FAILURE TO RECORD MORTGAGE.**—The defendant, payee of a note secured by a chattel mortgage, indorsed the note and assigned the mortgage to the plaintiff. The mortgage was never recorded. Consequently, the maker's trustee in bankruptcy took the chattel free of the mortgage lien. The plaintiff sued the defendant as indorser of the note. *Held*, that he is discharged. *Auto Brokerage Co., Inc. v. Morris & Smith Auto Co., Inc.*, 174 N. Y. Supp. 188 (Sup. Ct.).

A creditor generally owes the surety no duty of affirmative action against the principal. The surety has no defense because the creditor's mere inactivity caused a loss of the latter's security, as by failing to foreclose a mortgage or suffering a judgment lien to expire. *Sheldon v. Williams*, 11 Neb. 272; *Kindt's Appeal*, 102 Pa. 441. This is because the surety can himself pay the debt and preserve the security. But where the creditor fails to do something which is peculiarly in his power to do, as recording a mortgage or other security, the surety should be discharged. *Bennett v. Taylor*, 43 Tex. Civ. App. 30, 93 S. W. 704; *Sullivan v. State*, 59 Ark. 47, 26 S. W. 194; *Burr v. Boyer*, 2 Neb. 265. *Contra*, *Philbrooks v. McEwen*, 29 Ind. 347; *Westchester Mortgage Co. v. McIntire*, 174 N. Y. App. Div. 525. In the present case, however, it does not appear that the defendant indorsed for the maker's accommodation. If his indorsement to the plaintiff was an independent transaction, then the indorser could have recorded the mortgage while in his hands. He is, then, as blamable as the plaintiff, and should not be discharged.

**WILLS—CONSTRUCTION—GIFT TO A CLASS.**—A will read, "I give the residue of my estate to my late husband's nephews and nieces, as follows: to A, B, C, D, and E, to be equally divided between them, share and share alike." Three of these legatees predeceased the testatrix. *Held*, that their shares should go intestate. *In re Deming's Will*, 174 N. Y. Supp. 172.

In the construction of wills there is a general presumption against intestacy. *Meiners v. Meiners*, 179 Mo. 614, 78 S. W. 795. This is especially true where there is a residuary clause, because it shows the testator meant to dispose of all his property by will. *Welsh v. Gist*, 101 Md. 606, 61 Atl. 665. Neverthe-

less, it is well settled that a lapsed part of the residuary estate will not go to the other residuary legatees, but to the next of kin. *Canfield v. Canfield*, 62 N. J. Eq. 578, 50 Atl. 471. If, however, the gift is to a class, on the death of one, the survivors take the whole. *Dresel v. King*, 198 Mass. 546, 85 N. E. 77. Usually, a gift to a group consisting of persons connected by some common tie, as "to all my nephews and nieces," is *prima facie* a gift to a class. *Kingsbury v. Waller*, [1901] App. Cas. 187. This presumption is strengthened in the principal case by the fact that the beneficiaries are grouped as residuary legatees. *Smith v. Haynes*, 202 Mass. 531, 89 N. E. 158. But where the beneficiaries are named, though they may constitute a class, it is generally held the gift is to the individuals distributively. *Dildine v. Dildine*, 32 N. J. Eq. 78; *Sharpless's Estate*, 214 Pa. St. 335, 63 Atl. 884. The words "share and share alike" also tend to indicate an intention to have an individual distribution. *Moffet v. Elmendorf*, 152 N. Y. 475, 46 N. E. 845. Balancing these considerations, and with regard to the rest of the will, the court in the present case might well have found as it did.

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## BOOK REVIEWS

THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW. By Gerard Carl Henderson, A.B., LL.B. Cambridge University Press. 1918.

Mr. Henderson's essay will with English lawyers excite at once amazement and admiration. Their wonder will be caused by the subject with which the book deals. Most Englishmen have somehow become so accustomed to the existence of corporate bodies, whether English or foreign, that they no more think of any necessity for explaining or defining the nature of a corporation than of the need for a lawyer, at any rate, making up his mind what is the proper definition of a human being, any more than for settling how far soul and body are united together, and whether the soul can exist without a bodily form. To the ordinary barrister or solicitor in England these inquiries lie outside his professional interests; some of them are questions which deserve the attention of clergymen; others are the study belonging to philosophers or metaphysicians. It will come as startling news to our practicing lawyers, to our leading solicitors, and, even one suspects, to a good number of our judges, to learn that the question, whether a corporation, *e.g.*, the London and Northwestern Railway Company, is the creation of a legal fiction, or is as much an actual being as any living man or woman, occupies the attention not only of German jurists but also of the lawyers and the courts of the United States. No Englishman is surprised that any German should muddle his head over a futile controversy, for we all know that the Germans of today, and above all German professors, always think wrongly, and act wrongly. But English lawyers and judges are many of them astounded that the citizens of the United States, where, as we are inclined to believe, uprightness and good sense are as much developed as in England, should trouble themselves with futile controversies of what is popularly called a scholastic character. Difficult as it may be for leading English barristers fully occupied in the lucrative practice of that lucid misrepresentation which wins the verdicts of juries, and occasionally perverts the judgments of courts, to believe that speculations about the nature of corporate existence occupy in the United States, and have occupied for many years, the thoughts of successful lawyers and of some very distinguished judges, it is quite certain that questions as to the nature of corporate personality are constantly discussed, not only by the Law



Professors, but also by the leading lawyers of the United States. If any man doubts the truth of this assertion he should at once read Mr. Henderson's essay, and at the same time peruse Mr. Machen's article on "Corporate Personality," 24 HARV. L. REV. 253 and 347. But if many Englishmen are amazed at the vehemence with which a sort of legal controversy to which we in England are little used is carried on by American lawyers and countenanced by learned judges in American courts, every English reader will join in my admiration for the clearness and the learning with which a strange though really important question is explained and discussed by Mr. Henderson. Personally I am not inclined at the present moment to follow out German thought, or misthought, to the startling conclusion that a corporate body has all or nearly all the characteristics of a human being. Whilst I am not prepared without further consideration to treat the important legal fact as grounded on nothing but a legal fiction, my inclination is to go a good way in the direction of the line of thought followed out by Mr. Henderson, though at present I do not wish to do more than to dwell upon two or three ideas which his work has brought prominently before my mind. I purposely adopt in the rest of this article the form of questions. It best expresses the fact that I wish to write far more as an inquirer than as a controversialist.

First question: Why is it that, till recently at least, English judges and lawyers, as also English writers of law books, have paid but slight attention to questions bearing on the nature of corporate existence? I have not been able to study the matter in hand with anything like profundity, but, as is always my habit, when treating of a subject bearing on the conflict of laws, I turned to the one book bearing on that topic in which I place unlimited confidence, namely, the "Private International Law" of my dear friend, the late Mr. Westlake. He is one of those rare writers whose power of expression, though it greatly increased with every successive edition of his celebrated work, fell far short of his learning, of his thoughtfulness, and of his sound judgment. It is sometimes difficult at a first reading to follow his line of reasoning, but when a student has got completely to understand Westlake's thought, he will, to trust my own experience, find he has arrived at a true conclusion as to a possibly very difficult question. Now if any one will look at Chapter XVI of Westlake's book, which treats of Corporations and Public Institutions, he will find that a very few pages comprehend almost all that our author has to say as to the nature of such bodies. It is hardly an exaggeration to say that the subject is exhausted in three or four pages. It is true that events which have occurred since Westlake's death, and especially the terrible war, which I trust may have ended in a real peace before this notice reaches the editor of the HARVARD LAW REVIEW, but which now is only suspended, have forced our courts to consider, almost against their will, what is the true nature of a corporation (see *Daimler Co. v. Continental Tyre, & Co.*, [1916] A. C. II, 307, and contrast the same case before the court below, [1915] 1 K. B. 893). But the very terms of the judgment of the House of Lords in the case referred to show that their lordships were dealing with a comparatively new topic. Take then for a moment the question I have raised, how it has happened that English courts have rarely embarked on trying to solve a puzzle which has long perplexed American jurists. I am inclined to suggest two answers:

The recognition of foreign corporations and the tendency to consider them as persons who, when belonging to a friendly country, ought to have pretty much the same rights as other inhabitants of foreign and friendly states, was favorable to trade, and English courts, like Englishmen, have in a good sense been traders, and looked with favor upon any arrangement which increased the commerce of England. It was the easier for English judges, again, to recognize corporations created under a law different from that of England, be-

cause after the union with Scotland the necessity for such recognition became patent, and the same thing applied to a considerable extent to corporations created by colonial legislatures. Then, too, as Professor Maitland has more than once suggested, the tremendous and on the whole most salutary extension of trusteeship under the law of England made it often unnecessary to consider with care the position and the character of corporate bodies.

Second question: Is it necessary to treat a corporation either as a mere fiction or as being a person in the same sense as is a human being?

On this point the suggestions of Mr. Henderson are most important. It is impossible for me to say that I completely agree with the language he has used. I doubt whether in discussing the sort of legal problems with which his book deals any two persons would ever use precisely the same terms. In truth, the language which a writer on law is compelled to use consists to a great extent of words, such as a right, a person, an interest, a corporation, and the like, which have a popular, and, therefore, a vaguer sense. No man can make himself intelligible if he departs utterly from this sense, or makes to himself a series of carefully defined terms which he treats as the real meaning of the words he uses. If this be carried out beyond very narrow limits, he will find that he has created a language of his own far inferior to the current language of every-day life in its impressiveness and needing, if it is to be understood, systematic translation.

Third question: Is it not of primary importance to remember in dealing, *e.g.*, with a foreign corporation, that though corporate rights do distinctly differ from the ordinary rights of the group of individuals who make up the corporation, yet the persons whose interests are affected are such group of individuals?

That this inquiry must be answered affirmatively I am, as at present advised, inclined to agree with Mr. Henderson, who clearly emphasizes the difference between the corporate body and the group whose interests are affected. But my own inclination is to go a little further than he does, or perhaps rather to enter upon a path which he has not fully pursued. My belief increases every day that there are "natural corporations," if the expression may be allowed, that is, groups of persons who act together for different objects, some good and some bad, and on account of their acting together have many feelings, and do many actions which they would not entertain, and which they would not perform were it not for this habit of common action and common sentiment. This is what may be termed "corporate consciousness," and in my judgment the gravest mistake made both by English courts and by the British Parliament has been always, where possible, to incorporate such natural corporations when their aims are not injurious to the state, and, on the other hand, to treat such natural corporations as illegal where their aims are palpably injurious to the state. But I cannot at the moment express this idea with the accuracy and the reservations which it requires. I trust that at some future day I may be allowed to work it out with more fullness in the *HARVARD LAW REVIEW*. Meanwhile I hope that your readers will study, and I may be able to re-study, Mr. Henderson's masterly essay.

A. V. DICEY.

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JUDICIAL TENURE IN THE UNITED STATES. With especial reference to the tenure of federal judges. By William S. Carpenter. New Haven: Yale University Press. 1918. pp. ix, 234.

In the classifications which academic organization has imposed upon us, judicial tenure no doubt belongs in the domain of politics. But personnel, mode of choice, and tenure of judges are not the least item in any effective program for the improvement of judicial administration of justice in this

country. Hence one could wish, if we cannot hope for help from one who is a student both of law and of politics, that some lawyer would take up the subject in thoroughgoing fashion. Until he does, Dr. Carpenter's little book will be useful.

Although our political theory puts the legislative, the executive, and the judiciary as coequal in authority, with nothing before and nothing after, at first the hegemony was distinctly in the legislative, whence it passed in time to the judiciary, and has now in turn passed to the executive. In the earlier part of our political history, legislatures were fully persuaded that the other departments, if accountable ultimately to the people, were directly and immediately accountable to them. In part this may have been due to the example of the British Parliament. In part it may have been due to the term "representative," which made the legislator seem and feel peculiarly the agent of the people. But this legislative supremacy derived its strength from the proved primacy of the legislative in colonial America, before the days of judicial justice and modern courts, and when the executive represented a government across the water. Accordingly in the first half of the last century legislatures believed themselves competent to call the judges to account directly for their decisions and to interfere as of right with the disposition of particular controversies. Indeed the first half of the century had gone by before legislative appellate jurisdiction was wholly done away with. Perhaps the last echoes of the claim that the other departments were directly and immediately responsible to the legislative are to be found in the debates over the impeachment of Andrew Johnson.

Next, for a season, and notably from the Civil War down to the first decade of the present century, the courts achieved a definite leadership, claiming to interpret and apply a higher body of law, merely declared in the Constitution, to which legislative and executive were subject and by which their acts must be measured. The legislative no longer made extravagant claims and the claim of the executive to be the peculiar mouthpiece of public opinion and to enforce the popular will upon legislators and courts was yet to come. For nearly half a century the judicial hegemony was scarcely disputed. Many things have combined to work a change. The pressure on judicial administration from the rise of new interests clamoring for recognition; the pressure of social legislation, not only causing jealousy of the common-law doctrine of supremacy of law, but often straining the elastic possibilities of the bill of rights; the pressure of demands for freer application of law involved in the multiplication of public utilities, — all these would have made it hard for the American judiciary to maintain its hegemony in any case. Only strong courts, such as those which built it up could have preserved it. Not the least factor was the inability of our state courts to do the work before them and the growth of executive boards and commissions with continually increasing measure of jurisdiction as a consequence. And this inability to deal adequately with a series of new problems, in striking contrast with the creative work of the classical period of American law, coincides with a gradual but definite decline in the caliber of the state courts, as a whole, which followed the general shift to an elective bench.

It is at this point that Dr. Carpenter's work is least satisfactory to the lawyer. He dismisses a suggestion that the decline in judicial constructive power, which has made it seem sometimes that our common-law tradition was stricken with sterility, is connected with the popular election of judges by saying that "it would be very interesting if proof could be shown in support of this contention" (pages 210-11). The proof is at hand in the law reports for those who realize that there is more to be done in supreme courts than to decide constitutional questions, and more to be done in courts of first instance than to prosecute felons. It must be remembered that American law all but

made a complete new start at the beginning of the nineteenth century. American judges then did their share in working out conceptions that are now received among English-speaking peoples. They helped to incorporate the law merchant in the common law. Kent and Story helped to develop and systematize equity while Eldon was still chancellor. In 1850, while the English cases were still going on the forms of action, Chief Justice Shaw worked out the modern doctrine as to negligence in advance of the common-law world and in enduring fashion. The achievements of the classical period of American law, the period of the great appointive state courts prior to the Civil War, will stand with those of any period of growth and adjustment in legal history. The courts of to-day, with abundant experience at hand in the reports, with an apparatus of organized legal knowledge easily accessible, are externally much better equipped to meet problems that are relatively no more difficult. If they do not meet them adequately, may we not with good reason inquire as to the men behind the machinery? This is no place to argue the point. It is enough to say that if no one but a lawyer is competent to treat it, no one but a lawyer is competent to complacently wave it aside. And as to the voucher of *Borgnis v. Falk*, 147 Wis. 377, one might suggest a comparison with *State v. Kreutzberg*, 114 Wis. 530, 537, and *Nunemacher v. State*, 129 Wis. 190, 198-203, and a query whether the moral of these decisions may not be Mr. Dooley's proposition that "The Supreme Court follows th' illiction rethurns." Some recent opinions in North Dakota and the marked increase in opinions written for the newspaper rather than for the law report since the advent of the direct primary, might also be studied profitably in this connection.

It is not fair to Dr. Carpenter, who has done his work well from the political side, to hold him too rigidly for an incidental incursion into strictly legal history. And yet this inability of the student of politics apart from law to appreciate the most significant of his materials deserves to be emphasized quite as much as the inability of the lawyer *simpliciter* to use valuable materials for his purpose, of which we have heard so much.

ROSCOE POUND.

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STATE OF CONNECTICUT: FOURTH REPORT OF THE BOARD OF COMPENSATION COMMISSIONERS FOR THE YEARS 1917 AND 1918. Hartford. 1918. pp. 34.

The recognition of industrial accidents as a legitimate part of the expense of industry brings many things in its train: a new relation between employer and employed, care for the safety of the workman; and as that proves to be rather profitable, care of his general health as well, and of his social welfare. This report shows part of the process. In a state having more than half a million workmen, with over twenty thousand accidents coming under the act (nearly 95 per cent of which were amicably settled), voluntary aid was given by the employers in about three-quarters of a million accidents. Nearly two million dollars were paid out in compensations; but three-fourths as much was paid in medical or surgical aid, in cases where no compensation was due. One-half of all the employers reporting on the subject had an emergency hospital at the place of employment; almost every large plant furnished first aid; about seventy nurses were reported as in constant attendance. These facilities would hardly have been furnished in such large measure unless they paid; they minimized accidents, prevented infection, and kept the employees at work.

This report does not show the great extent of other similar agencies. What is broadly called "welfare work," preventive work, not curative, is widely employed in the industries today; and it pays. The weakest part of the workmen's compensation acts is the employment of the unfortunate word "accident," or whatever phrase takes its place. If an industrial accident is part of the cost of industry, so surely is an industrial disease. The Connecticut Commissioners

make use of their interesting power to recommend legislation by proposing an amendment on this point. Their draft provides for compensation "though the injury cannot be traced to a definite occurrence which can be located in time and place; nor shall it be a defense that it is, either in whole or in part, a disease." This amendment seems to be an excellent piece of drafting.

The Report as a whole may be commended as a sensible business-like presentation of the work of a great industrial instrumentality.

J. H. B.

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**WATER: FRENCH LAW AND COMMON LAW.** A Reprint from Volume VI of the CALIFORNIA LAW REVIEW. By Samuel C. Wiel of the San Francisco Bar.

In this little book Mr. Wiel makes another real contribution to the law of waters. His "Water Rights in the Western States," now in its third edition, and which deals with the riparian and with the appropriation systems of water law is one of the masterpieces of American legal literature.

In the present book of fifty-two pages, the subject of this review, Mr. Wiel discusses the origin of the riparian doctrine as that doctrine exists in the common law of America and of England, and also makes a comparison between the riparian doctrine of the common law and the riparian doctrine of the French Civil Code.

The essence of the riparian doctrine is the principle that the riparian proprietors along a stream have an equal right to make reasonable use of the waters of the stream. Mr. Wiel's conclusion as to the origin of the riparian doctrine will prove rather startling to American and English lawyers and jurists. With evidence apparently convincing, he shows that the doctrine referred to, as known to American common law, came not, as is usually supposed, from England, but from the French Civil Code, having been introduced into American law by Story and by Kent, and that instead of England having passed the doctrine to America it was passed by America to England. The doctrine, according to Mr. Wiel, was not known to the Roman law, and was not formulated with definiteness in the French civil law until the appearance of the French or Napoleonic Code. A principle which is to be found in the Roman law, and in the French civil law, and in the law of the riparian system of England, and in that of the riparian and appropriation systems of America, is the one to the effect that a water right in respect to a running stream is not a right in the *corpus* of the water itself while in the stream, but simply a right to make use of the water of the stream. This principle, however, is not to be confused with the riparian doctrine, for it is common to the riparian and to the appropriation systems, the underlying fundamental principles of which are, respectively, equality for the one and discrimination in favor of the first user for the other.

After having traced the riparian doctrine from the English common law back into the American common law, and then on back into the law of the French Civil Code, Mr. Wiel compares various features of the riparian doctrine or system obtaining in America with features existing in the French civil law under the code, with the result that he finds them substantially the same. Thus, they are found to be alike in the following, among other, particulars: use of the water is confined to lands that are riparians; use does not create the water right and nonuse does not extinguish it, for the right exists by virtue of the riparian nature of the land; the right of one riparian proprietor against another is that of equality, not equality in the amount of water used, but in the right to make a reasonable use; excessive use — in other words, the use of an amount of water over and above the amount which equality of right makes reasonable — is unlawful; a riparian, as against himself, may part with his water right to a nonriparian, but not as against other riparians; riparians

lands are those which touch or border upon a stream, and the rear portions of such tracts, if sold, cease to be riparian, although becoming again riparian if repurchased; and the riparian right may be lost by prescription.

Mr. Wiel regards his book as exploratory, and wishes for the general subject matter a still further investigation. It is to be hoped that the scholarly author himself will do the further work and then "consolidate the gains." Meanwhile, the present little book should be on the shelf of every real student of the law of waters.

L. WARD BANNISTER.

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**PERSONAL IDENTIFICATION: METHODS FOR THE IDENTIFICATION OF INDIVIDUALS, LIVING OR DEAD.** By Harris Hawthorne Wilder, Ph.D., Professor of Zoölogy in Smith College, and Bert Wentworth, former Police Commissioner of Dover, New Hampshire. Boston: Richard C. Badger. 1919. pp. 374.

This is a book of absorbing interest, though a purely scientific work, the result of collaboration between scientific research and practical experience. It discusses all methods of personal identification, from Bertillon measurements to the reconstruction of a face upon a skull; identification by birthmarks and scars, by handwriting, voice, habits, by bones and teeth. The principal original work of the authors is their careful detailed study of identification by "friction skin," *i. e.*, by finger prints and by prints of the palm of the hand or the sole of the foot. The anatomical origin of this "friction skin" is found to be the cushions of flesh and folds of skin on the feet of climbing animals such as the rodents and the apes. The practical development and comparison of actual prints, such as might be left by a criminal, is described, and a method of classifying prints for reference is developed. The scientific value of the work is apparent.

The lawyer, who may at any time find it necessary to establish personal identity, should find this book invaluable; and any student of law may profitably use it to become familiar betimes with methods of identification.

J. H. B.

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VOL. XXXII

JUNE, 1919

NO. 8

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## JURISDICTION OVER NONRESIDENTS DOING BUSINESS WITHIN A STATE

A PERSONAL judgment against a defendant over whom the court rendering it has no jurisdiction is invalid. It is not merely reversible on writ of error or appeal, but is wholly void for all purposes.<sup>1</sup> An attempt to execute it is without justification; a sheriff levying upon property of the defendant is liable for conversion,<sup>2</sup> and a purchaser of the property on execution sale gets no title to it.<sup>3</sup> A court of equity may, where the remedy at law is inadequate, enjoin the execution of the judgment.<sup>4</sup> No action lies upon it either in the state wherein it is rendered<sup>5</sup> or in any other state.<sup>6</sup> It cannot be set up as a bar in a suit upon the original cause of action.<sup>7</sup>

If these fundamental principles of the conflict of laws are disregarded by a state court, they may be vindicated in the federal courts, for they are protected by two provisions of the federal Constitution. If a judgment is rendered in one state and an action is brought thereon in another state, a federal question is involved

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<sup>1</sup> *Pennoyer v. Neff*, 95 U. S. 714 (1877); *Needham v. Thayer*, 147 Mass. 536 (1888).

<sup>2</sup> See *Elliott v. Peirsol*, 1 Pet. (U. S.) 328, 340 (1828).

<sup>3</sup> *McKinney v. Collins*, 88 N. Y. 218 (1882).

<sup>4</sup> *Riverside, etc. Mills v. Menefee*, 237 U. S. 189 (1915).

<sup>5</sup> *Needham v. Thayer*, 147 Mass. 536, 18 N. E. 429 (1888).

<sup>6</sup> *Buchanan v. Rucker*, 9 East, 191 (1808); *Schibsby v. Westenholz*, L. R. 6 Q. B. 155 (1870); *Pennoyer v. Neff*, 95 U. S. 714 (1877); *Rand v. Hanson*, 154 Mass. 87, 28 N. E. 6 (1891); *McEwan v. Zimmer*, 38 Mich. 765 (1878); *Whittier v. Wendell*, 7 N. H. 257 (1834); *Price v. Schaeffer*, 161 Pa. 530, 29 Atl. 279 (1894).

<sup>7</sup> *McDonald v. Mabec*, 243 U. S. 90 (1917).

under the provision of Article IV, section 1, that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."<sup>8</sup> The enforcement of a judgment against a defendant over whom the court has no jurisdiction involves a violation of the provision of the Fourteenth Amendment that no state shall "deprive any person of life, liberty or property without due process of law."<sup>9</sup> The decisions of the Supreme Court of the United States upon the question of jurisdiction over the defendant are, therefore, under these two provisions, binding upon the states.

"The foundation of jurisdiction is physical power."<sup>10</sup> A state cannot authorize its courts to reach out and impose liabilities upon persons over whom the state has no control. In other jurisdictions such an attempt would be regarded as an impertinence, an unauthorized assumption of power. "Can the island of Tobago pass a law to bind the rights of the whole world?" asked Lord Ellenborough. "Would the world submit to such an assumed jurisdiction?"<sup>11</sup> In the leading case of *Pennoyer v. Neff*,<sup>12</sup> Mr. Justice Field said:

"The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse."

A state cannot compel parties domiciled in another state to leave it and respond to proceedings brought against them, or impose liabilities upon them on their failure to appear. It is immaterial

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<sup>8</sup> *Dull v. Blackman*, 169 U. S. 243 (1898); *Old Wayne Life Ass'n v. McDonough*, 204 U. S. 8 (1907).

<sup>9</sup> *Dewey v. Des Moines*, 173 U. S. 193 (1899); *Simon v. Southern Ry. Co.*, 236 U. S. 115 (1915); *Riverside, etc. Mills v. Menefee*, 237 U. S. 189 (1915). See *Pennoyer v. Neff*, 95 U. S. 714, 732, 733 (1877).

<sup>10</sup> *McDonald v. Mabec*, 243 U. S. 90 (1917), per Holmes, J.

<sup>11</sup> *Buchanan v. Rucker*, 9 East, 191 (1808).

<sup>12</sup> 95 U. S. 714, 720 (1877). See also *Baker v. Baker, Eccles & Co.*, 242 U. S. 394 (1917), per Pitney, J.: "To hold one bound by the judgment who has not had such opportunity is contrary to the first principles of justice. And to assume that a party resident beyond the confines of a State is required to come within its borders and submit his personal controversy to its tribunals upon receiving notice of the suit at the place of his residence is a futile attempt to extend the authority and control of a State beyond its own territory."



whether or not the claim upon which the judgment is rendered arose within the state wherein the judgment is rendered.<sup>13</sup> It is immaterial whether or not the defendant has property in the state,<sup>14</sup> although in a proceeding *in rem* or *quasi in rem*, judgment may be given against the property.<sup>15</sup> It is immaterial whether or not the defendant had notice of the action and an opportunity to be heard.<sup>16</sup> It is indeed necessary to due process that steps should be taken calculated to give the defendant notice and an opportunity to be heard; but something more than notice and an opportunity to be heard is necessary. The judgment is valid only when the state has some power, some control over the defendant.

The state has such control as to justify it in giving judgment in at least three cases: first, when the defendant is present within the state; second, when he has consented to the jurisdiction of the state; and third, when he is a citizen or resident of the state. If the state has control of the defendant at the time when action is

<sup>13</sup> *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670; *Emanuel v. Symon*, [1908] 1 K. B. 302 (C. A.). See Beale, "The Jurisdiction of Courts over Foreigners," 26 HARV. L. REV. 283, 296.

<sup>14</sup> *Pennoyer v. Neff*, 95 U. S. 714 (1877); *Dewey v. Des Moines*, 173 U. S. 193 (1899); *De Arman v. Massey*, 151 Ala. 639, 44 So. 688 (1907); *Easterly v. Goodwin*, 35 Conn. 273 (1868); *Eastman v. Dearborn*, 63 N. H. 364 (1877).

A few early cases holding that jurisdiction over the defendant's property gives jurisdiction to pronounce a personal judgment against him, have, since the decision in *Pennoyer v. Neff*, been discredited. *De Arman v. Massey*, *supra*; *Laughlin v. Louisiana, etc. Co.*, 35 La. Ann. 1184 (1883); *Lydiard v. Chute*, 45 Minn. 277, 47 N. W. 967 (1891).

<sup>15</sup> *Pennoyer v. Neff*, 95 U. S. 714 (1877); *Arndt v. Griggs*, 134 U. S. 316 (1890); *Dewey v. Des Moines*, 173 U. S. 193 (1899); *Clark v. Wells*, 203 U. S. 164 (1906); *De Arman v. Massey*, 151 Ala. 639, 44 So. 688 (1907); *Cloyd v. Trotter*, 118 Ill. 391, 9 N. E. 507 (1886); *Beard v. Beard*, 21 Ind. 321 (1863); *Elmendorf v. Elmendorf*, 58 N. J. Eq. 113, 44 Atl. 164 (1899); *Schwinger v. Hickok*, 53 N. Y. 280 (1873).

But such service is insufficient unless it reasonably tends to give the defendant notice and an opportunity to be heard. *Roller v. Holly*, 176 U. S. 398 (1900); *United States v. Fisher*, 222 U. S. 204 (1911).

<sup>16</sup> Hence even actual service upon a nonresident defendant outside the jurisdiction is insufficient. *Harkness v. Hyde*, 98 U. S. 476 (1878); *Wilson v. Seligman*, 144 U. S. 41 (1892); *Denny v. Ashley*, 12 Colo. 165, 20 Pac. 331 (1888); *Rand v. Hanson*, 154 Mass. 87, 28 N. E. 6 (1891); *McEwan v. Zimmer*, 38 Mich. 765 (1878); *Scott v. Streepy*, 73 Texas 547, 11 S. W. 532 (1889). Similarly, service by publication upon a nonresident is insufficient. *Freeman v. Alderson*, 119 U. S. 185 (1886); *Baker v. Baker, Eccles & Co.*, 242 U. S. 394 (1917); *Cocke v. Brewer*, 68 Miss. 775, 9 So. 823 (1891); *Smith v. McCutchen*, 38 Mo. 415 (1866); *McKinney v. Collins*, 88 N. Y. 216 (1882). Compare *D'Arcy v. Ketchum*, 11 How. (U. S.) 165 (1850) (service upon a co-debtor).

brought, the jurisdiction over the defendant continues throughout all stages of the action, although the defendant may in the meantime have left the state, acquired a domicile or citizenship elsewhere, or attempted to withdraw his consent.<sup>17</sup>

The most usual method of acquiring jurisdiction is by personal service of process upon the defendant. Such service is valid only when the defendant, whether a resident or nonresident, is within the state when served. While he is within the state, no matter for how brief a time, the state has control over him, and if during that time he is duly served with process, the court acquires jurisdiction over him,<sup>18</sup> unless indeed for some reason he was exempt or privileged from service.<sup>19</sup>

Again, jurisdiction over the person of the defendant may be acquired by his consent. This consent may be given either before or after action has been brought. Jurisdiction is conferred when the defendant enters a general appearance in an action, that is, an appearance for some purpose other than that of raising the objection of lack of jurisdiction over him.<sup>20</sup> A stipulation waiving service has the same effect.<sup>21</sup> The defendant may, before suit is

<sup>17</sup> *Nations v. Johnson*, 24 How. (U. S.) 195 (1860); *Michigan Trust Co. v. Ferry*, 228 U. S. 346 (1913); *Fitzsimmons v. Johnson*, 90 Tenn. 416, 17 S. W. 100 (1891). "This is one of the decencies of civilization that no one would dispute." *Michigan Trust Co. v. Ferry*, *supra*, per Holmes, J. As to the extent of this principle, see *New York Life Ins. Co. v. Dunlevy*, 241 U. S. 518 (1916).

<sup>18</sup> *Smith v. Gibson*, 83 Ala. 284, 3 So. 321 (1887); *Lee v. Baird*, 139 Ala. 526, 36 So. 720 (1903); *Darrah v. Watson*, 36 Iowa, 116 (1872); *Alley v. Caspari*, 80 Me. 234, 14 Atl. 12 (1888); *Peabody v. Hamilton*, 106 Mass. 217 (1870); *Thompson v. Cowell*, 148 Mass. 552, 20 N. E. 170 (1889).

<sup>19</sup> As in the case of persons inveigled into the state, and nonresident witnesses and, in some jurisdictions, nonresident parties to judicial proceedings. *Stewart v. Ramsay*, 242 U. S. 128 (1916); *Matthews v. Tufts*, 87 N. Y. 568 (1882). As to privilege from service of process, see, further, cases cited in SCOTT, CAS. CIV. PROC. 23.

<sup>20</sup> *Boyle v. Sacker*, 39 Ch. D. 249 (C. A. 1888); *Henderson v. Carbondale, etc. Co.*, 140 U. S. 25 (1891); *Western Loan Co. v. Butte, etc. Co.*, 210 U. S. 368 (1908); *St. Louis Car Co. v. Stillwater, etc. Co.*, 53 Minn. 129, 54 N. W. 1064 (1893). An application for an extension of time to answer is not necessarily a general appearance. *Meisukas v. Greenough, etc. Co.*, 244 U. S. 54 (1917); *Lowrie v. Castle*, 198 Mass. 82, 83 N. E. 1118 (1908). A petition for removal to a federal court is not a general appearance. *Goldney v. Morning News*, 156 U. S. 518 (1895); *Wabash Western Ry. v. Brow*, 164 U. S. 271 (1896); *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437 (1910). A state statute providing that an appearance for any purpose confers jurisdiction over the defendant is constitutional. *York v. Texas*, 137 U. S. 15 (1890). Cf. *Harris v. Taylor*, [1915] 2 K. B. 580.

<sup>21</sup> *Allured v. Voller*, 107 Mich. 476, 65 N. W. 285 (1895); *Jones v. Merrill*, 113 Mich. 433, 71 N. W. 838 (1897).

brought, give a power of attorney to confess judgment,<sup>22</sup> or appoint an agent to accept service, or agree that service by any other method shall be sufficient.<sup>23</sup> The defendant in all these cases has submitted to the control of the state and of the court over him.

Again, a state has control over its citizens and over all persons domiciled within the state even when they have gone outside the state. At common law jurisdiction over such persons can be acquired by the courts of the state only by personal service within the state, or by consent.<sup>24</sup> But statutes in several states have provided for other methods of service upon citizens and residents. If the methods provided for are such as are reasonably calculated to give notice and an opportunity to defend, they are constitutional.<sup>25</sup>

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<sup>22</sup> *Van Norman v. Gordon*, 172 Mass. 576, 53 N. E. 267 (1899); *First National Bank v. Garland*, 109 Mich. 515, 67 N. W. 559 (1896); *Hazel v. Jacobs*, 78 N. J. L. 459, 75 Atl. 903 (1910); *Teel v. Yost*, 128 N. Y. 387, 28 N. E. 353 (1891). The judgment is not valid unless the authority given in the power of attorney is strictly followed. *Grover, etc. Co. v. Radcliffe*, 137 U. S. 287 (1890); *National Exchange Bank v. Wiley*, 195 U. S. 257 (1904); *Re Raymor's Estate*, 165 Mich. 259, 130 N. W. 594 (1911).

<sup>23</sup> *Montgomery, Jones & Co. v. Liebenthal & Co.*, [1898] 1 Q. B. 487 (C. A.).

<sup>24</sup> At common law if no service could be made upon a resident it was possible to outlaw him. 3 BL. COMM. 283. One result of the outlawry was to forfeit to the Crown the property of the defendant. This did not directly inure to the benefit of the plaintiff but it was a powerful club to force the defendant to appear. The process of outlawry was rejected in the United States as inapplicable to our conditions. *Blessing v. McLinden*, 81 N. J. L. 379, 79 Atl. 347 (1911); *Nathanson v. Spitz*, 19 R. I. 70, 31 Atl. 690 (1895); *McCall v. Price*, 1 McCord (S. C.) 82 (1821).

In European countries jurisdiction is normally based upon allegiance or domicile rather than upon the personal presence of the defendant. Beale, "The Jurisdiction of Courts over Foreigners," 26 HARV. L. REV. 193.

<sup>25</sup> *Ouseley v. Lehigh Valley, etc. Co.*, 84 Fed. 602 (C. C., E. D. Pa., 1897); *Bickerdike v. Allen*, 157 Ill. 95, 41 N. E. 740 (1895) (publication and mailing); *Sturgis v. Fay*, 16 Ind. 429 (1861) (usual or last place of residence); *Bryant v. Shute's Executor*, 147 Ky. 268, 144 S. W. 28 (1912) (last and usual place of abode); *Harryman v. Roberts*, 52 Md. 64 (1879) (service at residence); *Henderson v. Stanford*, 105 Mass. 504 (1870) (publication); *Continental National Bank v. Thurber*, 74 Hun (N. Y.) 632, 26 N. Y. Supp. 956 (1893) (service at residence). Cf. *Douglas v. Forrest*, 4 Bing. 686 (1828) (proclamation in public place); *Schibsby v. Westenholz*, L. R. 6 Q. B. 155 (1870). But see, *contra*, *Raher v. Raher*, 150 Iowa, 511, 129 N. W. 494 (1911) (service outside the state).

A method of service is insufficient when, although it may have a tendency to give notice to the defendant, yet there is another way obviously better calculated to give notice. Service by publication is insufficient therefore when personal service is possible (*Bardwell v. Collins*, 44 Minn. 97, 46 N. W. 315 (1890)), or where the defendant had left the state but his family remained at his last place of abode. *McDonald v. Mabce*, 243 U. S. 90 (1917). It is doubtful whether service by publication upon a resident is sufficient even when no other method of service is available. See *McDonald*

To what extent has a state control over nonresidents not personally within the state but doing business therein, either as individuals or as partners? To what extent may the state confer upon its courts jurisdiction over such persons? In *Pennoyer v. Neff*,<sup>26</sup> in which the general principles in regard to jurisdiction were thoroughly discussed and expounded, these questions were expressly left open. Mr. Justice Field said:<sup>27</sup>

"Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure to make such appointment or to designate such place, that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State."

A number of cases have lately arisen involving the validity of a Kentucky statute. This statute<sup>28</sup> provides that:

"In actions against an individual residing in another State, or a partnership, association, or joint stock company, the members of which reside in another State, engaged in business in this State, the summons may be served on the manager, or agent of, or person in charge of, such business in this State, in the county where the business is carried on, or in the county where the cause of action occurred."

The courts of Kentucky have upheld the validity of this statute.<sup>29</sup> In several cases, however, the courts of other states have held invalid Kentucky judgments rendered under the statute.<sup>30</sup>

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*v. Mabey, supra*; *De la Montanya v. De la Montanya*, 112 Cal. 101, 44 Pac. 354 (1896).

<sup>26</sup> 95 U. S. 714 (1877).

<sup>27</sup> *Ibid.*, 735.

<sup>28</sup> KENTUCKY CIVIL CODE, § 51, subsec. 6.

<sup>29</sup> *Guenther v. American Steel Hoop Co.*, 116 Ky. 580, 76 S. W. 419 (1903); *Johnson v. Westerfield*, 143 Ky. 10, 135 S. W. 425 (1911); *Crane v. Hall*, 165 Ky. 827, 178 S. W. 1096 (1915).

<sup>30</sup> *Moredock v. Kirby*, 118 Fed. 180 (C. C., W. D. Ky., 1902); *Flemer v. Farson*, 268 Ill. 435, 109 N. E. 327 (1915); *Cabanne v. Graf*, 87 Minn. 510, 92 N. W. 461 (1902). For cases holding similar statutes invalid, see *Brooks v. Dun*, 51 Fed. 138 (C. C., W. D. Tenn., 1892); *Ralya Market Co. v. Armour & Co.*, 102 Fed. 530 (C. C.,

In the most recent of these cases, *Flexner v. Farson*,<sup>31</sup> an action of debt was brought in Illinois upon a Kentucky judgment. It appeared that the cause of action on which the judgment was based arose in Kentucky; that the defendants were nonresidents but were, at the time the cause of action arose, doing business in Kentucky as partners through one Washington Flexner as their agent; that service was made upon him after he had ceased to act as such agent; that the defendants did not appear in the action; and that the Kentucky court thereupon rendered judgment against them by default. The Illinois court gave judgment for the defendants, which was affirmed on appeal by the Supreme Court of the state. The plaintiff, contending that full faith and credit was denied to the Kentucky judgment, brought the case on writ of error to the Supreme Court of the United States, and that court has affirmed the Illinois judgment.<sup>32</sup> The opinion of the court, delivered by Mr. Justice Holmes, is very brief. After stating the facts, he says:

"It is argued that the pleas tacitly admit that Washington Flexner was agent of the firm at the time of the transaction sued upon in Kentucky, and the Kentucky statute is construed as purporting to make him agent to receive service in suits arising out of the business done in that State. On this construction it is said that the defendants by doing business in the State consented to be bound by the service prescribed. The analogy of suits against insurance companies based upon such service is invoked. *Mutual Reserve Fund Life Association v. Phelps*, 190 U. S. 147. But the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in. *Lafayette Ins. Co. v. French*, 18 How. 404; *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U. S. 93, 96. The State had no power to exclude the defendants and on that ground without going farther the Supreme Court of Illinois rightly held that the analogy failed, and that the Ken-

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N. D. Iowa, 1900); *Caldwell v. Armour*, 1 Pen. (Del.) 545 (1899); *Aikmann v. Sanderson*, 122 La. 265, 47 So. 600 (1908). But see, *contra*, *Alaska Commercial Co. v. Debney*, 144 Fed. 1 (C. C. A., 9th Circ., 1906); *Rauber v. Whitney*, 125 Ind. 216, 25 N. E. 186 (1890); *Behn v. Whitney*, 125 Ind. 599, 25 N. E. 187 (1890); *Edwards v. Van Cleave*, 47 Ind. App. 347, 94 N. E. 596 (1911); *Green v. Synder*, 114 Tenn. 100, 84 S. W. 808 (1904).

<sup>31</sup> 268 Ill. 435, 109 N. E. 327 (1915).

<sup>32</sup> *Flexner v. Farson*, 248 U. S. 289 (1919).

tucky judgment was void. If the Kentucky statute purports to have the effect attributed to it, it cannot have that effect in the present case. *New York Life Ins. Co. v. Dunlevy*, 241 U. S. 518, 522, 523. *Judgment affirmed.*"

The line of thought which the opinion seems to suggest is this: A state may exclude a foreign corporation altogether, and may therefore admit it on such conditions as it may choose to impose; but a state may not exclude nonresident persons, and may not therefore impose any conditions on admission. The problem, however, is not quite as simple as this. A state may not always exclude foreign corporations; for example, it may not exclude a corporation which seeks to do only an interstate business. But even though it may not exclude, it may impose some conditions on admission.<sup>33</sup>

The opinion of Mr. Justice Holmes suggests an inquiry into the basis of jurisdiction over corporations. There is no difficulty as to domestic corporations. Obviously the state which creates a corporation has the necessary control over it to serve as a basis of jurisdiction. It is domiciled within the state. At common law service upon a corporation is effected by service upon its principal officer.<sup>34</sup> By statute service upon other officers or agents is frequently allowed, and such service, or service by any other method, is valid if it fairly tends to give the corporation notice of the action and an opportunity to be heard.<sup>35</sup>

<sup>33</sup> See *International Harvester Co. v. Kentucky*, 234 U. S. 579 (1914), stated and discussed *infra*, p. 885.

And even though a state may exclude, there are some conditions on admission it may not impose, *e. g.*, conditions designed to prevent resorting to the federal courts or conditions which would result in taking the property of the corporation without due process of law. See note 44, *infra*. But see the dissenting opinion of Mr. Justice Holmes in *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 52 (1910). For a discussion of "unconstitutional conditions," see HENDERSON, *FOREIGN CORPORATIONS*, Chap. VIII; Report of the Commissioner of Corporations on State Laws concerning Foreign Corporations, 1915, Pt. II.

<sup>34</sup> *Kansas City, etc. R. R. Co. v. Daughtry*, 138 U. S. 298, 305 (1891); *State v. Western N. C. R. R. Co.*, 89 N. C. 584 (1883); 1 *TIDD'S PRACTICE*, 8 ed., 119.

<sup>35</sup> *St. Mary's Petroleum Co. v. West Virginia*, 203 U. S. 183 (1906) (service upon state auditor); *Clearwater Mercantile Co. v. Roberts*, 51 Fla. 176, 40 So. 436 (1906) (publication); *Nelson v. C., B. & Q. R. R. Co.*, 225 Ill. 197, 80 N. E. 109 (1907) (publication and mail); *Hinckley v. Kettle River R. R. Co.*, 70 Minn. 105, 72 N. W. 835 (1897) (deposit of summons in office of secretary of state, who is charged with duty of mailing a copy to an officer of the corporation); *Straub v. Lyman, etc. Co.*, 30 S. D. 310, 138 N. W. 957 (1912) (service outside the state.)

If the method of service is not reasonably calculated to give the corporation notice

A more difficult question arises as to foreign corporations, that is, corporations organized and existing under the laws of another state or territory or country than that in which the action is brought. If a foreign corporation is not doing business within the state, it is not subject to the jurisdiction of the state merely because one or more of its officers or agents happens to live there or to go there.<sup>36</sup> The New York and North Carolina courts long obstinately clung to the opposite view;<sup>37</sup> but the Supreme Court of the United States has now definitely held that a state has no jurisdiction over the corporation in such a case, and that an attempt to exercise jurisdiction is a violation of the Fourteenth Amendment.<sup>38</sup>

Certainly, however, a foreign corporation may voluntarily consent to submit itself to the jurisdiction of the state and of the courts of the state. And inasmuch as a corporation, although a "person"<sup>39</sup> and entitled as such to protection under the due-process clause of the Fourteenth Amendment, is not a "citizen"<sup>40</sup> and is not as such entitled to "all privileges and immunities of citizens in the several States,"<sup>41</sup> or "the privileges or immunities of citizens of the United States,"<sup>42</sup> a state may in general exclude a foreign corporation from doing business within the state.<sup>43</sup> It may impose conditions precedent to its doing business within the

and an opportunity to defend, it is unconstitutional. *Pinney v. Providence Loan & Investment Co.*, 106 Wis. 396, 82 N. W. 308 (1900) (leaving copy in registry of deeds, no one being charged with duty to notify defendant).

<sup>36</sup> *St. Clair v. Cox*, 106 U. S. 350 (1882); *Goldey v. Morning News*, 156 U. S. 518 (1895); *Kendall v. American Automatic Loom Co.*, 198 U. S. 477 (1905); *Newell v. Great W. Ry. Co.*, 19 Mich. 336 (1869); *Moulin v. Insurance Co.*, 24 N. J. L. (4 Zab.) 222 (1853); *Aldrich v. Anchor Coal Co.*, 24 Ore. 32, 32 Pac. 756 (1893).

<sup>37</sup> *Sadler v. Boston, etc. Co.*, 202 N. Y. 547, 95 N. E. 1139 (1911), 140 N. Y. App. Div. 367, 125 N. Y. Supp. 405 (1910); *Menefee v. Riverside, etc. Mills*, 161 N. C. 164, 76 S. E. 741 (1913).

<sup>38</sup> *Riverside, etc. Mills v. Menefee*, 237 U. S. 189 (1915). See also *Dollar Co. v. Canadian, etc. Co.*, 220 N. Y. 270, 115 N. E. 711 (1917).

<sup>39</sup> *Santa Clara Co. v. Southern Pac. R. R. Co.*, 118 U. S. 394, 396 (1886); *Smyth v. Ames*, 169 U. S. 466 (1898).

<sup>40</sup> *Paul v. Virginia*, 8 Wall. (U. S.) 168 (1868).

<sup>41</sup> Article IV, § 2.

<sup>42</sup> Amendment XIV.

<sup>43</sup> *Paul v. Virginia*, 8 Wall. (U. S.) 168 (1868). For an exhaustive digest of decisions as to what constitutes "doing business" within a state, see the Report of the Commissioner of Corporations on State Laws concerning Foreign Corporations, 1915, 156-68.

state. It may impose as a condition precedent the filing of a consent to service of process in a designated manner. If a foreign corporation actually files such a consent it is bound thereby.<sup>44</sup>

Not infrequently it happens that a foreign corporation does business in a state without having filed consent to any form of service of process. The statute may not require the filing of any consent, but may simply provide that if a corporation does business within the state, service may be made upon one of its officers or agents within the state, or upon a public officer of the state. Or the statute may require the filing of a consent, but the corporation may have neglected to comply with the statute.<sup>45</sup> In such cases, where the corporation has not expressly assented to the jurisdiction of the state and of the courts of the state, three possible foundations for jurisdiction have been suggested: (1) that the corporation has given an "implied" consent to the jurisdiction; (2) that the corporation is present and is found within the state; and (3) that on principles of justice, if a corporation voluntarily does business within the state, it is bound by the reasonable regulations by the state of that business.<sup>46</sup>

1. In the leading case of *Lafayette Insurance Co. v. French*,<sup>47</sup> jurisdiction is rested upon the theory of "implied" consent. Mr. Justice Curtis said: <sup>48</sup>

"A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. 13 Pet.

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<sup>44</sup> The decisions on this point are numberless. See BEALE, FOREIGN CORPORATIONS, Chaps. VII, XI; HENDERSON, POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW, Chap. V.

But a foreign corporation is not bound by its consent to conditions which are so outrageously unreasonable as to amount to a deprivation of property without due process of law. "A state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law." *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 83 (1913). It is conceived therefore that if the corporation should agree to be bound by a judgment rendered without any service of process, or after service by a method which would have no tendency to give notice of the action to the corporation or an opportunity to be heard, it would not be bound. See note 33, *supra*, and note 50, *infra*.

<sup>45</sup> For a summary of the statutes of the several states, see the Report of the Commissioner of Corporations on State Laws concerning Foreign Corporations, 1915, 34-41.

<sup>46</sup> A corporation, it seems clear, is domiciled only in the state creating it. Hence jurisdiction over a foreign corporation cannot be based upon domicile.

<sup>47</sup> 18 How. (U. S.) 404 (1855).

<sup>48</sup> Pages 407, 408.



519. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States, and by this court, provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence . . . Now, when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the corporation must be taken to assent to the condition upon which alone such business could be there transacted by them; that condition being, that an agent, to make contracts, should also be the agent of the corporation to receive service of process in suits on such contracts."

This line of reasoning is undoubtedly sound enough in cases in which it is really possible to find sufficient evidence of consent. In truth, however, although it is sometimes possible to spell out a consent by the corporation, it is often difficult and sometimes impossible to do so.<sup>49</sup> But the corporation may be held even if it appears that it did not consent. The Supreme Court recognizes that the implication of consent in many cases involves a fiction, but the corporation nevertheless does not on that account escape.<sup>50</sup>

2. To meet the difficulty of lack of any real consent, and to avoid the necessity of resorting to a fiction, it has been urged that the jurisdiction is based upon the presence of the corporation within the state.<sup>51</sup> It is asserted that a corporation is actually present and can be found wherever it is engaged in business. On this theory a foreign corporation can be served in a state where it does

<sup>49</sup> The difficulties with the theory of implied consent are set forth in HENDERSON, *POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW*, Chap. V; Cahill, "Jurisdiction over Foreign Corporations," 30 *HARV. L. REV.* 676. The theory is supported in BEALE, *FOREIGN CORPORATIONS*, Chap. XI.

<sup>50</sup> Conversely, a foreign corporation is not bound by regulations which are so outrageous as to amount to a deprivation of property without due process of law. It has been held that if a state statute provides for service of process upon a foreign corporation doing business within the state by service upon a public officer, such service is invalid if it is not such as is calculated to give notice to the corporation. *King Tonopah Mining Co. v. Lynch*, 232 Fed. 485 (D. C., Nev., 1916) (service upon state official not charged with duty to notify corporation); *Knapp v. Bullock Tractor Co.*, 242 Fed. 543 (D. C., S. D. Cal., 1917) (like preceding case). Cf. *Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602 (1899); *Commercial Mutual Accident Co. v. Davis*, 213 U. S. 245 (1909).

<sup>51</sup> For a discussion of this theory, see HENDERSON, *POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW*, Chap. V; 30 *HARV. L. REV.* 676-96.

business even though no statute authorizes such service. Some cases have indeed gone to this length.<sup>52</sup> There would seem to be no objection on principle to this theory, but it has never met with complete and unqualified approval by the Supreme Court. In a famous dictum of Chief Justice Taney in *Bank of Augusta v. Earle*,<sup>53</sup> the proposition was asserted in broad terms that "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created." Although since that dictum was promulgated, the broad doctrine there laid down has been considerably limited, and the Supreme Court has in many cases stated that a corporation may be found outside the state wherein it was organized, yet the Supreme Court has never completely and definitely repudiated the dictum. Two recent cases, *Old Wayne Life Association v. McDonough*<sup>54</sup> and *Simon v. Southern Railway*,<sup>55</sup> decided by that court, tend to show a disapproval of, or at least a limitation on, the doctrine of corporate presence. In these cases it was held that under a statute providing for service on foreign corporations doing business within the state by service upon a public official, such service was insufficient if the cause of action arose in another state.

3. In explanation of *Old Wayne Life Association v. McDonough* and *Simon v. Southern Railway*, Learned Hand, J., has, in the case of *Smolik v. Philadelphia & Reading Coal & Iron Co.*,<sup>56</sup> suggested a third possible theory on which to base jurisdiction over foreign corporations. In that case it appeared that a New York statute required every foreign corporation doing business in New York to take out a license, which should not be issued unless the corporation had appointed an agent within the state upon whom process might be served. The defendant corporation did appoint such an agent, and in an action brought in the federal District Court for the Southern District of New York, and based upon a cause of action which did not arise in New York, service was made upon the

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<sup>52</sup> *La Compagnie Générale Transatlantique v. Law & Co.*, [1899] A. C. 431; *Wilson Packing Co. v. Hunter*, 8 Biss. 429, Fed. Cas. No. 17,852 (1879). But see *Desper v. Continental Water Meter Co.*, 137 Mass. 252 (1884). And see cases cited, Scott, CAS. CIV. PROC. 38, note.

<sup>53</sup> 13 Pet. (U. S.) 519, 588 (1839).

<sup>54</sup> 204 U. S. 8 (1907).

<sup>55</sup> 236 U. S. 115 (1915).

<sup>56</sup> 222 Fed. 148 (D. C., S. D., N. Y., 1915).

agent. A motion to set aside the service was denied.<sup>57</sup> Judge Hand said:

"When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the state, but that is not equivalent to a consent; actually it might have refused to appoint, and yet its refusal would make no difference. The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent.

"The limits of that consent are as independent of any actual intent as the consent itself. Being a mere creature of justice it will have such consent only as justice requires; hence it may be limited, as it has been limited in *Simon v. Southern Railway*, *supra*, and *Old Wayne Insurance Co. v. McDonough*, *supra*. The actual consent in the cases at bar has no such latitudinarian possibilities; it must be measured by the proper meaning to be attributed to the words used, and, where that meaning calls for wide application, such must be given."<sup>58</sup>

Here then is a third theory of the basis of jurisdiction over foreign corporations. If a foreign corporation voluntarily does business within the state it is bound by reasonable regulations of that business imposed by the state, not because it is found there, not because it has consented to those regulations, but because it is as reasonable and just to subject the corporation to those regulations as though it had consented. The jurisdiction is based upon the control of the state resulting from the voluntary act of the corpora-

<sup>57</sup> *Bagdon v. Philadelphia, etc. Co.*, 217 N. Y. 432, 111 N. E. 1075 (1916), *accord*.

<sup>58</sup> 222 Fed. 148, 151. This opinion was approved by Holmes, J., in *Pennsylvania Fire Ins. Co. v. Gold Issue Min. & Mill. Co.*, 243 U. S. 93 (1917), in which case the defendant had filed a consent to service of process upon a *public official*, and the service was upheld although the cause of action arose outside the state. It is not yet settled whether, in view of the *Old Wayne* and *Simon* cases, service of process upon an *agent* is valid, when the cause of action arose outside the state, if no consent had been filed. The service was held invalid in *Fry v. Denver, etc. R. R. Co.*, 226 Fed. 893 (D. C., N. D., Cal., 1915), and in *Takacs v. Philadelphia, etc. Ry. Co.*, 228 Fed. 728 (D. C., S. D., N. Y., 1915). But the contrary result was reached in *Barrow Steamship Co. v. Kane*, 170 U. S. 100 (1898); *Atchison, etc. Ry. Co. v. Weeks*, 248 Fed. 970, 979 (D. C., W. D., Texas, 1918); *Reynolds v. Missouri, etc. Ry.*, 228 Mass. 584, 117 N. E. 913 (1917); *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915 (1917).

tion in doing business within the state, not from its voluntary consent to be bound by the laws of the state.<sup>59</sup> Here is no illegitimate assumption of power by the state; Tobago is not trying to bind the rights of the whole world.

Having examined the possible bases of jurisdiction over foreign corporations, we may turn again to the question of jurisdiction over nonresident persons.<sup>60</sup> When citizens of other states seek to do business within the state, either as individuals or as partners, the state has no power arbitrarily to exclude them. To do so would violate the provision of Article IV, section 2, of the federal Constitution that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States"; and the provision of the Fourteenth Amendment that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." But because the state cannot exclude, it does not follow that it may not impose conditions upon admission.

It is well settled that a state may, in the reasonable exercise of the police power, regulate business carried on within the state, although the business is of an interstate character and although it is carried on by nonresidents. Under the pretence of exercising the police power, to be sure, the state may not impose burdens upon interstate commerce, or take property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws, or deny to citizens of the several states and citizens of the United States the privileges and immunities guaran-

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<sup>59</sup> A state may validly provide for service of process upon a foreign corporation which has ceased to do business within the state if the cause of action arose in the state before the withdrawal. *Mutual Reserve Life, etc. Ass'n v. Phelps*, 190 U. S. 147 (1903); *McCord Lumber Co. v. Doyle*, 97 Fed. 22 (C. C. A., 8th Circ., 1899); *Tucker v. Insurance Co.*, 232 Mass. 224, 122 N. E. 285 (1919). Cf. *Hunter v. Mutual Reserve Life Ins. Co.*, 218 U. S. 573 (1910). It would be impossible to say that at the time of service the corporation is present within the state. *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79 (1918). These decisions can be upheld only on the theory of implied consent, or on the theory suggested by Judge Hand.

<sup>60</sup> I have not attempted to distinguish cases where the business is carried on by a partnership from those in which it is carried on by an individual. In our law a partnership is not treated as an entity. If it were so treated it would be possible to apply many of the principles applicable to corporations which are not applicable to individuals. See *Worcester, etc. Co. v. Firbank, Pauling & Co.*, [1894] 1 Q. B. 784; *Von Hellfeld v. Rechnitzer and Mayer Frères & Co.*, [1914] 1 Ch. 748; *Sugg v. Thornton*, 132 U. S. 524 (1889); *State v. Adams Express Co.*, 66 Minn. 271, 68 N. W. 1085 (1896).

teed by the Constitution. When a state attempts to compel non-residents doing business within the state to submit to the jurisdiction of the courts of the state, the validity of the attempt depends upon the question whether this is a reasonable exercise of the power to regulate business.

The state has not power to exclude a corporation which seeks to do within the state only interstate business. Nevertheless it was held in *International Harvester Co. v. Kentucky*<sup>61</sup> that the state may validly provide that such a corporation should appoint an agent to accept service of process. Such a provision does not impose an improper burden upon interstate commerce. It merely treats foreign corporations like domestic corporations. Mr. Justice Day, speaking for the court in that case, said:

"It is argued that a corporation engaged in purely interstate commerce within a State cannot be required to submit to regulations such as designating an agent upon whom process may be served as a condition of doing such business, and that as such requirement cannot be made, the ordinary agents of the corporation, although doing interstate business within the State, cannot by its laws be made amenable to judicial process within the State. The contention comes to this, so long as a foreign corporation engages in interstate commerce only it is immune from the service of process under the laws of the State in which it is carrying on such business. This is indeed, as was said by the Court of Appeals of Kentucky, a novel proposition, and we are unable to find a decision to support it, nor has one been called to our attention. True, it has been held time and again that a State cannot burden interstate commerce or pass laws which amount to the regulation of such commerce; but this is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the State which is wholly of an interstate commerce character."<sup>62</sup>

<sup>61</sup> 234 U. S. 579 (1914).

<sup>62</sup> A statute subjecting cars used in interstate commerce to attachment and garnishment is not an improper interference with interstate commerce. *Davis v. Cleveland, etc. Ry. Co.*, 217 U. S. 157 (1910).

A state may not impose unreasonable conditions upon a corporation seeking to carry on only interstate commerce within the state. *International Textbook Co. v. Pigg*, 217 U. S. 91 (1910); *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914). But it may impose such conditions upon a corporation seeking to carry on intrastate as well as interstate commerce, provided the conditions do not actually burden interstate commerce. *Interstate Amusement Co. v. Albert*, 239 U. S. 560 (1916). It may not, however, impose conditions upon a corporation seeking to carry on intrastate as well as interstate commerce if the conditions would operate as a burden upon inter-

Although the state may not exclude the corporation, it may compel the corporation to submit to the jurisdiction of its courts.

The case of *Kane v. New Jersey*<sup>63</sup> shows that although a state may not exclude from its borders a nonresident individual, yet it may under certain circumstances impose as a condition of admission the appointment of an agent to accept service of process. A statute of New Jersey provided that a nonresident owner of an automobile should, as a condition precedent to his right to operate his car in the highways of the state, appoint the secretary of state as his agent upon whom process might be served "in any action or legal proceeding caused by the operation of his registered motor vehicle within this state against such owner." The defendant, a resident of New York, having failed to comply with this provision was arrested while driving his automobile in New Jersey. When arrested he was on his way from New York to Pennsylvania. He claimed that the statute as to him violated the Constitution and laws of the United States regulating interstate commerce, and also the Fourteenth Amendment. These contentions were overruled, and he was fined. The conviction was affirmed in the highest court of the state, and the case was brought to the Supreme Court of the United States by writ of error. It was held that the statute was constitutional. Mr. Justice Brandeis, speaking for the court, said:<sup>64</sup>

"We know that ability to enforce criminal and civil penalties for transgression is an aid to securing observance of laws. And in view of the speed of the automobile and the habits of men, we cannot say that the Legislature of New Jersey was unreasonable in believing that ability to establish, by legal proceedings within the State, any financial liability of nonresident owners, was essential to public safety. There is nothing to show that the requirement is unduly burdensome in practice. It is not a discrimination against nonresidents, denying them equal protection of the law. On the contrary, it puts nonresident owners upon an equality with resident owners."

A state may then in the exercise of its police power impose reasonable conditions upon nonresidents wishing to do acts within

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state commerce. *Western Union Tel. Co. v. Kansas*, 216 U. S. 1 (1910); *Pullman Co. v. Kansas*, 216 U. S. 56 (1910); *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146 (1910); *Looney v. Crane Co.*, 245 U. S. 178 (1917); *International Paper Co. v. Massachusetts*, 246 U. S. 135. Cf. *Interstate Amusement Co. v. Albert*, 239 U. S. 560 (1916).

<sup>63</sup> 242 U. S. 160 (1916).

<sup>64</sup> *Ibid.*, 167.

the state. The mere fact that the state may not prevent the doing of such acts does not preclude it from imposing such conditions. The police power is not confined to regulations of public health, morals, safety, and the like. It affects economic as well as social conditions. "It embraces regulations designed to promote public convenience or the general prosperity or welfare."<sup>65</sup> The conditions, to be sure, must be such as fairly fall within the proper scope of the police power, and such as do not violate any rights guaranteed by the federal Constitution, such as those protected by the interstate-commerce clause or by the "privileges and immunities" clauses or the due-process clause, or the clause forbidding a state to deny to any person within its jurisdiction the equal protection of the laws. Undoubtedly a statute forbidding a foreign corporation to enter the state to carry on interstate commerce, without filing a consent to the jurisdiction of the courts of the state as to all causes of action, no matter where or how arising, is unconstitutional.<sup>66</sup> Similarly, doubtless, a statute forbidding a nonresident to operate his automobile within the state, unless he has consented to submit himself to the jurisdiction of the courts of the state as to all causes of action, whether or not arising out of the operation of the automobile in the state, would be unconstitutional. Similarly, doubtless, a statute providing that nonresidents should not do business within the state without having consented to the jurisdiction of the courts of the state as to all causes of action, no matter where or how arising, would be unconstitutional.

<sup>65</sup> *Sligh v. Kirkwood*, 237 U. S. 52, 59 (1915). See, also, *Central Loan & Trust Co. v. Campbell*, 173 U. S. 84 (1899); *C. B. & Q. Railway v. Drainage Comm'rs*, 200 U. S. 561, 592 (1906); *Bacon v. Walker*, 204 U. S. 311 (1907); *Noble State Bank v. Haskell*, 219 U. S. 104 (1911); *Eubank v. Richmond*, 226 U. S. 137 (1912). See FREUND, POLICE POWER, §§ 8, 12.

<sup>66</sup> *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 205 (1914). In that case the court said: "The second[condition], respecting the appointment of a resident agent upon whom process may be served, is particularly burdensome, because, as the Supreme Court of the State has said, it requires the corporation to subject itself to the jurisdiction of the courts of the State in general as a prerequisite to suing in any of them; that is to say, it withholds the right to sue even in a single instance until the corporation renders itself amenable to suit in all the courts of the State by whosoever chooses to sue it there. If one State can impose such a condition others can, and in that way corporations engaged in interstate commerce can be subjected to great embarrassment and serious hazards in the enforcement of contractual rights directly arising out of and connected with such commerce. As applied to such rights we think the conditions are unreasonable and burdensome, and therefore in conflict with the commerce clause."

But there would seem to be no objection to a statute which forbids nonresidents to do business within the state without having consented to the jurisdiction of the courts of the state as to all causes of action arising within the state and out of the business carried on within the state. Such a provision seems essentially just. Very clearly provisions allowing creditors to attach the assets employed in the business within the state are desirable and proper, and such provisions are well-nigh universal; but very frequently the business is carried on without the use of any property within the state. In such a case should a creditor of the business be bound to resort to other states to search out and discover the owner of the business? That would seem to be a hardship to the creditor. The words of Mr. Justice Swaine, speaking of the unfairness of refusing a creditor the right to sue a foreign corporation in the state where the corporation was carrying on business and where the cause of action arose, are equally applicable here. "In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility."<sup>67</sup> On the other hand there is little hardship on the owner of the business if he is required to answer for all claims arising out of the business in the place where the business is carried on. A statute requiring persons carrying on business within the state to consent to service of process upon an agent in actions arising within the state out of the business carried on within the state, would therefore seem to fall within the proper scope of the police power.

If a state has power to forbid a nonresident to do business without having filed a consent to service of process upon his agent, the question arises whether the state has jurisdiction in the absence of such express consent. We have seen that in the case of corporations, on one or the other of three possible theories, the Supreme Court has held that the state may acquire jurisdiction over foreign corporations doing business within the state, as to causes of action therein arising, although no consent was expressly given. How far are these three theories applicable to the case of nonresident individuals? It seems impossible to say that the nonresident is present and "found" within the state; an individual cannot be present

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<sup>67</sup> *Railroad Co. v. Harris*, 12 Wall. (U. S.) 65, 84 (1870).



except where his physical body is. But it would seem that it is as easy to apply the doctrine of "implied" consent to an individual nonresident, as to a foreign corporation. If the mere fact that a corporation does business in a state constitutes a consent to the conditions which the state may properly and does impose, it is hard to see why the doing of business by an individual is not a consent to the conditions which the state may properly and does impose. The mere fact that the state may not properly impose conditions upon individuals which it may impose upon corporations is immaterial, as long as the conditions it does impose are proper. Furthermore if, according to Judge Hand's theory, a corporation is bound by conditions imposed by the state, not because it has consented to be bound, but because by voluntarily doing business within the state it is just and proper to hold that it is bound by the reasonable regulations of that business by the state, there is no good reason why an individual should not likewise be bound.

There are several grounds, however, on which it may be urged that it is possible to reconcile the decision in *Flexner v. Farson* with the principles discussed above.

The Kentucky statutes do not make provision for any form of substituted or constructive service upon residents in a proceeding *in personam*. In Kentucky the only form of service upon residents in such a proceeding is personal service. Does the provision for service upon the agent of a nonresident doing business within the state discriminate against nonresidents in such a way as to violate the constitutional provisions as to privileges and immunities? It would seem not. It is not necessary to put residents and nonresidents on an exact equality. Nonresidents have by virtue of their nonresidence a certain advantage over residents. It is more difficult to find them within the jurisdiction and to effect personal service upon them. Since the discrimination merely removes this advantage, it is not a violation of the constitutional provisions.<sup>68</sup> The case of *Ballard v. Hunter*<sup>69</sup> is instructive on this point. In that case a proceeding *in rem* was brought in Arkansas for the sale of land in that state for nonpayment of taxes. Service was made

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<sup>68</sup> *Guenther v. American Steel Hoop Co.*, 116 Ky. 580, 591, 76 S. W. 419 (1903). The opposite view was taken in *Moredock v. Kirby*, 118 Fed. 180 (C. C., W. D., Ky., 1902), and in *Caldwell v. Armour*, 1 Pen. (Del.) 545 (1899).

<sup>69</sup> 204 U. S. 241 (1907).

by publication upon the defendant, a nonresident owner. This service was in accordance with the statutes of Arkansas, which required personal service upon resident owners at least twenty days before the rendition of the decree of sale, but which provided for constructive service by publication of four weeks upon nonresident owners. It was contended that the statute discriminated against nonresident owners, in violation of the provisions of the federal Constitution. As to this Mr. Justice McKenna said:<sup>70</sup> "We have no doubt of the power of the State to so discriminate, nor do we think extended discussion is necessary. Personal service upon non-residents is not always within the State's power. Its process is limited by its boundaries. Constructive service is at times a necessary resource."<sup>71</sup>

Again, the Kentucky statute makes no distinction between causes of action arising within the state and causes of action arising elsewhere. To the extent to which the Kentucky statute attempts to allow an action for a cause of action not arising within the state, by service of process upon an agent, it is undoubtedly unreasonable and unconstitutional. But it would seem that there is no objection to holding that the statute is severable and that it is valid as to causes of action arising within the state, out of the business carried on within the state. The statutes relating to corporations frequently make no distinction between causes of action arising within the state and those arising elsewhere, and although under *Old Wayne Life Association v. McDonough* and *Simon v. Southern Railway*, these statutes have been held invalid as to causes of action arising outside the state, they are upheld as to causes of action arising within the state.

There is, however, a ground upon which *Flexner v. Farson* may

<sup>70</sup> 204 U. S. 254.

<sup>71</sup> See *Kane v. New Jersey*, stated *supra*, p. 886.

Similarly it is not uncommon to allow attachment of the property of nonresidents only. This is not an unconstitutional discrimination. *Campbell v. Morris*, 3 H. & McH. (Md.) 535 (1797). It is not unconstitutional to allow the attachment of property of a nonresident without requiring the plaintiff to give a bond, although such a bond is required in the case of attachment of property of a resident. *Central Loan & Trust Co. v. Campbell*, 173 U. S. 84, 97 (1899); *Marsh v. Steele*, 9 Neb. 96 (1879). Compare *St. Mary's Petroleum Co. v. West Virginia*, 203 U. S. 183 (1906), in which it was held that a provision for service upon the state auditor in actions against non-resident domestic corporations and foreign corporations was not unconstitutional, although there was no similar provision as to domestic corporations.

be supported. The Kentucky statute provided for service upon an agent in charge of the business. The person served in *Flexner v. Farson* had ceased to be an agent at the time when process was served upon him. Service therefore was not in accordance with the terms of the statute, and hence was insufficient.<sup>72</sup> The decision is therefore reconcilable with the principles advocated above; and it is to be hoped that the Supreme Court of the United States will not feel that it is precluded by the decision from holding that a state may validly provide for service of process upon non-residents doing business within the state, by service upon an agent, in actions arising in the state out of the business carried on within the state.

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<sup>72</sup> See *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79 (1918).

EFFECT OF AN INCREASE IN THE LIVING WAGE  
BY A COURT OF INDUSTRIAL ARBITRATION  
UPON VESTED RIGHTS AND DUTIES  
UNDER PREEXISTING AWARDS

IN the present article I address myself to a subject which, so far as I am aware, has never yet received a comprehensive consideration by courts of industrial arbitration. The subject, brought into strong relief by recent fluctuations in the cost of living, has not, generally at any rate, been faced by legislatures. Sidetracked by industrial courts, it is yet vital to their efficient functioning. For the purpose of the present article, I may explain that under the legislation of the state of South Australia, the Industrial Court is precluded from awarding less than a living wage, that the lockout and the strike are punishable offenses, and that the court is authorized by statute to *vary* an existing award.

I will deal first, though briefly, with new cases. When an industrial court has raised the living wage, in the absence of such declaration being challenged (and the challenge being duly supported by evidence or argument), it may be assumed that the court will accept the living wage, and apply it in the new cases which come before it. It is necessary, further, to distinguish between the living wage and the minimum wage for an industry. The minimum wage may be a primary minimum (extending to unskilled laborers in an industry generally), or a secondary minimum (applicable in cases of skill, etc., in various grades of an industry). As regards the primary minimum, it will be apparent that, although the court may be at liberty to declare a wage higher than the living wage, there may be cogent reasons for the exercise of caution where the living wage has recently been raised materially. No argument is necessary to justify a loyal adherence to the living wage as a bed-rock level. It will simplify my later argument if I briefly resume the cogent reasons for maintaining, at any rate in new cases, preëxisting marginal differences between the living wage (or the primary minimum wage, if that be higher than the living wage) and the secondary minimums. The conditions of industrial organization to-day call for an increas-

ing degree of skilled work. It is absolutely necessary to the well-being of a community that the skilled and competent worker should be encouraged in every way possible. If he is not, a premium is put on apathy, and the community drifts towards that "cult of incompetence" which, according to many distinguished authorities, is one of the regrettable prices paid for democratic institutions. In part, the need for differential rates of wage may be illustrated by the need for maintaining a reasonably high standard of output. The question of output to-day is even more important than the question of nominal wages. Again, while employers should, as far as possible, coöperate in maintaining a high secondary wage, they are subject, in the absence of legal regulation, to the danger that if they are just to the competent and skilled workmen, they may find themselves handicapped by the competition of some other employer who is less scrupulous. It is scarcely possible to exaggerate the importance of this limitation upon any disposition which the employers may have to regard special competence or efficiency by adequate additions to a living or primary minimum wage. In the early days of industrial legislation, and when Wages Boards were first introduced, it was not so much the intention of the legislatures to secure an adequate remuneration for skill, etc., as to preclude sweating. Prevailing opinion assumed that the skilled worker could take of himself. In the course of time, however, it has become increasingly apparent that a system of industrial regulation must pass far beyond the question of the elimination of sweating if national efficiency is to be maintained, or justice to the workers even approximately assured.

I pass from new cases to consider what adjustments, if any, should be made with respect to court awards actually in force at the time when the living wage is increased. Naturally, when the living wage is increased, the employees who are under an obligation still in force will desire that the revised standard should be immediately applied to them as well as in new cases. Briefly, the argument is that what a court awards is not so much a particular sum of money as so much purchasing power. When, through an increase in the cost of living, the living wage is increased, the employees are entitled to argue that the revised standard should be universally and comprehensively adopted if the spirit of preëxisting regulation is to be honored, notwithstanding the fact that the award under which

they are working is still binding as a matter of strict law. On the other hand, the employers are entitled to argue that the award, having been made in contemplation of being binding for a certain period, should be honored as something more than a scrap of paper, — in a word, that no adjustments should be made until the pre-existing award has run its normal course.

I assume that, under any conceivable legislation, an industrial court will be formally authorized to vary its own awards. What, from the point of view of that public policy to which both civil and industrial courts defer, should be taken to be the scope of the power to vary? Is it limited to the rectification of obvious anomalies in existing awards, or is the power sufficiently wide to include the adaptation of those awards to new circumstances (including therein an increase in the cost of living as found by the court)? Such questions raise many difficulties. In the South Australian legislation various sections may be quoted as suggestive of a legislative intent that awards shall run their normal course. There is certainly no general statutory direction prescribing that preëxisting awards shall be altered automatically by reference to variations in the living wage. Such legislation has been suggested. If such legislation were enacted, and if it were accompanied by a direction to the court to declare the living wage from year to year, it would save a good deal of controversy and discontent. The appeal to employees is apparent. So far as employers are concerned, they would at any rate know exactly where they stood, and that, if they entered upon an obligation to perform contracts for future services, they would do so subject to the risks of a variation in the living wage. Confining myself to existing legislation, I am of the opinion that the South Australian court has the full legal power to adjust court awards for which a variation is asked. But, while the court has the legal power, it may not be subject to a coextensive legal duty.

The distinction between the power which a court may technically possess and a duty which it ought to recognize is vital. An industrial court *might* declare a living wage of £10 for a working week of twenty hours! But the things which an industrial court ought to do are much more modest, and involve a far more restricted ambit of investigation, than the things which it might technically do. With regard to the question to what extent the court should exercise the power which it may legally possess in the way of effecting ad-

justments of existing awards, it is my disagreeable duty to point out some difficulties. I may begin with a brief explanation of the nature of the "living wage" as understood by the South Australian court. In the first place, while the "living wage" is a very modest interpretation of the needs of the average family, it is not, for such a family, a wage below which subsistence is impossible. Australian industrial tribunals generally have recognized that, in a young, prosperous and progressive community like Australia, the living wage should be somewhat above a bare subsistence level. It is, apart from such very abnormal conditions as may result from war, a declaration of what, in the opinion of the court, is necessary in order that an average worker may be able at least to maintain the standard of living which generally prevails in Australia among unskilled workers. In the second place, when the court makes a declaration of the living wage which involves a substantial increase on a preëxisting standard, it ought to allow a margin of safety in view of the practical certainty of some rise in the general level of prices. The reasons for doing so should be apparent. I have indicated them at length in my remarks on the "Theory of the Pernicious Circle" in *The Carpenters and Joiners' Case*.<sup>1</sup> It follows that, for a period at any rate, the living wage as declared by the court is anticipatory, and to that extent may admit of some slight deduction when considering what is immediately necessary even for the maintenance of the Australian standard. (I must concede that the period is apt to be brief. This has been illustrated by a recent declaration of the living wage which I made last September. Judging from the latest figures of the Commonwealth statistician, the cost of living in this state has already advanced since my judgment to an extent equal to the margin of safety which I had in mind at the time the living wage was declared. Some people appeared to hold that my estimate, at the time it was made, was excessive; but I cannot think that they had had much experience of workingmen's budgets, or of the peculiar difficulties with which an industrial judge has to deal. I am aware that grounds exist for hoping that the general level of prices may shortly decline. I can only trust that the hope may be realized.) In the third place, as I have pointed out in *The Plumbers' Case*,<sup>2</sup> when I considered the question of wages in relation to the distribution of the national income, the judicial estimate even of the

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<sup>1</sup> 1916-18, S. A. I. R. 170.

<sup>2</sup> 1916-18, S. A. I. R. 116.

living wage is necessarily affected by variations in national efficiency. The court is under a legal duty to award the living wage; but in the discharge of this duty, it is necessarily conditioned by some reference, however imperfect, to the very difficult but extremely important question of what at a given time the community can afford to pay, without suffering a catastrophic increase in the price of commodities out of which wages are ultimately paid. It will be apparent that a marked disturbance of the general level of prices, and consequent trade and industrial dislocations are greatly increased if, on the increase of the living wage with a view to future cases, the new standard is immediately applied to all existing awards.

The remarks just made with regard to the precise significance of the living wage, and the results of its revision, must be cumulatively considered. With regard to the danger of industrial dislocation, I do not feel that it is generally recognized amongst employees how grave might be the consequence if, apart from statutory direction, the court were to assume the responsibility of the view that, as far as it legally could, it should throw all existing awards into the melting pot. The efficient functioning of industry, so essential to the welfare of both employers and employees, is so dependent upon considerations of credit and finance, and upon the need for a reasonable certainty as to the future, that if employers are never able to know, or with reasonable foresight anticipate, whether a legally binding award is to be altered or not, trade and industry may be depressed, and initiative discouraged to the verge of extinction. I am quite aware that even at present employers manage to survive, and often thrive, despite the risk of supply and demand of labor operating unfavorably to them. Although employers may not pay less than the legally binding wage, they may be bound to pay more if labor is scarce. But this risk is not an adequate reason for imposing the additional risk of having legal obligations abruptly altered from time to time, not according to statutory direction, but according to the particular views and outlook of an industrial judge, as to what ought to be the living wage.

I doubt, moreover, whether employees who argue in favor of the immediate adjustments of all existing awards according to variations in the standard of the living wage quite realize that the argument cuts both ways. It is to be hoped that in the near future the cost



of living will decline. But if we accept the view that upon an increase in the living wage there should be an immediate and complete adjustment of all existing awards, then we ought also to accept the view that when an industrial court should be happily in the position of being able to lower the living wage owing to a decrease in the cost of living, then all awards properly before the court should be adjusted in accordance therewith, although such awards had not expired, and although the employees working under them would naturally feel that they were entitled to the schedule of rates during the normal continuance of the award.

One further matter seems not unworthy of consideration. There can only be one living wage for unskilled labor; and that is declared by courts from time to time with a view to assisting the court in new cases which may come before it. I fear that if, without statutory sanction, the court were to adopt the view that wholesale adjustments of existing legal rights and duties ought to be made, the result might be to exercise a depressing influence upon a judge who is called upon to revise the living wage. If the living wage and the secondary wage are limited to new cases, and to isolated existing awards, then the effect of a rise in the living wage on the cost of living is not so immediate or potent, and the obligation cast upon industry is an obligation which gradually takes substance as new cases come before the court, and as existing awards run their course.

I think I have said enough to show that while a court may have technically the power to make such adjustments as it deems proper with regard to awards properly before it, there are strong reasons why the powers should be exercised with considerable caution. I have tried to state these reasons at their full value. They must be read, however, in conjunction with the reasons expressed earlier, — why secondary minimums should be sufficiently high to stimulate the ambition and effort of the worker, and also in conjunction with the reasons, which should be obvious, why even the unskilled workers throughout the various branches of industry should be in receipt of at least a living wage. It is only thus that it is possible to arrive at sane conclusions. We cannot answer a reason by ignoring it: nor can we appreciate the importance of a reason without viewing it in relation to other reasons — *pro* and *con*. Comprehensively considered, the whole question which I am now considering must be admitted to be one of extraordinary delicacy and diffi-

culty. In order to determine under what, if any, circumstances the power of adjustment which a court may legally possess should be exercised, speaking very generally, regard should be paid to the date of the regulation before the court, the margin of discrepancies between the old and the new standard and the financial outlook and general conditions of the industry under consideration. To be more precise, it is necessary to distinguish between the living and the secondary wage. While reasons of national health and efficiency may be urged in favor of wholesale adjustments, the cogency of such reasons has a special claim to consideration where the living wage is involved.

On an application to vary an award, subject to any power which the court might have to dismiss the case or to order a conference of the parties, the living wage, unless challenged (together with argument or evidence in favor of such challenge) must be awarded. The duty of the South Australian court is never to award less than the living wage. (Special provision is made with respect to aged, slow, or infirm workers.) With regard, however, to the secondary wage, this being a matter of policy, and there being no legislative direction to the court, it appears to me that the presumption is unfavorable to adjustments, and that the burden of proving the existence of very special reasons for a complete adjustment (or, at least, of establishing a strong *prima facie* case) rests with the party seeking to reopen the award. Needless to say, the "special reasons" must outweigh, in the particular case, the general reasons which I have previously stated against the reopening of awards. The secondary wage, it must be noted, does not threaten the subsistence of the worker, at any rate to the extent to which that subsistence is threatened where an increase in the cost of living makes a pre-existing estimate of the living wage obsolete.

I have frequently referred to the possibility of a statutory direction authorizing complete adjustment of existing awards. I feel that I ought to point out, however, that such a direction would be unlikely of itself, and in the absence of increased production, to insure an enduring material benefit to the workers as a class. In a highly protective community, it would tend to inflate prices. Despite the existence of profiteering by some business concerns it remains unfortunately true that the extent to which profits may contribute to enhance wages is limited, if we take industry in the

bulk. No jugglery, not even a complete transformation of our industrial system in accordance with the ideals of state socialists or guild socialists, would enable a community to maintain higher real wages than are warranted by the prevailing conditions of financial prosperity. Under the present social system, the fact is apt to be lost sight of, owing to an exaggerated impression of the extent to which increased wages may be paid out of profits, instead of out of prices. According to English statistics, if the national income were equally divided among all, the result would only be 3/- a day at pre-war prices. Writing with reference to the lessons of the war, a contributor to *The Round Table* for December last remarks:<sup>3</sup>

"We have learnt that the true wealth of a nation consists in a healthy, strong population, and in the utilisation of its material resources to that end. But unfortunately—as we shall find—we have discovered no new Aladdin's lamp, no new short new cut to prosperity. Wages and profits depend as of yore on hard work, saving, efficient management, co-operation between Capital and Labour, and up-to-date plant. There is no inexhaustible fund of riches into which the State can dip its hand, and which it can distribute gratis to its citizens. Our wealth is what we produce and what we save. If we have wasted capital in war, we shall have to make it good. If our production is impeded and saving gives way to extravagance, profits and enterprise will decline and wages and employment with them. We must not be misled by the fallacious appearances of war. We have been enjoying the temporary prosperity of a spendthrift, speeding towards bankruptcy. We have been living easy, because we have been living on our capital."

In illustration of the fallacious appearance of prosperity during the war, the same writer relates that in Russia peasants now weigh instead of counting their paper money; that in revolutionary France, Mirabeau's paper-money policy was pursued until a pair of boots cost £100 in the depreciated currency, and that the consequence of thinking only of the distribution of wealth, as distinct from production, is seen at the present moment in Russia, where the great proportion of factories is likely before long to be closed, and the town populations, at any rate, to be without the necessities of life.

If a statutory direction authorizing a complete automatic adjustment of existing awards according to variations in the cost of

<sup>3</sup> "The Financial and Economic Future," 33 *THE ROUND TABLE*, December, 1918.

living is to be materially helpful, several things are necessary: (1) A clear apprehension, on the part of both employers and employed, of the ideal in view. That ideal includes nothing less than the stability of industry, and the economic security of the worker — security of employment, security of earning power of wages, and security in respect of those general conditions of work which safeguard the worker's health and comfort. (2) A clear apprehension on the part of both employers and employed of the means conducive to the realization of the ideal just indicated. Superficially, those means involve progressive production; but a material increase in production will be found on analysis to demand a whole-hearted coöperation, in my opinion, some form of real partnership between employers and employed. Only thus can the pernicious doctrine of "go-slow" be eliminated. Apropos, the term "go-slow" is by custom reserved as a monopoly of the employed. But when I compare the methods of industrial organization in Australia even with those in force in America, or in Germany before the war, I cannot resist the conclusion that so far as concerns Australia, there is considerable room for improvement in most industries, both as regards the work done by employees, and also as regards the methods of business organization and management by employers. Employers cannot have it both ways; they cannot argue that brain as much as muscle is the source of wealth, and at the same time deny the possibilities of very materially increasing production by means of better methods of business management and organization.

If the views just expressed were taken to heart by the employers and employed, a statutory direction authorizing automatic adjustments of existing awards in accordance with new standards could be given effect to without any catastrophic increase in prices, or any perilous dislocation of trade and industry. Under conditions of mutual recrimination and conflict between employers and employed, even the purposes of wise legislation are frustrated, the possibilities of judicious action by industrial courts are nullified or hampered at every turn, and that future social justice which is the inspiration of progressive thinkers is postponed to some remote and imaginable future. If the real good now within our grasp is missed, even though the motive should be the attainment of something imaginably better, then that something imaginably better will have been made the enemy of an actual and immediately attainable good. For the

present conditions, neither employers nor employed can escape censure. While many employers desire to do the fair thing, most employers suffer from the obsession of profits, and the weight of the dead hand of a traditional industrial organization. On the other hand, while many employees would prefer the substance to the shadow, and are willing to work for other ideals by evolutionary process, the great majority of employees in Australia are under the leadership of those who mean well, but have very vague conceptions of exactly what they want, and still vaguer conceptions of the processes involved in the realization, in a complex community, of what they want. If this state of things continues, employers and employed alike will suffer. An industrial court may punish in various ways employees who strike; but even industrial courts cannot maintain a high standard of work. Nor can they, save possibly by a painful and long-drawn-out struggle, bring enlightenment or a sense of justice to employees as a class. The present struggle is educative, but expensive. Incidentally, it thwarts the desire which an industrial court may have to insure progressive and all-round adjustments of the rates of wage according to variations in the cost of living.

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INDIRECT ENCROACHMENT ON FEDERAL  
AUTHORITY BY THE TAXING POWERS  
OF THE STATES<sup>1</sup> VIII

III. SUMMARY AND CONCLUSION

WE are often told that a state cannot tax interstate commerce or an instrumentality of the federal government. This is commonly accepted legal doctrine. But in the law, as in human life elsewhere, actions speak louder than words. What judges actually permit and prohibit is more important than what they say about their approval and their disapproval. By their fruits ye shall know them better than by their professions. If judges do in fact permit the states to tax interstate commerce and the instrumentalities of the federal government, that commerce and those instrumentalities may be taxed by the states, all doctrine to the contrary notwithstanding.

It is perhaps too much to hope that all conflict between the formulations of legal doctrine and the substantial results of legal decisions will ever be resolved. Until all catch phrases which clothe half truths in the majesty of the universal and the absolute are banished from common speech, we cannot expect the imaginary deity which calls itself The Law to be free from the foibles of its mortal makers. But those who are interested in law, not as a conceptualist vision, but as an instrument for the actual ordering of human affairs, must necessarily seek to discover how the law does actually order human affairs. They will wish to make their own formulations of the law as it is laid down and applied by those duly vested with authority in the matter. They will be unwilling to accept the formulations of others that do not square with results of the adjudications.

When in this frame of mind we approach the limitations imposed upon the taxing powers of the states by the existence of

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<sup>1</sup> For preceding instalments of this discussion, see 31 HARV. L. REV. 321-72 (January, 1918); *Ibid.*, 572-618 (February, 1918); *Ibid.*, 721-78 (March, 1918); *Ibid.*, 932-53 (May, 1918); 32 HARV. L. REV. 234-65 (January, 1919); *Ibid.*, 374-416 (February, 1919); and *Ibid.*, 634-78 (April, 1919).

the federal system of government, we find the line of demarcation by no means so clear as familiar formulations would entice us to assume. We discover that in certain ways and to a certain extent a state may tax a federal instrumentality and may tax interstate commerce. We face the problem as one of methods and of degree. We see the solution reached by compromise and by practical adjustment and not by simple discovery of a sharp boundary between two entirely separate spheres of power. We find that the law cannot be summed up in a phrase, but that we must go behind the phrases to the facts.

To Chief Justice Marshall we are indebted for clarity and confusion on the problem of marking the limits of state power. The confusion appears when he professes clarity, and the clarity is manifest when he owns up to perplexity. By neglecting the concrete and rising to the heights of political theorizing, Marshall attains an artificial simplicity which would banish all our difficulties, if words alone were adequate to the task. In *McCulloch v. Maryland*,<sup>2</sup> he tells us:

"If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied."<sup>3</sup>

Find the limits of state sovereignty, and all difficulties are at an end. Sovereignty is the intelligible standard applicable to every case. In praise of his solution, Marshall continues:

"We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the

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<sup>2</sup> 4 Wheat. (U. S.) 316 (1819).

<sup>3</sup> *Ibid.*, 429-30.

judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power."<sup>4</sup>

If it were really so easy as Marshall here appears to think, the most merciful of critics could hardly condone the wanderings of his successors in the path which he pointed out. With the formula of *McCulloch v. Maryland*<sup>5</sup> before them, every dispute should have been speedily and unanimously resolved. But Marshall himself was soon to doubt the magic of his pronouncement of 1819. Eight years later in *Brown v. Maryland*<sup>6</sup> we find him aware that the notion of sovereignty is not the simple solvent that it had previously appeared to be. In 1827 he confesses:

"The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colours between white and black, approach so nearly as to perplex the understanding, as colours perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application."<sup>7</sup>

Here the great Chief Justice tells us that the line between state power and absence of power is not an easy one to mark. A state tax which from one angle is an exercise of lawful authority may from another angle be an encroachment on the field reserved to the

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<sup>4</sup> 4 Wheat. (U. S.) 430.

<sup>5</sup> Note 2, *supra*.

<sup>6</sup> 12 Wheat. (U. S.) 419 (1827).

<sup>7</sup> *Ibid.*, 441. Compare Chief Justice Taney in *License Cases*, 5 How. (U. S.) 504, 574 (1847): "It is unquestionably no easy task to mark by a certain and definite line the division between foreign and domestic commerce, and to fix the precise point, in relation to every imported article, where the paramount power of Congress terminates, and that of the State begins. They cannot be determined by the laws of Congress or of the States, as neither can by its own legislation enlarge its own powers, or restrict those of the other. And as the Constitution itself does not draw the line, the question is necessarily one for judicial decision, and depending altogether upon the words of the Constitution." That the words of the Constitution have to be supplemented by something extraneous is hinted by the previous recognition that the Constitution itself does not draw the line. How little the words of the Constitution have to do with the problem must be apparent to everyone who has read the judicial opinions which have struggled with its solution.



nation. Taxes which fall in some degree on instrumentalities of the national government or on the fruits of interstate commerce have a double aspect. They are imposed on persons or property or occupations or privileges within the geographical jurisdiction of a state and normally within its legal jurisdiction. They also have some effect on operations within the legal jurisdiction of the United States — a legal jurisdiction assumed to be exclusive. One or the other aspect must be legally predominant, since the same tax cannot be both valid and invalid. But the necessary legal predominance of one aspect cannot obliterate the existence of the other; and the recognized imperative of cleaving only to one does not carry with it any certain indication of the choice between the two. The choice must be made as the cases arise, and without the aid of any rule of universal application. The rule must be the child and not the parent of the cases.

All of the taxes which the Supreme Court has had to consider, from Marshall's day to this, have been demands which it was possible to regard as formally on subjects within the jurisdiction of the state. All have had some effect on interstate commerce or on some operation of the national government. On nearly every crucial question the judges have been in disagreement as to whether the form or the effect should be regarded as controlling. In most important instances this disagreement can be traced to differences of opinion as to the effect to be anticipated from the exercise of state power in question. It may be said, therefore, that the accepted test has always been a judgment on a question of economics, provided it is understood that the judges have been concerned with the economic effect, not of the precise tax before them, but of such a tax levied at the highest rate which a state might be moved to impose. It will not do to accept without qualifications Marshall's statement that "questions of power do not depend on the degree to which it may be exercised,"<sup>8</sup> but in general it is true that the court has not forgiven any state tax because the particular rate of levy was so moderate that its effect on national instrumentalities or on interstate commerce was negligible.

The disagreement among the judges which has been characteristic of most of the decisions was not present in *McCulloch v. Maryland*.<sup>9</sup> Here the court was unanimous in holding that a Maryland

<sup>8</sup> *Brown v. Maryland*, 12 Wheat. (U. S.) 419, 439 (1819).

<sup>9</sup> Note 2, *supra*.

stamp tax on notes issued by the United States bank was a tax on an instrumentality of the national government. The tax was discriminatory, in that it applied only to banks not chartered by Maryland; but the court did not notice this point, and Marshall's opinion is applicable to a nondiscriminatory tax as well. On the other hand the Chief Justice conceded that Maryland might tax the real estate of the bank and the interest of Maryland citizens in the institution "in common with other property of the same description throughout the State."<sup>10</sup> A tax on the issuance of notes was regarded as a tax on the operations of a federal instrumentality; a tax on the real estate was thought to be something else. The only difference between the two appears to be one of degree. One affects or may affect the operations of the bank more seriously than the other.

*Brown v. Maryland*<sup>11</sup> also dealt with a discriminatory tax, and again this was not noted by the court. The law declared invalid required a license of importers of foreign articles and others selling the same by wholesale as a pre-requisite of authority to dispose of them. Retailers of foreign commodities were subject to a companion law. Mr. Justice Thompson dissented. He assumed that retailers would be held taxable and declared that there was no difference in effect between a tax on the wholesaler and one on the retailer. He assumed also that "the law has no relation whatever to the goods intended for transportation to another State," but "applies purely to the internal trade of the State of Maryland."<sup>12</sup> Accepting

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<sup>10</sup> 4 Wheat. (U. S.) 316, 436 (1819).

<sup>11</sup> Note 6, *supra*.

<sup>12</sup> 12 Wheat. (U. S.) 419, 451 (1827). The correctness of this assumption may be doubted. Taney, who argued the case on behalf of the state, later expressed his approval of the decision against his client on the express ground that the tax fell on ultimate consumers in other states. In his opinion in the License Cases, 5 How. (U. S.) 504, 575-76 (1847), he says: "The immense amount of foreign products used and consumed in this country are imported, landed, and offered for sale in a few commercial cities, and a very small portion of them are intended or expected to be used in the State in which they are imported. A great (perhaps the greater) part imported, in some of the cities, is not owned or brought in by citizens of the State, but by citizens of other States, or foreigners. And while they are in the hands of the importer for sale, in the form and shape in which they were introduced, and in which they are intended to be sold, they may be regarded as merely *in transitu*, and on their way to the distant cities, villages and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported. And a tax upon them while in this condition, for State purposes, whether by direct assessment, or indirectly, by requiring a license to sell, would hardly be more justifiable in principle than a transit duty upon the merchandise when passing through a State."

his assumptions, his economics is satisfactory. He has some excuse for neglecting the fact that sales of foreign goods were discriminated against, since Marshall in the majority opinion did not mention the point and declared broadly that so long as the goods remain imports, their sale in the normal way is immune from state taxation. But Marshall would never have allowed a discriminatory tax on sales of imported goods even by retailers after the articles had ceased to be technical imports within his original-package rule. He expressly says that "we do not mean to give any opinion on a tax discriminating between foreign and domestic articles,"<sup>13</sup> although the language of the Maryland Act, warranted placing the decision on the ground of such discrimination.

If we take the case on the assumptions on which the majority and minority proceeded, we have the ruling that a general tax on all wholesalers of goods for use within the state cannot be imposed on those wholesalers who deal exclusively in goods of foreign origin which have not previously been sold or taken from their original package. Such a tax is not within the letter of the constitutional prohibition. It adds to the price of foreign goods no more than it adds to the price of home-made articles. Its encroachment on federal authority is indirect, remote, and negligible. To exempt sales of imports from burdens which sales of domestic goods must bear confers a positive benefit upon dealers in foreign goods, and thereby bestows a bounty on importation. Yet Marshall seemed to think that to deny the bounty would be to impose a burden. Now that the federal tax on net income is held not to be a tax on exports although the income taxed is from an exporting business,<sup>14</sup> a state tax on net income must be permitted to reach income from the sale of imports and escape conviction on the charge of being a tax on imports. Mr. Brown, therefore, if he were doing business in Maryland to-day, would find that he had to include all income from his wholesale business in making his returns for the assessment of a general state income tax, notwithstanding the fact that he was a dealer in imports. Thus *Brown v. Maryland*<sup>15</sup> has now technical, rather than substantial, importance. It does not stand in the way

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<sup>13</sup> 12 Wheat. (U. S.) 419, 449 (1827).

<sup>14</sup> *Peck & Co. v. Lowe*, 247 U. S. 165, 38 Sup. Ct. Rep. 432 (1918), 32 Harv. L. Rev. 639.

<sup>15</sup> Note 6, *supra*.

of state taxation of the economic enterprise which in 1827 was relieved of a \$50 license fee. It still forbids specific impositions on the business of selling imports, but this goes, not so much to the existence of state power, as to the manner of wielding it. The famous decision would have been more impregnable against the assaults of time if it had been confined to discriminatory taxation. Though the Supreme Court has never relaxed its doctrine that no license fee can be imposed on foreign or interstate commerce, all the license fees with which it has had to deal have been imposed on selected enterprises and have therefore had in them the seeds of discrimination.

Two years after *Brown v. Maryland*<sup>16</sup> came *Weston v. City Council of Charleston*.<sup>17</sup> Here, too, there was discrimination, for the tax in question was one imposed, not on all property, but on certain selected species, among which "six and seven per cent stock of the United States" was included. In holding the levy on United States stock an invalid interference with the borrowing power of the national government, Marshall made no mention of the fact that such stock was taxed while certain other property went free. Mr. Justice Johnson in his dissent assumed also that there was no discrimination against United States bonds, as is evident from the concluding paragraphs of his opinion:

"Why should not the stock of the United States, when it becomes mixed up with the capital of its citizens become subject to taxation in common with other capital? Or why should one who enjoys all the advantages of a society purchased at a heavy expense, and lives in affluence upon an income derived exclusively from interest on government stock, be exempted from taxation?

"No one imagines that it is to be singled out and marked as an object of persecution, and that a law professing to tax, will be permitted to destroy; this subject was sufficiently explained in *McCulloch's* case. But why should the states be held to confer a bonus or bounty on the loans made by the general government? The question is not whether their stock is to be exposed to peculiar burdens; but whether it shall enjoy privileges and exemptions, directly interfering with the power of the states to tax or to borrow.

"I can see no reason for the exemption, and certainly cannot acquiesce in it."<sup>18</sup>

<sup>16</sup> Note 6, *supra*.

<sup>17</sup> 2 Pet. (U. S.) 449 (1829), 31 HARV. L. REV. 327-29.

<sup>18</sup> 2 Pet. (U. S.) 449, 473 (1829).

Mr. Justice Thompson also dissented. He understands that the majority means to hold that stock of the United States "is not to be included in the estimate of property subject to taxation" on "the broad ground" that it is "not taxable in any shape or manner whatever."<sup>19</sup> His objection to the decision is that the interference with the United States from permitting the tax is slight as compared with the evil of exempting the property and creating a privileged class of public creditors:

"No one procures stock without exchanging for it an equivalent in money or some other property; all which was, doubtless, subject to the payment of taxes. Exemption from taxation may hold out an inducement to invest property in stock of the United States, and might, possibly, enable the government to procure loans with more facility, and perhaps on better terms. But this possible, or even certain benefit to the United States, cannot extinguish pre-existing state rights. To consider this a tax upon the means employed by the general government for carrying on its operations, is, certainly, very great refinement. It is not a tax that operates directly upon any power or credit of the United States. The utmost extent to which the most watchful jealousy can lead is, that it may, by possibility, prevent the government from borrowing money on quite so good terms. And even this inconvenience is extremely questionable; for the stock only pays the same tax that the money with which it was purchased did. And whether the property exists in one form or the other, would seem to be matter of very little importance to the owner. But great injustice is done to others, by exempting men who are living upon the interest of their money, invested in stock of the United States, from the payment of taxes; thereby establishing a privileged class of public creditors who, though living under the protection of the government, are exempted from bearing any of its burdens. A construction of the Constitution, drawing after it such consequences, ought to be very palpable before it is adopted."<sup>20</sup>

In 1842, *Dobbins v. Commissioners of Erie County*<sup>21</sup> held without dissent that a revenue officer of the United States could not be subjected to a state tax imposed on "all offices and posts of profit." The law made it the duty of the assessors "to rate all offices and posts of profit, professions, trades, and occupations, at their discretion, having a due regard to the profits arising therefrom."<sup>22</sup>

<sup>19</sup> 2 Pet. (U. S.) 476.

<sup>21</sup> 16 Pet. (U. S.) 435 (1842).

<sup>20</sup> *Ibid.*, 478.

<sup>22</sup> *Ibid.*, 445.

The tax appears to have been one of the so-called faculty taxes, rather than an income tax. The plaintiff's office was assessed at \$500, and the assessments on it for three years had amounted altogether to \$10.75. The tax could hardly be called discriminatory, for it reached not only all professions, trades and occupations, but all idle bachelors over the age of twenty-one. The absence of discrimination was called to the attention of the court by counsel for the county, but was not referred to in the opinion. The decision proceeded on the broad ground that the salaries of all officers of the United States are exempt from taxation by the states. It was assumed without analysis that state taxation on federal salaries, whether discriminatory or not, would affect the compensation which the federal government would have to pay its officials. While the opinion as a whole is based on political rather than on economic considerations, Mr. Justice Wayne introduces the latter when he says:

"Is the officer, as such, less a means to carry into effect these great objects than the vessel which he commands, the instruments which are used to navigate her, or than the guns put on board to enforce obedience to the law? These inanimate objects, it is admitted, cannot be taxed by a state, because they are means. Is not the officer more so, who gives use and efficacy to the whole? Is not compensation the means by which his services are procured and retained? It is true it becomes his when he has earned it. If it can be taxed by a state as compensation, will not Congress have to graduate its amount, with reference to its reduction by the tax? Could Congress use an uncontrolled discretion in fixing the amount of compensation, as it would do without the interference of such a tax? The execution of a national power by way of compensation to officers, can in no way be subordinate to the action of the state legislatures upon the same subject. It would destroy also all uniformity of compensation for the same service, as the taxes by the states would be different. To allow such a right of taxation to be in the states, would also in effect be to give the states a revenue out of the revenue of the United States, to which they are not constitutionally entitled, either directly or indirectly, neither by their own action, nor by that of Congress."<sup>22</sup>

Later on the learned justice treats a tax on the salary as equivalent to a prohibition of the receipt of the salary and therefore in direct

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<sup>22</sup> 16 Pet. (U. S.) 448.

conflict with the Act of Congress authorizing its payment from the federal treasury.<sup>24</sup>

The element of discrimination which had been present in the three cases decided in Marshall's time, and which had passed unnoticed, received explicit consideration from Mr. Justice Nelson in *Bank of Commerce v. New York City*<sup>25</sup> decided in the second year of the Civil War. The learned justice's treatment of the point is not wholly immune from criticism. The tax before him was one on the capital stock of a bank, and the decision was that a tax on the capital was a tax on the property in which the capital was invested, and that such part of this capital as was invested in United States bonds must be excluded from assessment. In answer to the contention that the *Weston* case did not apply to such a tax, he said:

"It is true that the ordinance imposing the tax in the case of *Weston vs. The City of Charleston*, did discriminate between the stock of the United States and other property — that is, the ordinance did not purport to impose a tax upon all the property owned by the taxpayers of the City, and specially excepted certain property altogether from taxation. The only uniformity in the taxation was, that it was levied equally upon the articles enumerated, and which were taxed. To this extent it might be regarded as a tax on the stock *eo nomine*. But does this distinction thus put forth between the two cases distinguish them in principle? The argument admits that a tax *eo nomine*, or one that distinguishes unfavorably the stock of the United States from the other property of the taxpayer, cannot be upheld. Why? Because, as is said, if this power to discriminate be admitted to belong to the State it might be exercised to the destruction of the value of the stock, and, consequently, of the power or function of the Federal Government to issue it for any practical uses. . . . It will be seen, therefore, that the distinction claimed rests upon a limitation of the exercise of the taxing power of the State; that if the tax is imposed indiscriminately upon all the property of the individual or corporation, the stock may be included in the valua-

<sup>24</sup> "The compensation of an officer of the United States is fixed by a law made by Congress. It is in its conclusive discretion to determine what shall be given. It exercises the discretion and fixes the amount, and confers upon the officer the right to receive it when it has been earned. Does not a tax then by a state upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entirety? It certainly has such an effect; and any law of a state imposing such a tax cannot be constitutional, because it conflicts with a law of Congress made in pursuance of the Constitution, and which makes it the supreme law of the land." (16 Pet. (U. S.) 435, 449-50.)

<sup>25</sup> 2 Black (U. S.) 620 (1862), 31 HARV. L. REV. 329.

tion; if not, it must be excluded or cannot be reached. The argument concedes that the Federal stock is not subject to the general taxing power of the State, a power resting in the discretion of its constituted authorities as to the objects of taxation, and the amount imposed."<sup>26</sup>

But the argument need not make any such concession. Whether United States bonds are subject to the taxing power of the state may depend upon the effect of such taxation on the borrowing power of the nation. The effect will vary with the methods adopted. If United States bonds are taxed and securities which compete for buyers are exempted, the former are placed at a disadvantage. The same result does not necessarily follow when all corporations are taxed on their capital irrespective of the securities in which it is invested. Certainly the effect of such a tax differs from the effect of a discriminatory tax, and the concession that a state may not impose a tax "that distinguishes unfavorably the stock of the United States from the other property of the taxpayer" does not in common sense carry an admission that a state cannot impose a tax which avoids any such unfavorable distinction.

Mr. Justice Nelson is to be criticized also for his later assertion that it cannot be a question for judicial determination whether there is discrimination. He thinks that if the state can tax in any way, it must necessarily be free to tax in every way. Restraints against discrimination can be imposed only by the state itself. This conclusion is interwoven with the assumption that any complaint against discrimination goes only to the wisdom or unwisdom of an exercise of power and not to the existence or lawfulness thereof. The absence of any inexorable necessity for such a position is demonstrated by the cases dealing with state taxes on peddlers or property and holding them invalid when goods or the sales of goods of extra-state origin are selected for discriminatory burdens.<sup>27</sup> Congress has made the absence of discrimination the test of state authority to tax the shares of stock in national banks, and the Supreme Court has had abundant practice in applying the test.<sup>28</sup>

That the test of discrimination is often a difficult one to apply may be conceded. Mr. Justice Nelson is on firmer ground when he

<sup>26</sup> 2 Black (U. S.) 620, 629-30 (1862).

<sup>27</sup> *Welton v. Missouri*, 91 U. S. 275 (1875); *Darnell v. Memphis*, 208 U. S. 113, 28 Sup. Ct. Rep. 247 (1908), 31 HARV. L. REV. 573-74.

<sup>28</sup> See 31 HARV. L. REV. 344-69.



lays emphasis on this point in the succeeding paragraph of his opinion:

"There is and must always be a considerable latitude of discretion in every wise Government in the exercise of the taxing power, both as to the objects and the amount, and of discrimination in respect to both. Property invested in religious institutions, seminaries of learning, charitable institutions, and the like, are examples. Can any Court say that these are discriminations which, upon the argument that seeks to distinguish the present from the case of *Weston vs. The City of Charleston*, would or would not take it out of that case?"<sup>29</sup>

Such difficulties have had to be solved in dealing with taxes on shares of stock in national banks, but a court may well hesitate to invite them when not required so to do. If United States bonds were taxable as property, investors would undoubtedly find ways to use their funds for purchase of other securities on which the tax burden was actually or apparently lighter. An apparent exemption which was not an actual one would nevertheless affect the market for other securities unfavorably. But these considerations, which might justify a court in refusing to allow United States bonds to be subject to a property tax, are not pertinent to the issue whether they may be included in the assessment of a tax on the capital of a corporation. If the corporation must pay the same tax whatever the rank or title of its investments, it is denied access to places of untaxed refuge which may be open to an individual. It can reduce its tax only by the Samson-like method of diminishing its assets. Mr. Justice Nelson's remarks on the difficulty of applying the test of discrimination may justify a refusal to limit *Weston v. City Council of Charleston*<sup>30</sup> to a tax that is patently discriminatory, since the tax there involved was directly on property; but the difficulties which the learned justice suggested were absent from the case before him.

If we put to one side the question of discrimination, we can readily agree that a tax on the capital of a corporation is a tax on the property in which that capital is invested. To tax United States bonds through a tax on corporate capital may have a different effect on the federal borrowing power than to tax them directly, but none the less it is the bonds that are taxed. In *Bank Tax Case*,<sup>31</sup>

<sup>29</sup> 2 Black (U. S.) 620, 631 (1862).

<sup>30</sup> Note 17, *supra*.

<sup>31</sup> 2 Wall. (U. S.) 200 (1864), 31 HARV. L. REV. 330.

which followed *Bank of Commerce v. New York City*,<sup>32</sup> Mr. Justice Nelson remarked wisely:

"It is not easy to separate the property in which the capital is invested from the capital itself. It requires some refinement to separate the two thus intimately blended together. The capital is not an ideal, fictitious, arbitrary sum of money set down in the articles of association, but, in the theory and practical operation of the system, is composed of substantial property, and which gives value and solidity to the stock of the institution."<sup>33</sup>

If it is conceived that any and all taxes on federal securities are unconstitutional obstructions to the federal borrowing power, the state should not be allowed to escape from the restriction by calling the securities some book-keeping name. It is clear that in *Bank Tax Case*<sup>34</sup> and *Bank of Commerce v. New York City*,<sup>35</sup> the Supreme Court meant to protect federal securities from state taxation in any form. A court could hardly be expected to do otherwise while the Civil War was raging and the government at Washington needed all the support to its credit that was available. It was no time for nice discriminations between burdens and denial of bounties.

A few years later, however, when the conflict between the states had ended, a majority of the Supreme Court allowed a state to impose a tax on the privilege of being a corporation and measure the amount by assets which included United States bonds.<sup>36</sup> Then followed decisions allowing inheritance taxes on bequests of federal securities<sup>37</sup> and permitting the economic value contributed by United States bonds owned by a corporation to be included in the assessment of the shares of stock owned by individuals.<sup>38</sup> So far as appears, federal securities may be a source of state revenue both through a tax on the franchise of a corporation and a tax on the shares owned by individuals. The difference between a tax on

<sup>32</sup> Note 25, *supra*.

<sup>33</sup> 2 Wall. (U. S.) 200, 208-09 (1865).

<sup>34</sup> Note 31, *supra*.

<sup>35</sup> Note 25, *supra*.

<sup>36</sup> *Society for Savings v. Coite*, 6 Wall. (U. S.) 594 (1868); *Provident Savings Institution v. Massachusetts*, 6 Wall. (U. S.) 611 (1868); *Hamilton Co. v. Massachusetts*, 6 Wall. (U. S.) 632 (1868); *Home Insurance Co. v. New York*, 134 U. S. 594, 10 Sup. Ct. Rep. 593 (1890); 31 HARV. L. REV. 331-35.

<sup>37</sup> *Plummer v. Coler*, 178 U. S. 115, 20 Sup. Ct. Rep. 829 (1900), 31 HARV. L. REV. 336.

<sup>38</sup> *Van Allen v. Assessors*, 3 Wall. (U. S.) 573 (1866); *Cleveland Trust Co. v. Lander*, 184 U. S. 111, 22 Sup. Ct. Rep. 394 (1902); 31 HARV. L. REV. 339-41.

the capital of a corporation and a tax on its franchise measured by its capital is one between tweedledum and tweedledee. Since taxes on a corporation are in last analysis taxes on the interest of the shareholders in the corporate assets or business, to exclude federal securities from the computation of a tax on the corporate capital and to include them in the assessment of the shares of stock is to allow the state to reach with one hand what it is forbidden to touch with the other. The idea that federal securities cannot be taxed by a state is a mythical fancy so long as such securities belonging to a corporation may enter into the assessment of a tax on the corporate franchise and of a further tax on the interest of the shareholders in the corporation.

The burden put upon the federal borrowing power by such taxation of federal securities in the vaults of corporations is of course a more limited one than would be imposed by their inclusion in all property taxation. But the court in subjecting United States bonds owned by corporations to the fiscal power of a state did not go on any such common-sense distinction. The inclusion of the bonds in the assessment of franchise taxes was sustained on the theory of the absolute power of a state over privileges which it might grant or withhold.<sup>39</sup> The taxation of shares at their full value without deduction of the contribution of United States bonds to that value was approved on the basis of a notion of the "separate individuality" of a corporation and its stockholders.<sup>40</sup> The first of these theories has since been deprived of capacity to enable a state to measure taxes on the local business of foreign corporations engaged also in interstate commerce by the value of their total capital stock.<sup>41</sup> The second has been refused recognition in a recent case<sup>42</sup> in which a state sought to impose double taxation on the economic interest in shares of a national bank owned by another national bank. It had previously been commented on unfavorably by Mr. Justice Moody in *Home Savings Bank v. Des Moines*,<sup>43</sup> which found that a

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<sup>39</sup> See passage quoted from *Home Insurance* case in 31 HARV. L. REV. 334. "No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows."

<sup>40</sup> See passage quoted from the *Lander* case in 31 HARV. L. REV. 341.

<sup>41</sup> *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. Rep. 190 (1910), and cases following it. See 31 HARV. L. REV. 584-618, 937-53.

<sup>42</sup> *Bank of California v. Richardson*, 248 U. S. 476, 39 Sup. Ct. Rep. 165 (1919).

<sup>43</sup> 205 U. S. 503, 27 Sup. Ct. Rep. 571 (1907), 31 HARV. L. REV. 341-44.

state tax was imposed on the property of a corporation and not on that of its shareholders, as the state court had held. It is therefore apparent that the decisions allowing United States bonds to be taxed through levies on corporate franchises and shares of stock are open to reexamination.

The decision which thwarted a state's endeavor to get two taxes out of some national bank stock is *Bank of California v. Richardson*,<sup>44</sup> decided January 27, 1919. The plaintiff national bank owned shares in another national bank known as D. O. Mills and Company. It was held taxable on those shares on the authority of *Bank of Redemption v. Boston*<sup>45</sup> which held that congressional permission to tax the shares of national banks to their owners extended to shares owned by other national banks. The state sought also to tax the shareholders of the plaintiff bank on the full value of their stock without any deduction for that part of the value due to the stock of the Mills National Bank owned by the plaintiff bank. The minority of the court declared that this was within the letter of the congressional permission, and brought to bear the traditional theory that the property interest of the stockholder is essentially different from that of the corporation, and that therefore a tax on the stockholder's interest in the plaintiff bank was not a tax on the property of the plaintiff. But the majority held that the purpose of the congressional permission was to allow but a single tax on national bank shares and that this purpose was defeated if the shares in the Mills Bank, after being taxed directly to the plaintiff bank which owned them, entered into the assessment of another tax on the shares of the plaintiff bank owned by individuals. The notion of "separate individuality" was not allowed to support a result deemed undesirable and in substance, though not literally, without the congressional permission upon which state power over national bank stock is held to rest. The Chief Justice's treatment of the issue is not so sharp as might be desired, but the basis of the decision may be gathered from the following paragraphs:

"It is undoubted that the statute from the purely legal point of view, with the object of protecting the federal corporate agencies which it created from state burdens and securing the continued existence of such agencies despite the changing incidents of stock ownership, treated the banking corporations and their stockholders as different. But it is also

<sup>44</sup> Note 42, *supra*.

<sup>45</sup> 125 U. S. 60, 8 Sup. Ct. Rep. 772 (1888).

undoubted that the statute for the purpose of preserving the state power of taxation, considering the subject from the point of view of ultimate beneficial interest, treated the stock interest, that is, the stockholder, and the bank as one and subject to one taxation by the methods which it provided. . . . Again, when the purposes of the statute are taken into view, the conclusion cannot be escaped that the transmutation of the stock interest of the California in the Mills Bank, into an asset of the California Bank subject to be taxed for the purpose of reaching its stockholders, is to overthrow the very fundamental ground upon which the taxation of stockholders must rest." <sup>46</sup>

On the basis of this decision, it would be possible to support the contention that United States bonds owned by a corporation, since they must be excluded from the computation of a tax on the capital of the corporation, must also be excluded from a tax on the shares of stock in the corporation. Evidently a majority of the Supreme Court favored this view in 1907, when *Home Savings Bank v. Des Moines* <sup>47</sup> was decided, though the contrary view was recognized as too firmly established to be overthrown. It is to be assumed, therefore, that the Supreme Court will continue to permit the states to tax United States bonds owned by corporations through full assessment of their shares of stock. It would be wholesome, however, if some better basis for such taxation could be found than the unsubstantial one that the property of the shareholders is distinct from that of the corporation.

Such a basis appears in the rules which have been worked out in the field of state taxation of interstate commerce. If we discard all the doctrinal disquisitions of the opinions and look only to the results of the decisions, we find that the controlling motive of the Supreme Court has been the desire to prevent the states from imposing on interstate commerce any peculiar or unusual burden. Where the court has been assured that the state did not have a device which might be operated to discriminate against interstate commerce, taxation of that commerce has been allowed. Net income from interstate commerce may be included in a general income tax.<sup>48</sup> Property used in interstate commerce may be assessed by

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<sup>46</sup> 248 U. S. 476, 485, 39 Sup. Ct. Rep. 165 (1919).

<sup>47</sup> Note 43, *supra*. See 31 HARV. L. REV. 343.

<sup>48</sup> *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 38 Sup. Ct. Rep. 499 (1918), 32 HARV. L. REV. 634-43.

capitalizing the earnings from the business which it serves.<sup>49</sup> Even gross receipts from interstate commerce may be taxed in the guise of a property tax where the result is no more than a fair equivalent for ordinary property taxation.<sup>50</sup> The decisions sanctioning these results make it clear that a state which confines its taxation to levies on tangible property and on net income will have to take little or no account of the commerce clause. When it imposes license or franchise or occupation taxes, or adopts any other revenue devices which are not certain to fall equally on all enterprise within the state, then it runs the risk of disappointment whenever it seeks to lay its hand on interstate commerce. What the court is insistent upon is that there must be adequate safeguards against subjecting interstate commerce to heavier taxation than local commerce. It does not require the states to confer a bounty upon interstate commerce by exempting it from burdens which competing business must bear.

The substantial reason back of these decisions is that interstate commerce is not prejudiced by a summons to bear its proportionate contribution to the treasuries of the states. So, too, the borrowing power of the United States is not interfered with by proportionate taxation of the obligations created by its exercise. Taxation of the full value of the shares of corporate stock, without inquiry into the character of the corporate property which gives that stock some or all of its value, can seldom, if ever, discriminate against part of that property in favor of another part. A corporation will be likely to buy the same amount of United States bonds whether the shares of its stockholders are taxed at their full value or are entirely exempt. Taxation of the shares is not, in form, taxation of the property of the corporation. Technically, therefore, such taxation does not fall on a federal instrumentality, even when the corporation owns United States bonds. If, then, a tax on the shares does not actually place the United States at a disadvantage in marketing its bonds, there is no basis either formal or substantial on which to require the exclusion of the value contributed by such bonds from the assessment of the shares.

A more difficult problem confronts us when we seek to distinguish between a tax on corporate capital and a tax on a corporate franchise measured by the amount of the capital. The distinction

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<sup>49</sup> 32 HARV. L. REV. 239-65.

<sup>50</sup> 32 HARV. L. REV. 377-416.

is no longer accorded recognition to enable a state to impose on foreign corporations engaged partly in interstate commerce a tax which is in substance on extra-state property.<sup>51</sup> Should it continue to allow a state to tax United States bonds owned by a corporation through the device of a tax on the franchise of a corporation measured by the value of its capital? The answer must depend upon whether there is any substantial reason for holding that a tax directly on the capital must exclude such part thereof as is invested in United States bonds. To require such exclusion is to grant a bounty to the federal borrowing power. The extent of the bounty would be appreciated if the obligations of competing debtors were similarly excluded. The denial of this bounty, therefore, cannot in substance be regarded as an interference with the federal borrowing power. We may accept the conclusions that a tax on corporate capital is a tax on the property in which it is invested, and that a tax on United States bonds is a tax on a federal instrumentality. If, however, some particular tax on that instrumentality does not in fact burden or interfere with its exercise, there is no economic ground on which to declare it unconstitutional. If all other possible grounds are removed by changing the tax from one formally on capital to one formally on a franchise, there is no remaining obstacle to the assertion of state power.

Two objections may be made to the foregoing discussion. The first is that the United States bonds are taxed twice if they are reached through an assessment of the corporate franchise and a further assessment of the shares of stock. This is true. But they can be taxed twice only as the obligations of competing debtors are similarly taxed. This form of double taxation cannot discriminate against one borrower in favor of another. If the corporation and its stockholders will be subject to separate taxation of their respective legal interests without regard to the character of the investments of the corporation, this double taxation cannot exercise any direct influence on the corporation in its choice of investments. On the other hand, if United States bonds are excluded from the assessment of either tax, while the obligations of competing debtors are included in the assessment of both, the federal government has been granted a preference. This answer, it must be recognized, flies in the face of *Bank of California v. Richardson*.<sup>52</sup> If that de-

<sup>51</sup> Note 41, *supra*.

<sup>52</sup> Note 42, *supra*.

cision has any sound economic justification, the Supreme Court ought to apply it to the objection against double taxation now under consideration. The reply is that *Bank of California v. Richardson*<sup>53</sup> is not supportable on economic grounds. It must stand or fall on the assumption on which it proceeds, *i. e.*, that Congress has expressly dealt with the problem and permitted but a single tax on the economic interest represented by shares in national banks.<sup>54</sup>

The further objection to the inclusion of United States bonds in assessments of corporate franchises and shares of stock is that such inclusion may in fact operate to deter corporations from investing in those bonds. The argument runs as follows. With the normal difference between the interest rate of public and of private obligations due to the superior security of the former, a tax on capital value would bear more heavily on the bonds with the lower interest rate. Those who might prefer three-per-cent government bonds to six-per-cent railroad bonds, when both were exempt from taxation, would be likely to alter their preference if a two-per-cent tax reduced the income to one and four per cent respectively. The discrepancy would be reduced by the resulting alterations of capital value, but the effect on the borrowing power of the United States would not thereby be lessened. Giving full account to the fact that the capacity of the United States to borrow at lower interest rates than individuals or corporations is due in considerable part to a bounty conferred by the exemption of federal securities from burdens that competitors must bear, it may still be true that the removal of the exemption would in many instances be something more than the denial of a bounty. It may operate practically to deny to the government a part of the advantage conferred by the excellence of its credit. There may be a minimum to the total net income with which an investor will be content without looking for all possible ways of increase. He may look less favorably on three- or four-per-cent bonds subject to a two-per-cent tax, even though six-per-cent

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<sup>53</sup> Note 42, *supra*.

<sup>54</sup> The Chief Justice hints that he could support the case on economic grounds if he had to, but he refrains from elaborating the hint. On page 485 he says: "We do not stop to point out the double burden resulting from the taxation of the same value twice which the assessment manifested, as to do so could add no cogency to the violation of the one power to tax by the one prescribed method conferred by the statute and which was the sole measure of the state authority."



bonds also yield only four per cent net, than on the same three or four per cents when they and the six per cents produce a net yield of those amounts. It is more congenial to give the state a third of one's income from any given source than to divide fifty-fifty. Though a corporation may make a sacrifice of income to gain the benefit of sure and quick assets, its sacrificial spirit is likely to vary inversely with the amount involved in its indulgence. Whether a corporation would be wise to reduce its proportion of high-grade assets because of a diminution in their net yield is not in point. If it would in fact do so, a nondiscriminatory tax on the capital value of all its assets in whatever form imposed, would reduce the market for United States bonds.

Here is an incalculable factor. It may be of considerable or of little importance. An argument against allowing it consideration may be found in the fact that there is no reason why an investor should ever take less interest than he can get, except as he receives other advantages which he regards as compensatory. A corporation which foregoes income to gain security ought to stick to its choice even when pinched by increased taxation or by any other expense. It would have the same inducement to increase its interest receipts, whatever the cause of its decreased net income — whether it has to spend an additional \$5,000 for taxes or for increased wages. It could hardly be said that a labor union was interfering with a federal instrumentality because it succeeded in establishing such higher wage schedules that the employing corporation decided to invest henceforth only in seven-per-cent stocks in order to maintain its rate of dividends. The analogy affords a basis for the argument that such effect as taxation of corporate stock or franchise may have to deter the corporation from purchasing high-grade low-interest-bearing securities must be regarded as indirect, since the same effect may be contributed by other factors.

Nevertheless it remains true that taxation measured by the value of securities owned, and which therefore in effect falls on those securities, falls more heavily on securities with the lower interest yield. The ratio between the net yield of public and of private obligations is more favorable to the latter when both are taxed on their capital value than when both are exempt. It may well be, therefore, that state taxation directly on United States bonds should be forbidden on economic grounds. How, then, are we to

justify state taxation indirectly on those bonds? The best answer seems to be that their exemption from direct taxation is not only protection against a burden but also the grant of a bounty. The two cannot be separated. The states, therefore, are required to lend positive aid to the federal borrowing power at considerable sacrifice to themselves. This aid is given to the entire market afforded by individual investors. Such aid may well be credited to the states against any charge that full taxation of corporate shares and franchises deprives the federal government to some extent of the advantages due to its superior credit by making corporations less ready to sacrifice security for income.

It is obvious that the deleterious effect on the federal borrowing power which may possibly ensue from state taxation on the capital value of all stocks and bonds will not follow from state levies on all net income. A two-per-cent tax on the capital value of two \$1,000 bonds both selling at par, one issued by the government and paying \$30 annually, and the other issued by a private corporation and paying \$60 annually, will reduce their net yield to \$10 and \$40 respectively. The tax takes two-thirds of the income from the government bond and only one-third of the income from the corporation bond. On the other hand a thirty-per-cent tax on the income from the bonds would reduce their net yield to \$21 and \$42 respectively, leaving the ratio between them the same as when both are exempt. It might therefore be urged that the states should be allowed to include income from federal securities in a general income tax. Such a tax can be called one "upon the person for the general advantages of living in the jurisdiction,"<sup>55</sup> or "but a method of distributing the cost of government,"<sup>56</sup> or some of the other names that have been found convenient in sustaining taxes. Its effect on the federal borrowing power may be declared "indirect and remote," like the effect on exportation of a tax on net income from an exporting business.<sup>57</sup> It would not, it is conceived, place the federal borrowing power under any disadvantages that it would not labor under if all intangibles were entirely exempted from any form of taxation.

<sup>55</sup> Mr. Justice Holmes, in *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 58, 38 Sup. Ct. Rep. 40 (1917), 32 HARV. L. REV. 655.

<sup>56</sup> Mr. Justice Pitney in *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 329, 38 Sup. Ct. Rep. 499 (1918), 32 HARV. L. REV. 636.

<sup>57</sup> See Mr. Justice Van Devanter in *Peck & Co. v. Lowe*, 247 U. S. 165, 174-75, 38 Sup. Ct. Rep. 432 (1918), 32 HARV. L. REV. 639.

To exclude interest on United States bonds from a general state income tax is to confer upon the federal borrowing power a bounty to the extent of the exemption. To include such income would regulate the activities of the federal government no more than the permitted inclusion of income from interstate commerce regulates that commerce "in a constitutional sense." It seems, therefore, that the reason for the exemption of income from United States bonds from state-wide income taxes must be political rather than economic. It must be a conception that the federal government is entitled to claim from the states a subsidy for its borrowing power.

It is interesting that no case has specifically held that the states cannot include income from federal bonds in a general state income tax. It is clear, however, that until recently, at any rate, the Supreme Court has regarded a tax on income as indistinguishable from a tax on the source of the income. In *Pollock v. Farmers' Loan & Trust Co.*,<sup>58</sup> which held that the federal government cannot tax the income from state and municipal bonds, Chief Justice Fuller declared:

"It is contended that although the property or revenues of the States or their instrumentalities cannot be taxed, nevertheless the income derived from state, county, and municipal securities can be taxed. But we think the same want of power to tax the property or revenues of the States or their instrumentalities exists in relation to a tax on the income from their securities, and for the same reason, and that reason is given by Chief Justice Marshall in *Weston v. Charleston*, 2 Pet. 449, 468, where he said: 'The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent which shall arrest them entirely. . . . The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution.' Applying this language to these municipal securities, it is obvious that taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant to the Constitution."<sup>59</sup>

<sup>58</sup> 157 U. S. 429, 15 Sup. Ct. Rep. 673 (1895).

<sup>59</sup> *Ibid.*, 585-86.

Earlier in the opinion the Chief Justice reviewed the cases forbidding either the states or the nation to tax the salaries of the officers of the other, and plainly regarded the want of national power to tax income from state securities as the complement of an undoubted absence of state power to tax income from federal securities.

Though this immunity of federal securities from state taxation has been regarded as inherent in the federal system created by the Constitution, Congress has taken the precaution specifically to declare that United States bonds shall be exempt from state taxation. The Act of February 25, 1862,<sup>60</sup> specifies that "all stocks, bonds, and other securities of the United States held by individuals, corporations, or associations within the United States, shall be exempt from taxation by or under State authority." The Act of July 14, 1870,<sup>61</sup> mentions "the interest thereon" as well as the bonds. The Act of June 28, 1902,<sup>62</sup> is content with declaring exemption "from taxation in any form by or under State, municipal, or local authority;" but the recent acts under which Liberty Bonds have been issued require the states to refrain from taxing both "principal and interest."<sup>63</sup> Thus the only constitutional question which could now be brought before the court is the existence *vel non* of congressional power to decree the exemption of principal and interest of federal securities from state taxation. No one can doubt that this power will be sustained, even though the court might now be persuaded that the exemption is a bounty rather than the fending off of a burden. If Congress deems that the exigencies of the national government require that national obligations be wholly free from state taxation in any form whatsoever, its judgment will never be overruled by the Supreme Court.

Congress has been content to be silent with respect to state taxation of income from corporate dividends when the corporate income

<sup>60</sup> 12 STAT. AT L. chap. 33, § 2, p. 346, 8 FED. STAT. ANN. 2 ed., 407.

<sup>61</sup> 16 STAT. AT L. 272. "... all of which several classes of bonds and the interest thereon shall be exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal, or local authority."

<sup>62</sup> 32 STAT. AT L. 484. This was the statute authorizing the issue of the so-called Panama Canal bonds.

<sup>63</sup> FED. STAT. ANN. — 1918 Supp. 673: "... both principal and interest shall be exempt from all taxes or duties of the United States as well as from taxation in any form by or under State, municipal, or local authority." (Act of March 3, 1917.) Similar language is used in the Act of September 24, 1917, FED. STAT. ANN. — 1918 Supp. 684.

is from United States bonds, and state taxation of corporate franchises measured by earnings some of which are from United States bonds. *Flint v. Stone Tracy Co.*<sup>64</sup> permitted income from state bonds to be included in the measure of a federal excise on doing business in corporate capacity. *Lynch v. Hornby*<sup>65</sup> held that cash dividends paid to stockholders after the effective date of the federal income tax law of 1913 were taxable to them as income, although the dividends were the fruit of a surplus accumulated by the corporation before the enactment of the Sixteenth Amendment. Corporate income which was exempt is taxable when transmuted into stockholder's income. Corporate income which cannot be taxed may be made the measure of a tax on doing business in corporate form. Here are precedents to lean on in sanctioning state taxation of stockholder's income without regard to its economic origin, and state taxation of income from United States bonds when the tax is not formally on income, but on a privilege measured by income.

On the other hand, the distinction between the subject and the measure of the tax was dishonored by the court when Kansas sought to tax extra-state property in the guise of a tax on the privilege of a foreign corporation to do local business in connection with interstate business,<sup>66</sup> and the distinction between the shareholder's interest in the corporation and the property held by the corporation was disregarded when California sought to tax the stockholders of a national bank on the full value of their shares, without deduction for the contribution made to that value by the shares of another national bank owned by the corporation.<sup>67</sup> Obviously in dealing with the issues now under consideration the Supreme Court is at liberty to accept or reject formal distinctions as it chooses. That is one of the characteristic merits and demerits of formal distinctions. It is a demerit in that it makes prophecy and logical consistency difficult or impossible. It is a merit in that it permits a court to reach such results as its best judgment dictates.

We have already indicated the reasons which may be advanced, in support of the position that the Supreme Court should adhere to

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<sup>64</sup> 220 U. S. 107, 31 Sup. Ct. Rep. 342 (1911).

<sup>65</sup> 247 U. S. 339, 38 Sup. Ct. Rep. 543 (1918).

<sup>66</sup> Note 41, *supra*.

<sup>67</sup> Note 42, *supra*.

its formal distinctions and permit income from federal securities to be taxed by the states through excises on corporate franchises and through taxes on corporate dividends. If considerations of substance do not require exclusion of United States bonds from assessments of corporate franchises and shares of stock, *a fortiori* such assessments should be permitted to include income from United States bonds. Such taxes measured by income do not deprive borrowers with superior credit of any advantage which that credit gives. Double taxation of stockholder and corporation does not influence the choice of corporate investments. And any margin of error in such calculations is more than offset by the bounty conferred on the federal borrowing power by exemption of interest on United States bonds from an income tax which feeds on interest from competing obligations.

Thus there appears to be no substantial reason for adding new limitations to the power of the states to levy taxes which fall indirectly on federal instrumentalities. The distinction between taxes on corporate capital and taxes on corporate franchises or on shares of stock may be artificial, but it serves a useful purpose; and this on the whole is the most reliable test of the merit of a distinction. Since taxes directly on United States bonds do not have the serious effect on the federal borrowing power which judges of the Supreme Court have often assumed, there is good sense in not extending to indirect taxation the prohibitions against direct taxation. Animated by such good sense, the Supreme Court has allowed the states to tax income from interstate commerce and the United States to tax income from an exporting business. It has appreciated that a general tax on all net income does not cast any unwarranted burden on any particular enterprise from which such income issues. If the Supreme Court were making the law of the Constitution *de novo*, it might therefore be expected to allow the states to tax interest on federal securities and income from federal salaries, granting to the United States a similar power over the fruits of state functions. The economic implications of *Peck & Co. v. Lowe*<sup>68</sup> and *United States Glue Co. v. Oak Creek*<sup>69</sup> are opposed to the economics underlying *Pollock v. Farmers' Loan & Trust Co.*,<sup>70</sup> *Dobbins v. Com-*

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<sup>68</sup> Note 14, *supra*.

<sup>69</sup> 247 U. S. 321, 38 Sup. Ct. Rep. 499 (1918), 32 HARV. L. REV. 634 *ff*.

<sup>70</sup> Note 58, *supra*.

*missioners of Erie County*,<sup>71</sup> and *Collector v. Day*,<sup>72</sup> and thus afford a convenient excuse for abandoning the decisions of earlier decades.<sup>73</sup>

Unfortunately for any such possibility, Congress insists on denying to the states the power to tax income from federal securities. It thereby requires the states to lend their aid to the federal borrowing power. There seems, therefore, a strong political argument in favor of continuing to forbid the United States to tax income from state securities. Indeed, the argument may be deemed an economic one. We may grant that the effect of exempting interest on state bonds from a general federal tax on net incomes is to confer a bounty on the state borrowing power. But this is not the whole of the story. Such bounty cannot be considered apart from the bounty which the states are required to bestow on the federal borrowing power, to the consequent restriction of their own taxing power. The principle on which these limitations are based is that the federal system requires that neither the state nor the nation exercise their undoubted powers to the detriment of the undoubted powers of the other. No application of this principle can be considered apart from the other applications. What is sauce for the goose should be sauce for the gander. It is a poor rule that does not work both ways. The states receive no more than fair economic treatment if, in return for the aid and comfort which they render the

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<sup>71</sup> Note 21, *supra*.

<sup>72</sup> 11 Wall. (U. S.) 113 (1871). This case held that a federal income tax cannot be applied to the income of a state judicial officer. The court regarded the exemption of state salaries from a federal income tax as the necessary correlative of the exemption of federal salaries from state taxation, Mr. Justice Nelson observing: "And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion? (11 Wall. (U. S.) 113, 127.)"

<sup>73</sup> For suggestions that the later decisions furnish the ground for overruling the earlier ones, see note on *Peck & Co. v. Lowe*, and the *Oak Creek* case, in 4 BULLETIN OF THE NATIONAL TAX ASSOCIATION, 26.

federal borrowing power, they receive a corresponding advantage for their own borrowing power.

The same considerations apply to taxation of income from official salaries. In this field the Supreme Court may, if it wishes, overrule *Collector v. Day*,<sup>74</sup> and permit the inclusion of state salaries in the federal income tax, and overrule *Dobbins v. Commissioners of Erie County*,<sup>75</sup> and permit the states to tax the salaries of federal officials. A salary exempt from a tax which other salaries must bear is increased by that much. Now that we have a federal income tax, a \$5,000 professorship in a state university yields more than a \$5,000 professorship in an endowed institution of learning. In the absence of a state income tax, a \$6,000 federal judgeship is worth no more than a \$6,000 law practice. A state income tax makes the ermine more attractive than it was before. The law as it now stands makes the states and the United States undergo sacrifices, each for the benefit of the other. Neither government would suffer appreciably if the burnt offering were no longer required. But if it is required of either, it should be required of both. So long as Mr. Dobbins is exempt, Mr. Day should be also. The considerations which justify exempting either of them are political rather than economic. While from the political standpoint there is more reason to apprehend state encroachment on federal power than federal encroachment on state power, this can hardly justify a court in holding that a state tax on a federal salary interferes with a federal instrumentality, if a federal tax on a state salary is thought to be immune from criticism.

The conclusion to be drawn from our review and analysis of the decisions is that, in spite of cross currents and shifting winds of doctrine, the states will be permitted to continue the indirect encroachments on federal authority that have hitherto been sanctioned. They will be allowed to impose taxes that fall on interstate commerce and on the federal borrowing power, if they do it in approved ways. The decisions under the commerce clause may nearly all be referred to the judicial conviction that the federal system demands that the states shall not discriminate against interstate commerce, or indulge in forays on property or business beyond their borders, but does not demand that interstate commerce be relieved from proportionate contributions. The decisions which have permitted

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<sup>74</sup> Note 72, *supra*.

<sup>75</sup> Note 21, *supra*.



state taxation which falls indirectly on the federal borrowing power are satisfactorily explained on the economic ground that they have not hampered that borrowing power. There is ample economic justification for the cases which have restrained the states from laying discriminatory taxes on United States bonds. For the other restrictions which the Supreme Court has placed upon the states we must be content with political rather than with economic reasons.

In choosing between competing political considerations, much depends on personal predilections. Two of Marshall's colleagues did not share his views that United States bonds must be exempt from state taxation. What Marshall's doctrine achieved was a protective tariff in favor of the infant industry of national credit. His fears that the nation might be destroyed if the view of the dissent had prevailed must be regarded as extravagant. But this does not question the fundamental wisdom of his judgment, particularly at the time when it was rendered. Congress plainly believes that the judgment is as sound to-day, since it demands the continuance of the protection which Marshall decreed. It is difficult to quarrel with the position that the powers of the nation shall be immune from the direct touch of the states. In determining the constitutionality of state taxation which falls directly on federal instrumentalities, we can readily forego nice analysis as to its economic effects. But an understanding of those effects is essential to a proper evaluation of the decisions which permit state taxation that falls indirectly on those same instrumentalities. Distinctions between direct and indirect effect which seem unsubstantial, when abstracted from the complete situation in which they play their part, are found to be useful implements for reaching desirable results. In permitting indirect encroachment on federal authority by the taxing powers of the states, the Supreme Court has been wise in its judgments. If its conclusions deserve more praise than does some of the reasoning by which they have been supported, the phenomenon is not peculiar to the particular problem which we have been considering.

The explanation of the unsatisfactory character of so much of the judicial reasoning here and elsewhere is easily discovered. Decisions which are dictated by the necessity of making a wise practical choice between competing considerations are seldom placed frankly

on that ground. Judges are loth to say: "We decide this particular case in this particular way because we think that this is the best way to decide it." Instead, they are prone to refer their judgment to some immutable principle inherent in the nature of things, or unalterably established by the authoritative judgments of their predecessors. In the realm of constitutional law, courts are fond of professing that it is not they that speak, but the Constitution that speaketh in them, even in settling such disputes as this study has chronicled, concerning which concededly the Constitution is silent. Where the Constitution is not wholly mum, it often speaks with such a still, small voice that only a bare majority of the court can hear its echo. Yet the judicial opinions seldom recognize the patent fact. So long as judges pose as automatons when they are in fact wise arbiters of public policy and practical expediency, they necessarily hide their wisdom under the bushel of a supposed constraining conceptualism, which confuses much that would otherwise be simple and clear. The wonder is that wisdom so generally finds its way and controls the actual adjudications which together make the law. This could hardly be, if doctrine played any such potent part in shaping the course of the decisions as the opinions of the judges would lead us to believe.

The judicial umpiring of the contests between the conflicting claims of the states and of the nation over the exercise of the taxing power has clearly not been controlled by any undisputed and compelling doctrine. That is why it has so greatly perplexed those who see in doctrine their only guide. To dispel the perplexity we must study the cases as practical adjustments of competing interests, each of which is entitled to a degree of consideration. The interest which will be accorded the preference in one situation may have to be determined in the light of the preferences which have been accorded in other situations. No single adjustment liveth to itself alone. In a federal system there must be reciprocal give and take between the whole and the several parts. It must often be impossible in particular instances to make an even apportionment of the giving and the taking. So it may be necessary to favor now one side, and now the other. The aim should be to strike as even a balance as possible in the whole account. This can never be done by pious invocation of some image which men choose to call "Sovereignty." It must be done, as it has been done, by applying human

intelligence to the enterprise of forecasting and evaluating the practical results from differing courses of action, and of choosing that course which leads to the result preferred. Marshall pursued a vain hope in thinking it possible to "measure the power of taxation residing in the State by the extent of sovereignty which the people of a single State possess and can confer on its government." We can, however, if we find it necessary, measure to a considerable degree the extent of sovereignty residing in the state, by finding what the official interpreters of the Constitution permit the state to do in the exercise of the power of taxation and of other governmental functions. "Sovereignty" is a way of stating results rather than a means of reaching them.

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## FREEDOM OF SPEECH IN WAR TIME

NEVER in the history of our country, since the Alien and Sedition Laws of 1798, has the meaning of free speech been the subject of such sharp controversy as to-day.<sup>1</sup> Over two hundred

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<sup>1</sup> BIBLIOGRAPHICAL NOTE. — Important decisions under the Federal Espionage Act are printed in the various Federal and United States Supreme Court reports; the BULLETINS OF THE DEPARTMENT OF JUSTICE ON THE INTERPRETATION OF WAR STATUTES (cited hereafter as BULL. DEPT. JUST.) contain many *nisi prius* rulings and charges not otherwise reported. The cases before July, 1918, have been collected by Walter Nelles in a pamphlet, ESPIONAGE ACT CASES, *with certain others on related points*, published by the National Liberties Bureau, New York. This has some state cases and gives a careful analysis of the decisions. The Bureau has also published WAR-TIME PROSECUTIONS AND MOB VIOLENCE, *involving the rights of free speech, free press, and peaceful assemblage (from April 1, 1917, to March 1, 1919)*, containing an annotated list of prosecutions, convictions, exclusions from the mail, etc.; and "The Law of the Debs Case" (leaflet). Mr. Nelles has submitted to Attorney General Palmer "A Memorandum concerning Political Prisoners within the Jurisdiction of the Department of Justice in 1919" (MS. copy owned by the Harvard Law School Library).

The enforcement of the Espionage Act and similar statutes is officially summarized in the REPORTS OF THE ATTORNEY GENERAL for 1917 (page 75) and 1918 (pages 17, 20-23, 47-57). A list of prosecutions is given with the results. See, also, Atty. Gen. Gregory's Suggestions to the Executive Committee of the American Bar Association, 4 AM. BAR ASSOC. JOURN. 305 (1918).

The best discussion of the legal meaning of "Freedom of the Press in the United States" will be found in an article under that name by Henry Schofield, in 9 PUBLICATIONS OF THE AMERICAN SOCIOLOGICAL SOCIETY, 67 (1914). This volume is devoted entirely to "Freedom of Communication," and contains several valuable papers on different aspects of the problem. Other legal articles not dealing with the situation in war are: "The Jurisdiction of the United States over Seditious Libel," H. W. Bickel, 41 AM. L. REG. (N. S.) 1 (1902); "Restrictions on the Freedom of the Press," 16 HARV. L. REV. 55 (1902); "Free Speech and Free Press in Relation to the Police Power of the State," P. L. Edwards, 58 CENT. L. J. 383 (1904); "Federal Interference with the Freedom of the Press," Lindsay Rogers, 23 YALE L. J. 559 (1914), substantially reprinted as Chapter IV of his POSTAL POWER OF CONGRESS, Baltimore, Johns Hopkins Press, 1916; A. V. DICEY, THE LAW OF THE CONSTITUTION, 8 ed., Chap. VI; "Freedom of Speech and of the Press," 65 UNIV. OF PA. L. REV. 170 (1916); Joseph R. Long, "The Freedom of the Press," 5 VA. L. REV. 225 (1918). Freedom of speech is discussed by Dean Pound as an interest of the individual in his "Interests of Personality," 28 HARV. L. REV. 445, 453 (1915); and as an alleged bar to injunctions of libel in his "Equitable Relief against Defamation and Injuries to Personality," 29 HARV. L. REV. 640, 648 (1916).

The situation in war is specifically treated in the following: "Freedom of Speech and of the Press," W. R. Vance, 2 MINN. L. REV. 239 (1918); "The Espionage Act

prosecutions and other judicial proceedings during the war, involving speeches, newspaper articles, pamphlets, and books, have been followed since the armistice by a widespread legislative consideration of bills punishing the advocacy of extreme radicalism. It is becoming increasingly important to determine the true limits of freedom of expression, so that speakers and writers may know how much they can properly say, and governments may be sure how much they can lawfully and wisely suppress. The United States Supreme Court has recently handed down several decisions upon the Espionage Act,<sup>2</sup> which put us in a much better position than

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Cases," 32 HARV. L. REV. 417 (1919); "Threats to take the Life of the President," 32 HARV. L. REV. 724 (1919); "The Vital Importance of a Liberal Construction of the Espionage Act," Alexander H. Robbins, 87 CENT. L. J. 145 (1918); "Sufficiency of Indictments under the Espionage Act," 87 CENT. L. J. 400 (1918). The Espionage Act is one of the topics covered by Judge Charles M. Hough, "Law in War Time—1917," 31 HARV. L. REV. 692, 696 (1918). The issues involved in the current decisions are presented in nontechnical form by these articles: "Freedom of Speech," Z. Chafee, Jr., 17 NEW REPUBLIC, 66 (November 16, 1918); "The Debs Case and Freedom of Speech," Ernst Freund, 19 NEW REPUBLIC, 13 (May 3, 1919); 19 *ib.* 151 (May 31). William Hard, "Mr. Burleson, Espionagent," 19 NEW REPUBLIC, 42 (May 10, 1919), and "Mr. Burleson, Section 481 1/2 B," 19 NEW REPUBLIC, 76 (May 17, 1919), reviews exclusions from the mails. "The Trial of Eugene Debs," Max Eastman, THE LIBERATOR (November, 1918), gives a defendant's impression of the operation of the act.

The history of freedom of speech in America has not yet been fully investigated, but CLYDE A. DUNIWAY, THE DEVELOPMENT OF FREEDOM OF THE PRESS IN MASSACHUSETTS, Cambridge, Harvard University Press, 1906, is extremely useful. Much light is thrown on the problem by sedition trials in England, before our Revolution and during the French Revolution. The best account of these is in ERSKINE MAY, 2 CONSTITUTIONAL HISTORY OF ENGLAND, 2 ed., 1912, Chaps. IX-X, summarized by Charles A. Beard in 16 NEW REPUBLIC, 350 (October 19, 1918). See, also, 2 STEPHEN, HISTORY OF THE CRIMINAL LAW, Chap. XXIV; and G. O. TREVELYAN, THE EARLY HISTORY OF CHARLES JAMES FOX, for the Wilkes and Junius controversies.

The legal meaning of freedom of speech cannot properly be determined without a knowledge of the political and philosophical basis of such freedom. Four writings on this problem may be mentioned as invaluable: PLATO'S APOLOGY OF SOCRATES; MILTON'S AREOPAGITICA; the second chapter of MILL ON LIBERTY; and Walter Bagehot's essay, "The Metaphysical Basis of Toleration." The second chapter of J. F. STEPHEN, LIBERTY, EQUALITY, FRATERNITY, has an important critique on Mill. See, also, J. B. BURY, A HISTORY OF FREEDOM OF THOUGHT, the first and last chapters; GROTE, PLATO, Chap. VI; GRAHAM WALLAS, THE GREAT SOCIETY, 195-98; H. J. LASKI, AUTHORITY IN THE MODERN STATE, *passim*. For a caustic point of view, see Fabian Franklin, "Some Free Speech Delusions," 2 UNPOPULAR REV. 223 (October, 1914). The proper course in war is discussed by Ralph Barton Perry in a book review, 7 YALE REV. 670 (April, 1918). The difficulties of the problem as seen from actual experience on both sides are presented in VISCOUNT MORLEY'S RECOLLECTIONS.

<sup>2</sup> *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. Rep. 247, BULL. DEPT. JUST., No. 194 (1919), is the leading case. See, also, *Frohwerk v. United States*, 249 U. S. 204,

formerly to discuss the war-time aspects of the general problem of liberty of speech, and this article will approach the general problem from that side. At some later day it may be possible to discuss the proper limits of radical agitation in peace, and also to make a detailed historical examination of the events and documents leading up to the free speech clauses in our state and federal constitutions. For the present it is not feasible to do more than consider the application of those clauses to the treatment of opposition to war.

We shall not, however, confine ourselves to the question whether a given form of federal or state action against pacifist and similar utterances is void under the constitutions. It is often assumed that so long as a statute is held valid under the Bill of Rights, that document ceases to be of any importance in the matter, and may be henceforth disregarded. On the contrary, a provision like the First Amendment to the federal Constitution,

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of their grievances,"

is much more than an order to Congress not to cross the boundary which marks the extreme limits of lawful suppression. It is also an exhortation and a guide for the action of Congress inside that boundary. It is a declaration of national policy in favor of the public discussion of all public questions. Such a declaration should make Congress reluctant and careful in the enactment of all restrictions upon utterance, even though the courts will not refuse to enforce them as unconstitutional. It should influence the judges in their construction of valid speech statutes, and the prosecuting attorneys who control their enforcement. The Bill of Rights in a European constitution is a declaration of policies and nothing more, for the courts cannot disregard the legislative will though it violates the constitution.<sup>3</sup> Our Bills of Rights perform a double

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39 Sup. Ct. Rep. 249, BULL. DEPT. JUST., No. 197 (1919); *Debs v. United States*, 249 U. S. 211, 39 Sup. Ct. Rep. 252, BULL. DEPT. JUST., No. 196 (1919); *Sugarman v. United States*, 249 U. S. 182, 39 Sup. Ct. Rep. 191, BULL. DEPT. JUST., No. 195 (1919).

<sup>3</sup> A. V. DICEY, *LAW OF THE CONSTITUTION*, 8 ed., 130: "This curious result therefore ensues. The restrictions placed on the action of the legislature under the French constitution are not in reality laws, since they are not rules which in the last resort

function. They fix a certain point to halt the government abruptly with a "Thus far and no farther"; but long before that point is reached they urge upon every official of the three branches of the state a constant regard for certain declared fundamental policies of American life.<sup>4</sup>

Our main task, therefore, is to ascertain the nature and scope of the policy which finds expression in the First Amendment to the United States Constitution and the similar clauses of all the state constitutions,<sup>5</sup> and then to determine the place of that policy in the conduct of war, and particularly the war with Germany. The free speech controversy of the last two years has chiefly gathered about the federal Espionage Act. This Act contains a variety of provisions on different subjects, such as the protection of ships in harbors, spy activities, unlawful military expeditions, etc., but the portion which concerns us is the third section of Title 1.<sup>6</sup> As originally enacted on June 15, 1917, this section established three new offenses: (1) false statements or reports interfering with military or naval operations or promoting the success of our enemies; (2) causing or attempting to cause insubordination, disloyalty, mutiny or refusal of duty in the military and naval forces; (3) obstruction of enlistments and recruiting. Attorney General Gregory reports that, although this Act proved an effective instrumentality against deliberate or organized disloyal propaganda, it did not reach the individual, casual, or impulsive disloyal utterances. Also some District Courts gave what he considered a narrow con-

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will be enforced by the Courts. Their true character is that of maxims of political morality, which derive whatever strength they possess from being formally inscribed in the constitution and from the resulting support of public opinion. What is true of the constitution of France applies with more or less force to other polities which have been formed under the influence of French ideas."

<sup>4</sup> "No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows." J. B. THAYER, *LEGAL ESSAYS*, 38. See his quotation from 1 BRYCE, *AMERICAN COMMONWEALTH*, 1 ed., 377.

<sup>5</sup> Massachusetts, New Hampshire, Vermont, North and South Carolina retain a short clause like the federal Constitution. The other states follow the New York form: *NEW YORK CONSTITUTION*, 1822, Art. 7, § 8. "Every citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right; and no law shall be passed, to restrain, or abridge the liberty of speech, or of the press." See Schofield in 9 *PROC. AM. SOCIOLOG. SOC.* 95.

<sup>6</sup> Act of June 15, 1917, c. 30, tit. 1, § 3; 40 *STAT. AT. L.* 217, 219; *COMP. STAT.* 1918, § 10212c amended by Act of May 16, 1918, c. 75. The full text of the original and amended sections will be found in notes 91 and 131, *infra*.

struction of the word "obstruct" in clause (3), so that as he puts it, "most of the teeth which we tried to put in were taken out."<sup>7</sup>

"These individual disloyal utterances, however, occurring with considerable frequency throughout the country, naturally irritated and angered the communities in which they occurred, resulting sometimes in unfortunate violence and lawlessness and everywhere in dissatisfaction with the inadequacy of the Federal law to reach such cases. Consequently there was a popular demand for such an amendment as would cover these cases."<sup>8</sup>

On May 16, 1918, Congress amended the Espionage Act by what is sometimes called the Sedition Act, adding nine more offenses to the original three, as follows: (4) saying or doing anything with intent to obstruct the sale of United States bonds, except by way of bona fide and not disloyal advice; (5) uttering, printing, writing, or publishing any disloyal, profane, scurrilous, or abusive language, or language intended to cause contempt, scorn, contumely or disrepute as regards the form of government of the United States; (6) or the Constitution; (7) or the flag; (8) or the uniform of the Army or Navy; (9) or any language intended to incite resistance to the United States or promote the cause of its enemies; (10) urging any curtailment of production of any things necessary to the prosecution of the war with intent to hinder its prosecution; (11) advocating, teaching, defending, or suggesting the doing of any of these acts; and (12) words or acts supporting or favoring the cause of any country at war with us, or opposing the cause of the United States therein. Whoever commits any one of these offenses in this or any future war is liable to a maximum penalty of \$10,000 fine or twenty years' imprisonment, or both.

This statute has been enacted and vigorously enforced under a constitution which provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

Clearly, the problem of the limits of freedom of speech in war time is no academic question. On the one side, thoughtful men and journals are asking how scores of citizens can be imprisoned under this constitution only for their disapproval of the war as irreligious, unwise, or unjust. On the other, federal and state officials point

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<sup>7</sup> 4 AM. BAR ASSOC. JOURN. 306.

<sup>8</sup> REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES (1918), 18.



to the great activities of German agents in our midst and to the unprecedented extension of the business of war over the whole nation, so that in the familiar remark of Ludendorff, wars are no longer won by armies in the field, but by the *morale* of the whole people. The widespread Liberty Bond campaigns, and the shipyards, munition factories, government offices, training camps, in all parts of the country, are felt to make the entire United States a theater of war, in which attacks upon our cause are as dangerous and unjustified as if made among the soldiers in the rear trenches. The government regards it as inconceivable that the Constitution should cripple its efforts to maintain public safety. Abstaining from countercharges of disloyalty and tyranny, let us recognize the issue as a conflict between two vital principles, and endeavor to find the basis of reconciliation between order and freedom.

At the outset, we can reject two extreme views in the controversy. First, there is the view that the Bill of Rights is a peacetime document and consequently freedom of speech may be ignored in war. This view has been officially repudiated.<sup>9</sup> At the opposite pole is the belief of many agitators that the First Amendment renders unconstitutional any Act of Congress without exception "abridging the freedom of speech, or of the press," that all speech is free, and only action can be restrained and punished. This view is equally untenable. The provisions of the Bill of Rights cannot be applied with absolute literalness but are subject to exceptions.<sup>10</sup> For instance, the prohibition of involuntary servitude in the Thirteenth Amendment does not prevent military conscription,<sup>11</sup> or the enforcement of a "work or fight" statute.<sup>12</sup> The difficulty, of course, is to define the principle on which the implied exceptions are based, and an effort to that end will be made subsequently.

Since it is plain that the true solution lies between these two extreme views, and that even in war time freedom of speech exists

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<sup>9</sup> REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES (1918), 20: "This department throughout the war has proceeded upon the general principle that the constitutional right of free speech, free assembly, and petition exist in war time as in peace time, and that the right of discussion of governmental policy and the right of political agitation are most fundamental rights in a democracy."

<sup>10</sup> *Robertson v. Baldwin*, 165 U. S. 275, 281 (1897).

<sup>11</sup> *Selective Draft Law Cases*, 245 U. S. 366, 390 (1918); *Claudius v. Davie*, 175 Cal. 208 (1917).

<sup>12</sup> *State v. McClure*, 105 Atl. 712 (DEL. GEN. SESS., 1919).

subject to a problematical limit, it is necessary to determine where the line runs between utterance which is protected by the Constitution from governmental control and that which is not. Many attempts at a legal definition of that line have been made,<sup>12</sup> but two mutually inconsistent theories have been especially successful in winning judicial acceptance, and frequently appear in the Espionage Act cases.

One theory construes the First Amendment as enacting Blackstone's statement that "the liberty of the press . . . consists in laying no *previous* restraints upon publications and not in freedom from censure for criminal matter when published."<sup>14</sup> The line where legitimate suppression begins is fixed chronologically at the time of publication. The government cannot interfere by a censorship or injunction *before* the words are spoken or printed, but can punish them as much as it pleases *after* publication, no matter how harmless or essential to the public welfare the discussion may be. This Blackstonian definition found favor with Lord Mansfield,<sup>15</sup> and is sometimes urged as a reason why libels should not be enjoined.<sup>16</sup> It was adopted by American judges in several early prosecutions for libel,<sup>17</sup> one of which was in Massachusetts,<sup>18</sup> whence Justice Holmes carried it into the United States Supreme Court.<sup>19</sup> Fortunately he has now repudiated this interpretation of freedom of speech,<sup>20</sup> but not until his dictum had had considerable influence, particularly in Espionage Act cases.<sup>21</sup> Of course if the First Amend-

<sup>12</sup> See a discussion by Dean Pound of two views besides Blackstone's in 29 HARV. L. REV. 640, 651. The view mentioned as Story's is really that of St. George Tucker, whom Story was criticising. 2 STORY, CONSTITUTION, § 1886.

<sup>14</sup> 4 BLACKSTONE, COMMENTARIES, 151.

<sup>15</sup> King v. Dean of St. Asaph, 3 T. R. 428, 431 (1789): "The liberty of the press consists in printing without any previous licence, subject to the consequence of law."

<sup>16</sup> See Roscoe Pound, "Equitable Relief against Defamation and Injuries to Personality," 29 HARV. L. REV. 651. Recent Federal cases are American Malting Co. v. Keitel, 209 Fed. 351 (C. C. A. 2d, 1913); Willis v. O'Connell, 231 Fed. 1004 (S. D. Ala. 1916).

<sup>17</sup> Respublica v. Oswald, 1 Dall. (U. S.) 319, 325 (Pa., 1788), McKean, J.; Trial of William Cobbett, for Libel, WHARTON'S STATE TRIALS, 322, 323 (Pa., 1797), McKean, J.; Respublica v. Dennie, 4 Yeates (Pa.) 267, 269 (1805). See Schofield in 9 PROC. AM. SOCIOLOGICAL SOC. 69.

<sup>18</sup> Commonwealth v. Blanding, 3 Pick. (Mass.) 304, 313 (1825).

<sup>19</sup> Patterson v. Colorado, 205 U. S. 454, 462 (1907).

<sup>20</sup> Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. Rep. 247, 249 (1919).

<sup>21</sup> Masses Pub. Co. v. Patten, 246 Fed. 24, 27 (C. C. A. 2d, 1917); United States v. Coldwell, BULL. DEPT. JUST., No. 158 (D. C. R. I.) 4.

ment does not prevent prosecution and punishment of utterances, the Espionage Act is unquestionably constitutional.

This Blackstonian theory dies hard, but has no excuse for longer life. In the first place, Blackstone was not interpreting a constitution but trying to state the English law of his time, which had no censorship and did have extensive libel prosecutions. Whether or not he stated that law correctly, an entirely different view of the liberty of the press was soon afterwards enacted in Fox's Libel Act,<sup>22</sup> so that Blackstone's view does not even correspond to the English law of the last hundred and twenty-five years. Furthermore, Blackstone is notoriously unfitted to be an authority on the liberties of American colonists, since he upheld the right of Parliament to tax them,<sup>23</sup> and was pronounced by one of his own colleagues to have been "we all know, an anti-republican lawyer."<sup>24</sup>

Not only is the Blackstonian interpretation of our free speech clauses inconsistent with eighteenth-century history, soon to be considered, but it is contrary to modern decisions, thoroughly artificial, and wholly out of accord with a common-sense view of the relations of state and citizen. In some respects this theory goes altogether too far in restricting state action. The prohibition of previous restraint would not allow the government to prevent a newspaper from publishing the sailing dates of transports or the number of troops in a sector. It would render illegal removal of an indecent poster from a billboard or the censorship of moving pictures before exhibition, which has been held valid under a free speech clause.<sup>25</sup> And whatever else may be thought of the decision under the Espionage Act with the unfortunate title, *United States v. The Spirit of '76*,<sup>26</sup> it was clearly previous restraint for a federal court to direct the seizure of a film which depicted the Wyoming Massacre and Paul Revere's Ride, because it was "calculated reasonably so to excite or inflame the passions of our people or some of them as that they will be deterred from giving that full measure of cooperation, sympathy, assistance, and sacrifice which is due to

<sup>22</sup> 32 GEO. III, c. 60 (1792). See page 948, *infra*.

<sup>23</sup> 1 BLACKSTONE, COMMENTARIES, 109.

<sup>24</sup> Willes, J., in *Dean of St. Asaph's Case*, 4 Doug. 73, 172 (1784), quoted by Schofield, 9 PROC. AM. SOCIOLOGICAL SOC. 85, note.

<sup>25</sup> *Mutual Film Corporation v. Industrial Commission of Ohio*, 236 U. S. 230, 241 (1915).

<sup>26</sup> BULL. DEPT. JUST., No. 33 (D. C. S. D. Cal., 1917), Bledsoe, J.

Great Britain, as an ally of ours," and "to make us a little bit slack in our loyalty to Great Britain in this great catastrophe."

On the other hand it is hardly necessary to argue that the Blackstonian definition gives very inadequate protection to the freedom of expression. A death penalty for writing about socialism would be as effective suppression as a censorship.<sup>27</sup> Cooley's comment on Blackstone is unanswerable:<sup>28</sup>

. . . "The mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications, . . . Their purpose [of the free-speech clauses] has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. . . . The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."

If we turn from principles to precedents, we find several decisions which declare the constitutional guarantee of free speech to be violated by statutes and other governmental action which imposed no previous restraint but penalized publications after they were made.<sup>29</sup> And most of the decisions in which a particular statute

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<sup>27</sup> "Free speech, like every form of freedom, goes in danger of its life in war time. The other day in Russia an Englishman came on a street-meeting shortly after the first revolution had begun. An extremist was addressing the gathering and telling them that they were fools to go on fighting, that they ought to refuse and go home, and so forth. The crowd grew angry, and some soldiers were for making a rush at him; but the chairman, a big burly peasant, stopped them with these words: 'Brothers, you know that our country is now a country of free speech. We must listen to this man, we must let him say anything he will. But, brothers, when he's finished, we'll bash his head in!'" John Galsworthy, "American and Briton," 8 *YALE REV.* 27 (October, 1918).

<sup>28</sup> COOLEY, *CONSTITUTIONAL LIMITATIONS*, 7 ed., 603, 604.

<sup>29</sup> *Louthan v. Commonwealth*, 79 Va. 196 (1884) — statute punishing school superintendent for political speeches; *Atchison, etc. Ry. v. Brown*, 80 Kans. 312, 102 Pac.

punishing for talking or writing is sustained do not rest upon the Blackstonian interpretation of liberty of speech,<sup>30</sup> but upon another theory, now to be considered. Therefore, it is possible that Title I, section 3, of the Espionage Act, violates the First Amendment, although it does not interfere with utterances before publication.<sup>31</sup>

A second interpretation of the freedom of speech clauses limits them to the protection of the use of utterance and not to its "abuse." It draws the line between "liberty" and "license." Chief Justice White<sup>32</sup> rejects

"the contention that the freedom of the press is the freedom to do wrong with impunity and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. . . . However complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing."

A statement of the same view in another peace case is made by Judge Hamersley of Connecticut:<sup>33</sup>

"Every citizen has an equal right to use his mental endowments, as well as his property, in any harmless occupation or manner; but he has

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459 (1909) — service-letter statute, making employer liable to civil action if he failed to furnish a discharged employee a written statement for the true reason for discharge. *St. Louis, etc. Ry. Co. v. Griffin*, 106 Texas 477, 171 S. W. 703 (1914), same; *Wallace v. Georgia Ry. Co.*, 94 Ga. 732, 22 S. E. 579 (1894), same; *Ex parte Harrison*, 212 Mo. 88, 110 S. W. 709 (1908), — statute punishing voters' leagues for commenting on candidates for office without disclosing the names of all persons furnishing the information; *State ex rel. Metcalf v. District Court*, 52 Mont. 46, 155 Pac. 278 (1916) — contempt proceedings for criticism of judge for past decision; *State ex rel. Ragan v. Junkin*, 85 Neb. 1, 122 N. W. 473 (1909), — statute invalidating nomination of candidates by conventions or any other method except primaries; *State v. Pierce*, 163 Wis. 615, 158 N. W. 696 (1916) — corrupt practices act punishing political disbursements outside one's own county except through a campaign committee. Some of these decisions are open to dispute on the desirability of the statutes, and some are opposed by other cases for that reason, but in their repudiation of the Blackstonian test they furnish unquestioned authority.

<sup>30</sup> Examples in such cases of express repudiation of the Blackstonian doctrine are found in *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. Rep. 247 (1919); *State v. McKee*, 73 Conn. 18, 46 Atl. 409 (1900); *State v. Pioneer Press Co.*, 100 Minn. 173, 110 N. W. 867 (1907); *Cowan v. Fairbrother*, 118 N. C. 406, 418 (1896).

<sup>31</sup> Title XII of the Espionage Act does impose previous restraint on publications which violate the Act by authorizing the Postmaster-General to exclude them from the mails. See page 961, *infra*.

<sup>32</sup> *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 419 (1918).

<sup>33</sup> *State v. McKee*, 73 Conn. 18, 28, 46 Atl. 409 (1900).

no right to use them so as to injure his fellow-citizens or to endanger the vital interests of society. Immunity in the mischievous use is as inconsistent with civil liberty as prohibition of the harmless use. . . . The liberty protected is not the right to perpetrate acts of licentiousness, or any act inconsistent with the peace or safety of the State. Freedom of speech and press does not include the abuse of the power of tongue or pen, any more than freedom of other action includes an injurious use of one's occupation, business, or property."

The decisions in the war are full of similar language.<sup>24</sup>

Practically the same view is adopted by Cooley,<sup>25</sup> that the clauses guard against repressive measures by the several departments of government, but not against utterances which are a public offense, or which injure the reputation of individuals.

"We understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted."

To a judge obliged to decide whether honest and able opposition to the continuation of a war is punishable, these generalizations furnish as much help as a woman forced, like Isabella in "Measure for Measure," to choose between her brother's death and loss of honor, might obtain from the pious maxim, "Do right." What is abuse? What is license? What standards does the law afford?

<sup>24</sup> Mayer, J., in *United States v. Phillips*, BULL. DEPT. JUST., No. 14 (S. D. N. Y., 1917), 5: "In this country it is one of our foundation stones of liberty that we may freely discuss anything we please, provided that that discussion is in conformity with law, or at least not in violation of it." Mayer, J., in *United States v. Goldman*, BULL. DEPT. JUST., No. 41 (S. D. N. Y., 1917), 2: "No American worthy of the name believes in anything else than free speech; but free speech means, not license, not counseling disobedience of the law. Free speech means that frank, free, full, and orderly expression which every man or woman in the land, citizen or alien, may engage in, in lawful and orderly fashion." Van Valkenburgh, J., in *United States v. Stokes*, BULL. DEPT. JUST., No. 106 (W. D. Mo., 1918), 12: "No one is permitted under the constitutional guaranties to commit a wrong or violate the law." See also *United States v. Pierce*, BULL. DEPT. JUST., No. 52 (S. D. N. Y., 1917), 22, Ray, J.; *United States v. Nearing*, BULL. DEPT. JUST., No. 192 (S. D. N. Y., 1917), 4, Mayer, J.

<sup>25</sup> COOLEY, *CONSTITUTIONAL LIMITATIONS*, 7 ed., 605; quoted by Hough, J., in *Fraina v. United States*, 255 Fed. 28, 35 (C. C. A. 2d, 1918).

To argue that the federal Constitution does not prevent punishment for criminal utterances begs the whole question, for utterances within its protection are not crimes. If it only safeguarded lawful speech, Congress could escape its operation at any time by making any class of speech unlawful. Suppose, for example, that Congress declared any criticism of the particular administration in office to be a felony, punishable by ten years' imprisonment. Clearly, the Constitution must limit the power of Congress to create crimes. But how far does that limitation go? Cooley suggests that the legislative power extends only to speech which was criminal or tortious at common law in 1791. No doubt, conditions then must be considered, but must the legislature leave them unchanged for all time? Moreover, the few reported American cases before 1791 prove that our common law of sedition was exactly like that of England, and it would be extraordinary if the First Amendment enacted the English sedition law of that time, which was repudiated by every American and every liberal Englishman, and altered by Parliament itself in the very next year, 1792.<sup>36</sup> Clearly, we must look further and find a rational test of what is use and what is abuse. Saying that the line lies between them gets us nowhere. And "license" is too often "liberty" to the speaker, and what happens to be anathema to the judge.

We can, of course, be sure that certain forms of utterance, which have always been crimes or torts at common law, are not within the scope of the free speech clauses. The courts in construing such clauses have, for the most part, done little more than place obvious cases on this or that side of the line. They tell us, for instance, that libel and slander are actionable, or even punishable, that indecent books are criminal, that it is contempt to interfere with pending judicial proceedings, and that a permit can be required for street meetings; and on the other hand, that some criticism of the government must be allowed, that a temperate examination of a judge's opinion is not contempt, and that honest discussion of the merits of a painting causes no liability for damages. But when we ask where the line actually runs and how they know on which side of it a given utterance belongs, we find no answer in their opinions. Justice Holmes in his Espionage Act decisions had a magnificent

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<sup>36</sup> 2 MAY, CONSTITUTIONAL HISTORY OF ENGLAND, Chap. IX; 2 STEPHEN, HISTORY OF THE CRIMINAL LAW, Chap. XXIV.

opportunity to make articulate for us that major premise, under which judges ought to classify words as inside or outside the scope of the First Amendment. He, we hoped, would concentrate his great abilities on fixing the line. Instead, like the other judges, he has told us that certain plainly unlawful utterances are, to be sure, unlawful.

"The First Amendment . . . obviously was not intended to give immunity for every possible use of language. . . . We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder . . . would be an unconstitutional interference with free speech."<sup>37</sup>

"The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."<sup>38</sup>

How about the man who gets up in a theater between the acts and informs the audience honestly but perhaps mistakenly that the fire exits are too few or locked? He is a much closer parallel to *Schenck* or *Debs*. How about James Russell Lowell when he counseled, not murder, but the cessation of murder, his name for war? The question whether such perplexing cases are within the First Amendment or not cannot be solved by the multiplication of obvious examples, but only by the development of a rational principle to mark the limits of constitutional protection.

"The gradual process of judicial inclusion and exclusion,"<sup>39</sup> which has served so well to define other clauses in the federal Constitution by blocking out concrete situations on each side of the line until the line itself becomes increasingly plain, has as yet been of very little use for the First Amendment. The cases are too few, too varied in their character, and often too easily solved, to develop any definite boundary between lawful and unlawful speech. Even if some boundary between the precedents could be attained, we could have little confidence in it unless we knew better than now the fundamental principle on which the classification was based. Indeed, many of the decisions in which statutes have been held to violate free speech seem to ignore so seriously the economic and political facts of our time, that they are precedents of very dubious

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<sup>37</sup> *Frohwerk v. United States*, 249 U. S. 204, 39 Sup. Ct. Rep. 249, 250 (1919).

<sup>38</sup> *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. Rep. 247 (1919).

<sup>39</sup> *Miller, J.*, in *Davidson v. New Orleans*, 96 U. S. 97, 104 (1877).



value for the inclusion and exclusion process.<sup>40</sup> Nearly every free speech decision, outside such hotly litigated portions as privilege and fair comment in defamation, appears to have been decided largely by intuition.

Fortunately Justice Holmes has not left us without some valuable suggestions pointing toward the ultimate solution of the problem of the limits of free speech,<sup>41</sup> and still others are contained in Judge Learned Hand's opinion in *Masses v. Patten*.<sup>42</sup> To these we shall soon return. For the moment, however, it may be worth while to forsake the purely judicial discussion of free speech, and obtain light upon its meaning from the history of the constitutional clauses and from the purpose free speech serves in social and political life.

If we apply Coke's test of statutory construction, and consider what mischief in the existing law the framers of the First Amendment wished to remedy by a new safeguard, we can be sure that it was not the censorship. This had expired in England in 1695,<sup>43</sup> and in the colonies by 1725.<sup>44</sup> For years the government here and in England had substituted for the censorship rigorous and repeated prosecutions for criminal libel or seditious libel, as it was often called, which were directed against political discussion, and for years these prosecutions were opposed by liberal opinion and popular agitation. Primarily the controversy raged around two legal contentions of the great advocates for the defense, such as Erskine and Andrew Hamilton. They argued, first, that the jury and not the judge ought to decide the libellous nature of the writing, and secondly, that the truth of the charge ought to prevent conviction. The real issue, however, lay much deeper. Two different views of the relation of rulers and people were in conflict.<sup>45</sup> According to one view, the rulers were the superiors of the people, and therefore must not be subjected to any censure that would tend to diminish their authority. The people could not make adverse criticism in newspapers or pamphlets, but only through their lawful representatives in the legislature, who might be petitioned in an orderly manner. According to the other view, the rulers are agents and

<sup>40</sup> See note 29, *supra*.

<sup>41</sup> *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. Rep. 247, 249 (1919).

<sup>42</sup> 244 Fed. 535 (S. D. N. Y., 1917); reversed in 246 Fed. 24 (C. C. A. 2d., 1917).

<sup>43</sup> MACAULAY, HISTORY OF ENGLAND, Chap. XIX.

<sup>44</sup> C. A. DUNIWAY, FREEDOM OF SPEECH IN MASSACHUSETTS, 89, note.

<sup>45</sup> 2 STEPHEN, HISTORY OF THE CRIMINAL LAW, 299.

servants of the people, who may therefore find fault with their servants and discuss questions of their punishment or dismissal.

Under the first view, which was officially accepted until the close of the eighteenth century, developed the law of seditious libel. This is defined as "the intentional publication, without lawful excuse or justification, of written blame of any public man, or of the law, or of any institution established by law."<sup>46</sup> There was no need to prove any intention on the part of the defendant to produce disaffection or excite an insurrection. It was enough if he intended to publish the blame, because it was unlawful in him merely to find fault with his masters and betters. Such, in the opinion of the best authorities, was the common law of sedition.<sup>47</sup>

It is obvious that under this law liberty of the press was nothing more than absence of the censorship, as Blackstone said. All through the eighteenth century, however, there existed beside this definite legal meaning of liberty of the press, a definite popular meaning: the right of unrestricted discussion of public affairs. There can be no doubt that this was in a general way what freedom of speech meant to the framers of the Constitution. As Schofield says, "One of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press. . . . Liberty of the press as declared in the First Amendment, and the English common-law crime of sedition, cannot co-exist."<sup>48</sup> I must therefore strongly dissent, as would Professor Schofield, from the conclusion of Dean Vance in a recent article on the Espionage Act, that the founders of our government merely intended by the First Amendment "to limit the new government's statutory powers to penalize utterances as seditious, to those which were seditious under the then accepted common-law rule."<sup>49</sup> The founders had seen seventy English prosecutions for libel since 1760, and fifty convictions under that common-law rule, which made conviction easy.<sup>50</sup> That rule had been detested in this country ever since it was repudiated by jury and populace in the famous trial of Peter Zenger,

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<sup>46</sup> 2 STEPHEN, *HISTORY OF THE CRIMINAL LAW*, 353.

<sup>47</sup> *Ibid.*, 353, and Chap. XXIV, *passim*; Schofield, in 9 *PROC. AM. SOCIOLOGICAL SOC.*, 70 *ff.*, gives an excellent summary with especial reference to American conditions.

<sup>48</sup> Schofield, *Ibid.*, 76, 87.

<sup>49</sup> W. R. Vance, in "Freedom of Speech and of the Press," 2 *MINN. L. REV.* 239, 259.

<sup>50</sup> 2 MAY, *CONSTITUTIONAL HISTORY OF ENGLAND*, 2 ed., 9, note.

the New York printer, the account of which went through fourteen editions before 1791.<sup>51</sup> Nor was this the only colonial sedition prosecution under the common law, and many more were threatened.<sup>52</sup> The First Amendment was written by men to whom Wilkes and Junius were household words, who intended to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America.

It must not be forgotten that the controversy over liberty of the press was a conflict between two views of government, that the law of sedition was a product of the view that the government was master, and that the American Revolution transformed into a working reality the second view that the government was servant, and therefore subjected to blame from its master, the people. Consequently, the words of Sir James Fitzjames Stephen about this second view have a vital application to American law.<sup>53</sup>

"To those who hold this view fully and carry it out to all its consequences there can be no such offence as sedition. There may indeed be breaches of the peace which may destroy or endanger life, limb, or property, and there may be incitements to such offences, but no imaginable censure of the government, *short of a censure which has an immediate tendency to produce such a breach of the peace*, ought to be regarded as criminal."

The repudiation by the Constitutions of the English common law of sedition, which was also the common law of the American colonies,

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<sup>51</sup> 17 How. St. Tr. 675 (1735). The fullest account of Zenger and the trial is given by LIVINGSTON RUTHERFORD, JOHN PETER ZENGER, New York, 1904. Rutherford's bibliography lists thirteen editions of the account of the trial before 1781. The Harvard Law School Library contains four of these (London, 1738; London, 1752; London, 1765; New York, 1770), and also an undated copy without specified place differing from any listed by Rutherford. See also the life of Zenger's counsel, Andrew Hamilton, by William Henry Loyd, in 1 GREAT AMERICAN LAWYERS, 1. The close relation between the Zenger trial and the prosecutions under George III in England and America is shown by the quotations on reprints of the trial and the dedication of the 1784 London edition to Erskine.

<sup>52</sup> C. A. DUNIWAY, FREEDOM OF THE PRESS IN MASSACHUSETTS, 91, 93, 115, 123, 130, and note. In 1767 Chief Justice Hutchinson charged the grand jury on Blackstonian lines, "This Liberty means no more than a Freedom for every Thing to pass from the Press without a License." *Ibid.*, 125.

<sup>53</sup> 2 STEPHEN, HISTORY OF THE CRIMINAL LAW, 300. The italics are mine. See also Schofield, 9 PROC. AM. SOC. SOC. 75.

has been somewhat obscured by judicial retention of the two technical incidents of the old law after the adoption of the free speech clauses. Many judges, rightly or wrongly, continued to pass on the criminality of the writing and to reject its truth as a defense,<sup>54</sup> until statutes or new constitutional provisions embodying the popular view on these two points were enacted.<sup>55</sup> Doubtless, a jury will protect a popular attack on the government better than a judge, and the admission of truth as a defense lessens the evils of suppression. These changes help to substitute the modern view of rulers for the old view, but they are not essential. Sedition prosecutions went on with shameful severity in England after Fox's Libel Act<sup>56</sup> had given the jury power to determine criminality. The American Sedition Act of 1798,<sup>57</sup> which President Wilson declares to have "cut perilously near the root of freedom of speech and of the press,"<sup>58</sup> entrusted criminality to the jury and admitted truth as a defense. On the other hand, freedom of speech might exist without these two technical safeguards. The essential question is not, who is judge of the criminality of an utterance, but what is the test of its criminality. The common law and the Sedition Act of 1798 made the test blame of the government and its officials, because to bring them into disrepute tended to overthrow the state. The real issue in every free-speech controversy is this — whether the state can punish all words which have some tendency, however remote, to bring about acts in violation of law, or only words which directly incite to acts in violation of law.

If words do not become criminal until they have an immediate tendency to produce a breach of the peace, there is no need for a law of sedition, since the ordinary standards of criminal solicitation and attempt apply. Under those standards the words must bring the speaker's unlawful intention reasonably near to success. Such a limited power to punish utterances rarely satisfies the zealous in times of excitement like a war. They realize that all condemnation

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<sup>54</sup> *DUNIWAY*, *supra*, Chap. IX; *Commonwealth v. Clap*, 4 Mass. 163 (1808); *Commonwealth v. Blanding*, 3 Pick. (Mass.) 304 (1825).

<sup>55</sup> Examples are: PA. CONS. 1790, Art. 9, § 7; N. Y. SESSION LAWS, 1805, c. 90; N. Y. CONS., 1822, Art. VII, § 8; MASS. LAWS, 1827, c. 107. See Schofield, *op. cit.*, 95-99.

<sup>56</sup> 32 GEO. III, c. 60 (1792).

<sup>57</sup> 1 STAT. AT L., c. 74, § 596, Act of July 14, 1798.

<sup>58</sup> 3 WOODROW WILSON, HISTORY OF THE AMERICAN PEOPLE, 153.

of the war or of conscription may conceivably lead to active resistance or insubordination. Is it not better to kill the serpent in the egg? All writings that have a tendency to hinder the war must be suppressed.

Such has always been the argument of the opponents of free speech. And the most powerful weapon in their hand, since the abolition of the censorship, is this doctrine of indirect causation, under which words can be punished for a supposed bad tendency long before there is any probability that they will break out into unlawful acts. Closely related to it is the doctrine of constructive intent, which regards the intent of the defendant to cause violence as immaterial so long as he intended to write the words, or else presumes the violent intent from the bad tendency of the words on the ground that a man is presumed to intend the consequences of his acts. When rulers are allowed to possess these weapons, they can by the imposition of severe sentences create an *ex post facto* censorship of the press. The transference of that censorship from the judge to the jury is indeed important when the attack on the government which is prosecuted expresses a widespread popular sentiment, but the right to jury trial is of much less value in times of war or threatened disorder when the herd instinct runs strong, if the opinion of the defendant is highly objectionable to the majority of the population, or even to the particular class of men from whom or by whom the jury are drawn.<sup>59</sup> It is worth our frank consideration, whether in a country where the doctrine of indirect causation is recognized by the courts twelve small property holders, who have been through an uninterrupted series of patriotic campaigns and are sufficiently middle-aged to be in no personal danger of compulsory military service, are fitted to decide whether there is a tendency to obstruct the draft in the writings of a pacifist, who also happens to be a socialist and in sympathy with the Russian Revolution.<sup>60</sup>

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<sup>59</sup> "Under Charles II. [trial by jury] was a blind and cruel system. During part of the reign of George III. it was, to say the least, quite as severe as the severest judge without a jury could have been. The revolutionary tribunal during the Reign of Terror tried by a jury." 1 STEPHEN, HISTORY OF THE CRIMINAL LAW, 569.

<sup>60</sup> "As to the jury . . . they were about seventy-two years old, worth fifty to sixty thousand dollars, retired from business, from pleasure, and from responsibility for all troubles arising outside of their own family. An investigator for the defense computed the average age of the entire venire of 100 men; it was seventy years. Their average wealth was over \$50,000. In the jury finally chosen every man was a retired farmer or

This, however, is perhaps a problem for the psychologist rather than the lawyer.

The manner in which juries in time of excitement may be used to suppress writings in opposition to the government, if bad tendency is recognized as a test of criminality, is illustrated by the numerous British sedition trials during the French Revolution. These were after the passage of Fox's Libel Act. For instance, John Drakard was convicted for printing an article on the shameful amount of flogging in the army, under a charge in which Baron Wood emphasized the formidable foe with whom England was fighting, and the general belief that Napoleon was using the British press to carry out his purpose of securing her downfall.<sup>61</sup>

"It is to be feared, there are in this country many who are endeavoring to aid and assist him in his projects, by crying down the establishment of the country, and breeding hatred against the government. Whether that is the source from whence the paper in question springs, I cannot say, but I advise you to consider whether it has not that tendency. You

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a retired merchant, but one, who was a contractor still active. They were none of them native to leisure, however, but men whose faces were bitterly worn and wearied out of all sympathy with a struggle they had individually surmounted." Max Eastman, "The Trial of Eugene Debs," 1 *LIBERATOR*, No. 9 (November, 1918), 9. This statement is, of course, by a friend of Debs, but if accurate, makes the method of jury selection a serious problem in the prosecution of radicals.

The charge of Mayer, J., in *United States v. Phillips*, *BULL. DEPT. JUST.*, No. 14, was so favorable to the defendant that, I am informed by an eyewitness, an acquittal was generally expected in the court-room, but the defendants were convicted.

Another significant fact in sedition prosecutions is the well-known probability that juries will acquit, after the excitement is over, for words used during the excitement, which are as bad in their tendency as other writings prosecuted and severely punished during the critical period. This was very noticeable during the reign of George III. It is also interesting to find two juries in different parts of the country differing as to the criminal character of similar publications or even the same publication. Thus Leigh Hunt was acquitted for writing an article for the printing of which Drakard was convicted. See note 61, *infra*. The acquittal of Scott Nearing and the conviction by the same jury of the American Socialist Society for publishing his book form an interesting parallel. Mayer, J., has decided that there is not such inconsistency in the two verdicts as to warrant a new trial. *BULL. DEPT. JUST.*, No. 198.

<sup>61</sup> 31 *How. St. Tr.* 495, 535 (1811). Leigh Hunt was acquitted for writing the same article. Lord Ellenborough charged, 31 *How. St. Tr.* 367, 408, 413 (1811), "Can you conceive that the exhibition of the words 'One Thousand Lashes,' with strokes underneath to attract attention, could be for any other purpose than to excite disaffection? Could it have any other tendency than that of preventing men from entering into the army?" Compare with these two charges that of Van Valkenburgh, J., in *United States v. Rose Pastor Stokes*, *BULL. DEPT. JUST.*, No. 106 (*W. D. Mo.*, 1917), 985, *infra*.

will consider whether it contains a fair discussion — whether it has not a manifest tendency to create disaffection in the country and prevent men enlisting into the army — whether it does not tend to induce the soldier to desert from the service of his country. And what considerations can be more awful than these? . . .

"The House of Parliament is the proper place for the discussion of subjects of this nature . . . It is said that we have a right to discuss the acts of our legislature. That would be a large permission indeed. Is there, gentlemen, to be a power in the people to counteract the acts of the parliament, and is the libeller to come and make the people dissatisfied with the government under which he lives? This is not to be permitted to any man, — it is unconstitutional and seditious."

The same desire to nip revolution in the bud was shown by the Scotch judges who secured the conviction of Muir and Palmer for advocating reform of the rotten boroughs which chose the House of Commons and the extension of the franchise, sentences of transportation for seven and fourteen years being imposed.<sup>62</sup>

"The right of universal suffrage, the subjects of this country never enjoyed; and were they to enjoy it, they would not long enjoy either liberty or a free constitution. You will, therefore, consider whether telling the people that they have a just right . . . to a total subversion of this constitution, is such a writing as any person is entitled to compose, to print, and to publish."

In the light of such prosecutions it is plain that the most vital indication that the popular definition of liberty of the press, unpunishable criticism of officials and laws, has become a reality, is the disappearance of these doctrines of bad tendency and presumptive intent. In Great Britain they lingered until liberalism triumphed in 1832, but in this country they disappeared with the adoption of the free speech clauses. The French press law no longer recognizes indirect provocation to crime as an offence.<sup>63</sup>

<sup>62</sup> 2 MAY, CONSTITUTIONAL HISTORY, 38-41, on the trials of Muir and Palmer. Fourteen years appears to have been the longest sentence for sedition imposed in Scotland during the French wars. Four years was the longest in England. See note 120, *infra*, for sentences under the Espionage Act.

<sup>63</sup> A. ESMEIN, *ÉLÉMENTS DE DROIT CONSTITUTIONNEL*, 6 ed. 1145, 1149; Ernst Freund in 19 NEW REPUBLIC 14 (May 3, 1919). The crime of *délit d'opinion* no longer exists. Under the Republic one can lawfully express monarchical opinions and attack the Constitution. Formerly, indirect incitement was unlawful. During the reaction after the assassination of the Duc de Berry, the law allowed *procès de tendance*, by which a newspaper could be suppressed if "*l'esprit résultant d'une succession d'arti-*

The revival of those doctrines is a sure symptom of an attack upon the liberty of the press.

Only once in our history prior to 1917 has an attempt been made to apply those doctrines. In 1798 the impending war with France, the spread of revolutionary doctrines by foreigners in our midst, and the spectacle of the disastrous operation of those doctrines abroad,<sup>64</sup> — facts that have a familiar sound to-day — led to the enactment of the Alien and Sedition Laws.<sup>65</sup> The Alien Law allowed the President to compel the departure of aliens whom he judged dangerous to the peace and safety of the United States, or suspected, on reasonable grounds, of treasonable or secret machinations against our government. The Sedition Law punished false, scandalous, and malicious writings against the government, either House of Congress, or the President, if published with intent to defame any of them, or to excite against them the hatred of the people, or to stir up sedition or to excite resistance of law, or to aid any hostile designs of any foreign nation against the United States. The maximum penalty was a fine of two thousand dollars and two years' imprisonment. Truth was a defense, and the jury had power to determine criminality as under Fox's Libel Act. Despite the inclusion of the two legal rules for which reformers had contended, and the requirement of an actual intention to cause overt injury, the Sedition Act was bitterly resented as invading the liberty of the press. Its constitutionality was assailed on that ground by Jefferson, who pardoned all prisoners when he became President,<sup>66</sup> and popular indignation at the Act and the prosecutions wrecked the Federalist party. In those prosecutions words were once more

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*des serait de nature à porter atteinte à la paix publique.*" — In the same way the New York post-office objected to the general tenor and animus of the *Masses* as seditious without specifying any particular portion as objectionable, although the periodical offered to excerpt any matter so pointed out. *Masses* Pub. Co. v. Patten, 244 Fed. 535, 536, 543 (1917).

<sup>64</sup> Events leading up to these statutes are narrated in the standard histories and also in FRANCIS WHARTON, *STATE TRIALS OF THE UNITED STATES*, 23.

<sup>65</sup> Act of June 25, 1798, 1 STAT. AT L., 570; Act of July 14, 1798, 1 STAT. AT L., 596.

<sup>66</sup> For references to the Sedition Act in Jefferson's letters, see the edition of PAUL LEICESTER FORD, VII, 245: "The object of that, [the bill] is the suppression of the whig presses; VII, 246; VII, 266, on unconstitutionality; VII, 283, "The alien and sedition laws are working hard;" VII, 289, 311, 336, 350, 354, 355, 356, on popular opposition to the acts; VII, 367, 371, 483, on continuation of Sedition Law by Congress; VIII, 54, 56 ff., 308 ff., on unconstitutionality and pardons; IX, 456, on dismissal of prosecutions.



made punishable for their judicially supposed bad tendency, and the judges reduced the test of intent to a fiction by inferring the bad intent from this bad tendency.<sup>67</sup> Whether or not the Sedition Act was unconstitutional, and on that question Jefferson seems right, it surely defeated the fundamental policy of the First Amendment, the open discussion of public affairs. Like the British trials, the American sedition cases showed, as Professor Schofield demonstrates,<sup>68</sup> "the great danger . . . that men will be fined and imprisoned, under the guise of being punished for their bad motives or bad intent and ends, simply because the powers that be do not agree with their opinions, and spokesmen of minorities may be terrorized and silenced when they are most needed by the community and most useful to it, and when they stand most in need of the protection of the law against a hostile, arrogant majority." When the Democrats got into power, a common-law prosecution for seditious libel was brought in New York against a Federalist who had attacked Jefferson. Hamilton conducted the defense in the name of the liberty of the press.<sup>69</sup> This testimony from Jefferson and Hamilton, the leaders of both parties, leaves the Blackstonian interpretation of free speech in America without a leg to stand on. And the brief attempt of Congress and the Federalist judges to revive the crime of sedition had proved so disastrous that it was not repeated during the next century.

The lesson of the prosecutions for sedition in Great Britain and the United States during this revolutionary period, that the most essential element of free speech is the rejection of bad tendency as the test of a criminal utterance, was never more clearly recognized than in Jefferson's preamble to the Virginia Act for estab-

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<sup>67</sup> Schofield, 9 *PROC. AM. SOCIOLOGICAL SOC.* 86. The four reported prosecutions are in *WHARTON'S STATE TRIALS*, — Lyon, 333 (1798); Cooper, 659 (1800); Haswell, 684 (1800); Callender, 688 (1800).

<sup>68</sup> Schofield, *op. cit.*, 91, and 92, note.

<sup>69</sup> *People v. Crowell*, 3 Johns. Cas. 337 (1804). New York had then no constitutional guarantee of liberty of the press, but Hamilton urged that under that right at common law truth was a defense and the jury could decide on criminality. He defined liberty of the press as "The right to publish, with impunity, truth, with good motives, for justifiable ends though reflecting on government, magistracy, or individuals." See Schofield, *op. cit.*, 89 ff., for criticism of this definition as not in the common law and as too narrow a definition of the conception of free speech. However, it is embodied in many state constitutions and statutes. Two out of four judges agreed with Hamilton.

lishing Religious Freedom.<sup>70</sup> His words about religious liberty hold good of political and speculative freedom, and the portrayal of human life in every form of art.

"To suffer the civil Magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own;"

Although the free speech clauses were directed primarily against the sedition prosecutions of the immediate past, it must not be thought that they would permit unlimited previous restraint. They must also be interpreted in the light of more remote history. The framers of those clauses did not invent the conception of freedom of speech as a result of their own experience of the last few years. The idea had been gradually molded in men's minds by centuries of conflict. It was the product of a people of whom the framers were merely the mouthpiece. Its significance was not fixed by their personality, but was the endless expression of a civilization.<sup>71</sup> It was formed out of past resentment against the royal control of the press under the Tudors, against the Star Chamber and the pillory, against the Parliamentary censorship which Milton condemned in his "Areopagitica," by recollections of heavy newspaper taxation, by hatred of the suppression of thought which went on vigorously on the Continent during the eighteenth century. Blackstone's views also had undoubted influence to bar out previous restraint. The censor is the most dangerous of all the enemies of liberty of the press, and cannot exist in this country unless made necessary by extraordinary perils.

Moreover, the meaning of the First Amendment did not crystallize in 1791. The framers would probably have been horrified at the thought of protecting books by Darwin or Bernard Shaw, but

<sup>70</sup> Act of December 26, 1785, 12 HENING'S STATUTES AT LARGE OF VIRGINIA (1823), c. 34, page 84. 1 REVISED CODE OF VIRGINIA (1803), c. 20, page 29.

Another excellent argument against the punishment of tendencies is found in PHILIP FURNEAUX, LETTERS TO BLACKSTONE, 2 ed., 60-63, London, 1771; quoted in STATE v. CHANDLER, 2 HARR. (Del.) 553, 576 (1837), and in part by Schofield, *op. cit.*, 77.

<sup>71</sup> 1 KOHLER, LEHRBUCH DES BÜRGERLICHEN RECHTS, § 38.

"liberty of speech" is no more confined to the speech they thought permissible than "commerce" in another clause is limited to the sailing vessels and horse-drawn vehicles of 1787. Into the making of the constitutional conception of free speech have gone, not only men's bitter experience of the censorship and sedition prosecutions before 1791, but also the subsequent development of the law of fair comment in civil defamation,<sup>72</sup> and the philosophical speculations of John Stuart Mill. Justice Holmes phrases the thought with even more than his habitual felicity.<sup>73</sup> "The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil."

It is now clear that the First Amendment fixes limits upon the power of Congress to restrict speech either by a censorship or by a criminal statute, and if the Espionage Act exceeds those limits it is unconstitutional. It is sometimes argued that the Constitution gives Congress the power to declare war, raise armies, and support a navy, that one provision of the Constitution cannot be used to break down another provision, and consequently freedom of speech cannot be invoked to break down the war power.<sup>74</sup> I would reply that the First Amendment is just as much a part of the Constitution as the war clauses, and that it is equally accurate to say that the war clauses cannot be invoked to break down freedom of speech. The truth is that all provisions of the Constitution must be construed together so as to limit each other. In war as in peace, this process of mutual adjustment must include the Bill of Rights. There are those who believe that the Bill of Rights can be set aside in war time at the uncontrolled will of the government.<sup>75</sup> The first ten amendments were drafted by men who had just been through a war. Two of these amendments expressly apply in war.<sup>76</sup> A majority of the Supreme Court declared the war power of Congress to

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<sup>72</sup> Schofield, *op. cit.*, is valuable on the relation of fair comment to free speech. See also Van Vechten Veeder, "Freedom of Public Discussion," 23 HARV. L. REV. 413 (1910).

<sup>73</sup> *Gompers v. United States*, 233 U. S. 604, 610 (1914).

<sup>74</sup> *United States v. Marie Equi*, BULL. DEPT. JUST., No. 172, 21 (Ore., 1918), Bean, J.

<sup>75</sup> Henry J. Fletcher, "The Civilian and the War Power," 2 MINN. L. REV. 110, expresses this view. See also Ambrose Tighe, "The Legal Theory of the Minnesota 'Safety Commission' Act," 3 MINN. L. REV. 1.

<sup>76</sup> Amendments III and V.

be restricted by the Bill of Rights in *Ex parte Milligan*,<sup>77</sup> which cannot be lightly brushed aside, whether or not the majority went too far in thinking that the Fifth Amendment would have prevented Congress from exercising the war power under the particular circumstances of that case. If the First Amendment is to mean anything, it must restrict powers which are expressly granted by the Constitution to Congress, since Congress has no other powers.<sup>78</sup> It must apply to those activities of government which are most liable to interfere with free discussion, namely, the postal service and the conduct of war.

The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion, for, as Bagehot<sup>79</sup> points out, once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage in the contest. Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggres-

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<sup>77</sup> 4 Wall. (U. S.) 2 (1866). The judges all agreed that Congress had not authorized the trial of the petitioner by a military tribunal. The majority, per Davis, J., took the ground that the government cannot have recourse to extraordinary procedure until there are extraordinary conditions to justify it and that under the Bill of Rights the decision of Congress that such procedure is necessary can be reviewed by the courts. The minority, per Chase, C. J., declared that Congress is sole judge of the expediency of military measures in war time, and that the war power is not abridged by any Amendment. The majority view on this matter may be accepted by one who questions their opinion that military tribunals are never justified outside the theater of active military operations in a place where the civil courts are open. It may be that military tribunals are necessary where the machinery of the civil courts cannot adequately meet the situation (3 MINN. L. REV. 9), but the civil courts must eventually decide whether their machinery was adequate or not. Otherwise, in any war, no matter how small or how distant, Congress could put the whole country under military dictatorship.

<sup>78</sup> UNITED STATES CONSTITUTION, Art. I, § 1. "All legislative powers herein granted shall be vested in a Congress." Amendment X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

"This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent." Marshall, C. J., in *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 405 (1819). See also Taney, C. J., in *Ex parte Merryman*, Taney, 246, 260 (1861), and Brewer, J., in *Kansas v. Colorado*, 206 U. S. 46, 81 (1907).

<sup>79</sup> "The Metaphysics of Toleration," in his LITERARY ESSAYS, Silver Library edition, II, 208 (Longmans).

sion. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale. The First Amendment gives binding force to this principle of political wisdom.<sup>80</sup>

Or to put the matter another way, it is useless to define free speech by talk about rights. The agitator asserts his constitutional right to speak, the government asserts its constitutional right to wage war. The result is a deadlock. Each side takes the position of the man who was arrested for swinging his arms and hitting another in the nose, and asked the judge if he did not have a right to swing his arms in a free country. "Your right to swing your arms ends just where the other man's nose begins." To find the boundary line of any right, we must get behind rules of law to human facts. In our problem, we must regard the desires and needs of the individual human being who wants to speak and those of the great group of human beings among whom he speaks. That is, in technical language, there are individual interests and social interests, which must be balanced against each other, if they conflict, in order to determine which interest shall be sacrificed under the circumstances and which shall be protected and become the foundation of a legal right.<sup>81</sup> It must never be forgotten that the balancing cannot be properly done unless all the interests involved are adequately ascertained, and the great evil of all this talk about rights is that each side is so busy denying the other's claim to rights that it entirely overlooks the human desires and needs behind that claim.

The rights and powers of the Constitution, aside from the portions which create the machinery of the federal system, are largely means of protecting important individual and social interests, and because of this necessity of balancing such interests the clauses cannot be construed with absolute literalness. The Fourteenth Amendment and the obligation of contracts clause, maintaining important individual interests, are modified by the police power of the states, which protects health and other social interests. The Thirteenth Amendment is subject to many implied exceptions, so that tem-

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<sup>80</sup> This paragraph and a portion of the preceding have already been printed in 17 *NEW REPUBLIC*, 67.

<sup>81</sup> This distinction between rights and interests clarifies almost any constitutional controversy. The distinction originated with Von Ihering. For a presentation of it in English, see JOHN CHIPMAN GRAY, *NATURE AND SOURCES OF THE LAW*, § 48 ff.

porary involuntary servitude is permitted to secure social interests in the construction of roads,<sup>82</sup> the prevention of vagrancy, the training of the militia or national army. It is common to rest these implied exceptions to the Bill of Rights upon the ground that they existed in 1791 and long before,<sup>83</sup> but a less arbitrary explanation is desirable. It seems better to say that long usage does not create an exception, but demonstrates the importance of the social interest behind the exception.<sup>84</sup>

The First Amendment protects two kinds of interests in free speech.<sup>85</sup> There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way. This social interest is especially important in war time. Even after war has been declared there is bound to be a confused mixture of good and bad arguments in its support, and a wide difference of opinion as to its objects. Truth can be sifted out from falsehood only if the government is vigorously and constantly cross-examined, so that the fundamental issues of the struggle may be clearly defined, and the war may not be diverted to improper ends, or conducted with an undue sacrifice of life and liberty, or prolonged after its just purposes are accomplished. Legal proceedings prove that an opponent makes the best cross-examiner. Consequently it is a disastrous mistake to limit criticism to those who favor the war.<sup>86</sup> Men bitterly hostile to it may point

<sup>82</sup> *Butler v. Perry*, 240 U. S. 328 (1916).

<sup>83</sup> *Robertson v. Baldwin*, 165 U. S. 275, 281 (1897).

<sup>84</sup> Not everything old is good. Thus the antiquity of peonage does not constitute it an exception to the Thirteenth Amendment; it is not now demanded by any strong social interest. *Bailey v. Alabama*, 219 U. S. 219 (1911). It is significant that the social interest in shipping which formerly required the compulsory labor of articulated sailors (*Robertson v. Baldwin*, *supra*) is no longer recognized in the United States as sufficiently important to outweigh the individual interest in free locomotion and choice of occupation. Even treaties providing for the apprehension in our ports of deserting foreign seamen have been abrogated by the LaFollette Seamen's Act, Act of March 4, 1915, c. 153, § 16, 38 STAT. AT L. 1184; U. S. COMP. STAT., 1918, § 8382 a. For the old social interest in the regulation of laborers' wages, now abrogated by the New York Constitution, see *Saratoga Gas*, 191 N. Y. 123, 141, 83 N. E. 693 (1908). That the Bill of Rights does not crystallize antiquity, *Hurtado v. California*, 110 U. S. 516 (1884).

<sup>85</sup> See Roscoe Pound, "Interests of Personality," 28 HARV. L. REV. 445, 453-56.

<sup>86</sup> Judge Van Valkenburgh told the jury that it must be so limited in *United States v. Rose Pastor Stokes*, BULL. DEPT. JUST., 106, 14 (W. D. Mo., 1917). See page 956, *infra*.

out evils in its management like the secret treaties, which its supporters have been too busy to unearth. The history of the last five years shows how the objects of a war may change completely during its progress, and it is well that those objects should be steadily reformulated under the influence of open discussion not only by those who demand a military victory but by pacifists who take a different view of the national welfare. Further argument for the existence of this social interest becomes unnecessary if we recall the national value of the opposition in former wars.

The great trouble with most judicial construction of the Espionage Act is that this social interest has been ignored and free speech has been regarded as merely an individual interest, which must readily give way like other personal desires the moment it interferes with the social interest in national safety. The judge who has done most to bring social interests into legal thinking said years ago, "I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate and often unconscious."<sup>87</sup> The failure of the courts in the past to formulate any principle for drawing a boundary line around the right of free speech has not only thrown the judges into the difficult questions of the Espionage Act without any well-considered standard of criminality, but has allowed some of them to impose standards of their own and fix the line at a point which makes all opposition to this or any future war impossible. For example:

"No man should be permitted, by deliberate act, or even unthinkingly, to do that which will in any way detract from the efforts which the United States is putting forth or serve to postpone for a single moment the early coming of the day when the success of our arms shall be a fact."<sup>88</sup>

The true boundary line of the First Amendment can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing

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<sup>87</sup> Oliver Wendell Holmes, "The Path of the Law," 10 HARV. L. REV. 457, 467.

<sup>88</sup> United States v. "The Spirit of '76," BULL. DEPT. JUST., No. 33, 2 (S. D. Cal., 1917), Bledsoe, J. Another good example is United States v. Schoberg, BULL. DEPT. JUST., No. 149 (E. D. Ky., 1918), Cochran, J.

against each other of two very important social interests, in public safety and in the search for truth. Every reasonable attempt should be made to maintain both interests unimpaired, and the great interest in free speech should be sacrificed only when the interest in public safety is really imperiled, and not, as most men believe, when it is barely conceivable that it may be slightly affected. In war time, therefore, speech should be unrestricted by the censorship or by punishment, unless it is clearly liable to cause direct and dangerous interference with the conduct of the war.

Thus our problem of locating the boundary line of free speech is solved. It is fixed close to the point where words will give rise to unlawful acts. We cannot define the right of free speech with the precision of the Rule against Perpetuities or the Rule in Shelley's Case, because it involves national policies which are much more flexible than private property, but we can establish a workable principle of classification in this method of balancing and this broad test of certain danger. There is a similar balancing in the determination of what is "due process of law." And we can with certitude declare that the First Amendment forbids the punishment of words merely for their injurious tendencies. The history of the Amendment and the political function of free speech corroborate each other and make this conclusion plain.

The Espionage Act of 1917 seems on its face constitutional under this interpretation of the First Amendment, but it may have been construed so extremely as to violate the Amendment. Furthermore, freedom of speech is not only a limit on Congressional power, but a policy to be observed by the courts in applying constitutional statutes to utterance. The scope of that policy is determined by this same method of balancing social interests. The boundary line of punishable speech under this Act was consequently fixed where words come close to injurious conduct by the judge who has given the fullest attention to the meaning of free speech during the war, — Judge Learned Hand, of the Southern District of New York.

In *Masses Publishing Co. v. Patten*<sup>89</sup> Judge Hand was asked to enjoin the postmaster of New York from excluding from the mails *The Masses*, a monthly revolutionary journal, which contained several articles, poems, and cartoons attacking the war. The

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<sup>89</sup> 244 Fed. 535 (S. D. N. Y., 1917).



Espionage Act of 1917<sup>90</sup> made non-mailable any publication which violated the criminal provisions of that act,<sup>91</sup> already summarized in this article.<sup>92</sup> One important issue was, therefore, whether the postmaster was right in finding such a violation. The case did not raise the constitutional question whether Congress could make criminal any matter which tended to discourage the successful prosecution of the war, but involved only the construction of the statute, whether Congress had as yet gone so far. Judge Hand held that it had not and granted the injunction. He refused to turn the original Act, which obviously dealt only with interference with the conduct of military affairs,<sup>93</sup> into a prohibition of all kinds of propaganda and a means for suppressing all hostile criticism and all opinion except that which encouraged and supported the existing policies of the war, or fell within the range of temperate argument. As Cooley pointed out long ago, you cannot limit free speech to polite criticism, because the greater a grievance the more likely men are to get excited about it, and the more urgent the need of hearing what they have to say.<sup>94</sup> The normal test for the suppression of speech in a democratic government, Judge Hand insists, is neither the justice of its substance nor the decency and propriety of its temper, but the strong danger that it will cause injurious acts.

<sup>90</sup> Act of June 15, 1917, c. 30, Title XII, § 2, 40 STAT. AT L. 230, U. S. COMP. STAT., 1918, § 10401 a.

<sup>91</sup> Act of June 15, 1917, c. 30, Title I, § 3, 40 STAT. AT L. 219, U. S. COMP. STAT., 1917, § 10212 c: "Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both."

<sup>92</sup> Page 935, *supra*.

<sup>93</sup> *Masses Publishing Co. v. Patten*, *supra*, 539. The plain fact that the original Espionage Act is a military statute and not a sedition statute is also recognized by *United States v. Fontana*, BULL. DEPT. JUST., No. 148 (N. D. 1917), Amidon, J.; *United States v. Wishek*, BULL. DEPT. JUST., No. 153 (N. D., 1917), Amidon, J.; *United States v. Henning*, BULL. DEPT. JUST., No. 184 (Wis., 1917), Geiger, D. J.; and implied by other cases. The large number of cases which ignore the clear meaning of the statute is astounding in view of the rule that criminal statutes must be construed strictly.

<sup>94</sup> COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 613.

The Espionage Act should not be construed to reverse this national policy of liberty of the press and silence hostile criticism, unless Congress has given the clearest expression of such an intention in the statute.

Judge Hand places outside the limits of free speech one who counsels or advises others to violate existing laws. It is true, he says, that any discussion designed to show that existing laws are mistaken in means or unjust in policy may result in their violation,<sup>96</sup> but if one stops short of urging upon others that it is their duty or their interest to resist the law, he should not be held to have attempted to cause illegal conduct. If this is not the test, the 1917 Act punishes every political agitation which can be shown to be apt to create a seditious temper. The language of the statute proves that Congress had no such revolutionary purpose in view.

There is no finer judicial statement of the right of free speech than these words of Judge Hand:

"Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom."<sup>96</sup>

Look at the Espionage Act of 1917<sup>97</sup> with a post-armistice mind, and it is clear that Judge Hand was right. There is not a word in it to make criminal the expression of pacifist or pro-German opinions. It punishes false statements and reports — necessarily limited to statements of fact — but beyond that does not contain even a provision against the use of language. Clauses (2) and (3) punish successful interference with military affairs and attempts to interfere, which would probably include incitement.<sup>98</sup> The tests

<sup>96</sup> He expresses this idea both in *Masses Publishing Co. v. Patten*, *supra*, and in *United States v. Scott Nearing*, 252 Fed. 223, BULL. DEPT. JUST., No. 129 (S. D. N. Y., 1918).

<sup>97</sup> *Masses Pub. Co. v. Patten*, 244 Fed. 535, 540 (1917).

<sup>98</sup> See note 91, *supra*, for text of the act.

<sup>99</sup> Attempts do not ordinarily include solicitation, see Beale, *infra*, 16 HARV. L.

of criminal attempt and incitement are well settled.<sup>99</sup> The first requirement is the intention to bring about the overt criminal act. But the law does not punish bad intention alone, or even everything done with a bad intention. A statute against murder will not be construed to apply to discharging a gun with the intention to kill a man forty miles away.<sup>100</sup> Attempts and incitement to be punishable must come dangerously near success. A speaker is guilty of solicitation or incitement to a crime only if he would have been indictable for the crime itself, had it been committed, either as accessory or principal.<sup>101</sup> Consequently, no one should have been held under clauses (2) and (3) of the Espionage Act of 1917 who did not satisfy these tests of criminal attempt and incitement. As Justice Holmes said in *Commonwealth v. Peaslee*,<sup>102</sup> "It is a question of degree." We can suppose a series of opinions, ranging from "This is an unwise war" up to "You ought to refuse to go, no matter what they do to you," or an audience varying from an old women's home to a group of drafted men just starting for a training-camp. Somewhere in such a range of circumstances is the point where direct causation begins and speech becomes punishable as incitement under the ordinary standards of statutory construction and the ordinary policy of free speech, which Judge Hand applied. Congress could push the test of criminality back beyond this point, although eventually it would reach the extreme limit fixed by the First Amendment, beyond which words cannot be restricted for their remote tendency to hinder the war. In other words, the ordinary tests punish agitation just before it begins to boil over; Congress could change those tests and punish it when it gets really hot, but it is unconstitutional to interfere when it is merely warm. And there is not a word in the 1917 Espionage Act to show that Congress did change the ordinary tests or make any speech criminal except false statements and incitement to overt acts. Every word used, "cause,"

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REV. 491, 506, note 1; but attempts to commit offences under the 1917 Espionage Act would naturally be by incitement.

<sup>99</sup> Joseph H. Beale, "Criminal Attempts," 16 HARV. L. REV. 491; *Commonwealth v. Peaslee*, 177 Mass. 267, 59 N. E. 55 (1901), Holmes, C. J.; *United States v. Stephens* 12 Fed. 52 (Ore. 1882), Deady, D. J. See also 32 HARV. L. REV. 417.

<sup>100</sup> *United States v. Stephens*, *supra*, illustrates the same principle.

<sup>101</sup> See Beale, *supra*, 16 HARV. L. REV. 491, 505. Under the federal statutes he would be a principal. REV. STAT. §§ 5323, 5427, March 4, 1909, c. 321 § 332; 35 STAT. AT L. 1152; U. S. COMP. STAT. 1918, § 10506 (Crim. Code, § 332).

<sup>102</sup> 177 Mass. 267, 272, 59 N. E. 55 (1901).

"attempt," "obstruct," clearly involves proximate causation. Finally, this is a penal statute and ought to be construed strictly. Attorney General Gregory's charge that judges like Learned Hand "took the teeth" out of the 1917 Act<sup>103</sup> is absurd, for the teeth the government wanted were never there until other judges in an excess of patriotism put in false ones.

Nevertheless, Judge Hand was reversed,<sup>104</sup> largely on a point of administrative law,<sup>105</sup> but the Circuit Court of Appeals thought it desirable to reject his construction of the Espionage Act and substitute the view that speech is punishable under the Act "if the natural and reasonable effect of what is said is to encourage resistance to law, and the words are used in an endeavor to persuade to resistance."<sup>106</sup> It is possible that the Court of Appeals did not intend to lay down a very different principle from Judge Hand, but chiefly wished to insist that in determining whether there is incitement one must look not only at the words themselves but also at the surrounding circumstances which may have given the words a special meaning to their hearers. Mark Antony's funeral oration, for instance, counselled violence while it expressly discountenanced it.<sup>107</sup> However, the undoubted effect of the final decision in *Masses v. Patten* was to establish the old-time doctrine of indirect causation in the minds of district judges throughout the country. By its rejection of the common-law test of incitement,<sup>108</sup> it deprived us of the only standard of criminal speech there was, since there had been no well-considered discussion of the meaning of free speech in the First Amendment. It allowed conviction for words which had an indirect effect to discourage recruiting, if the intention to discourage existed,<sup>109</sup> and this requirement of intention became a mere form since it could

<sup>103</sup> See page 936, *supra*.

<sup>104</sup> *Masses Pub. Co. v. Patten*, 245 Fed. 102 (C. C. A. 2d, 1917), Hough, J., stayed the injunction; *ibid.*, 246 Fed. 24 (C. C. A. 2d, 1917), Ward, Rogers, and Mayer, JJ., reversed the order granting the injunction.

<sup>105</sup> That the postmaster's decision must stand unless clearly wrong. See for authorities against this proposition, 32 HARV. L. REV. 417, 420.

<sup>106</sup> *Masses v. Patten*, 246 Fed. 24, 38, Rogers, J.

<sup>107</sup> See the review of *Masses v. Patten* by Learned Hand, J., in *United States v. Nearing*, 252 Fed. 223, 227 (S. D. N. Y., 1918).

<sup>108</sup> *Ibid.* Judge Rogers may not have realized he was rejecting it (246 Fed. 38), but the test of common-law incitement has never been applied to the Act by a District Judge since.

<sup>109</sup> *Masses Pub. Co. v. Patten*, 246 Fed. 24, 39 (1917), Ward, J.

be inferred from the existence of the indirect effect.<sup>110</sup> A few judges, notably Amidon of North Dakota,<sup>111</sup> have stemmed the tide, but of most Espionage Act decisions what Schofield and Stephen and Jefferson said about the prosecutions under George III and the Sedition Act of 1798 can be said once more, that men have been punished without overt acts, with only a presumed intention to cause overt acts, merely for the utterance of words which judge and jury thought to have a tendency to injure the state. Judge Rogers was right in saying<sup>112</sup> that the words of the Espionage Act of 1917 bear slight resemblance to the Sedition Law of 1798, but the judicial construction is much the same, except that under the Sedition Law truth was a defense.

The revival of the doctrines of indirect causation and constructive intent always puts an end to genuine discussion of public matters. It is unnecessary to review the Espionage Act decisions in detail,<sup>113</sup> but a few general results may be presented here. The courts have treated opinions as statements of fact and then condemned them as false because they differed from the President's speech or the resolution of Congress declaring war. They have made it impossible for an opponent of the war to write an article or even a letter in a newspaper of general circulation because it will be read in some training camp where it might cause insubordination or interfere with military success. He cannot address a large audience because it is liable to include a few men in uniform; and some judges have held him punishable if it contains men between eighteen and forty-five; while Judge Van Valkenburgh, in *United States v. Rose Pastor Stokes*,<sup>114</sup> would not even require that, because what is said to mothers, sisters, and sweethearts may lessen their enthusiasm for the war, and "our armies in the field and our navies upon the seas can operate and succeed only so far as they are supported and maintained by the folks at home." The doctrine of indirect causation never had

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<sup>110</sup> *Masses Pub. Co. v. Patten*, 246 Fed. 24, 39 (1917), Roger, J.: "The court does not hesitate to say that, considering the natural and reasonable effect of the publication, it was intended willfully to obstruct recruiting."

<sup>111</sup> See in particular his discussion of "stirring up class against class," in *United States v. Brinton*, BULL. DEPT. JUST. No. 132 (N. D., 1917).

<sup>112</sup> *Masses Pub. Co. v. Patten*, 246 Fed. 24, 29 (1917).

<sup>113</sup> Detailed comment will be found in WALTER NELLES, *ESPIONAGE ACT CASES*, and in 32 HARV. L. REV. 417.

<sup>114</sup> BULL. DEPT. JUST., No. 106, p. 4 (W. D. Mo., 1917).

better illustration than in his charge. Furthermore, although Mrs. Stokes was indicted only for writing a letter, the judge admitted her speeches to show her intent, and then denounced the opinions expressed in those speeches in the strongest language <sup>115</sup> to the jury as destructive of the nation's welfare, so that she may very well have been convicted for the speeches and not for the letter. His decision makes it practically impossible to discuss profiteering, because of "the possible, if not probable effect" <sup>116</sup> on our troops, while a recent case in the Second Circuit <sup>117</sup> makes it equally perilous to urge a wider exemption for conscientious objectors because this tends to encourage more such objectors, a close parallel to the English imprisonment of Bertrand Russell.<sup>118</sup> Many men have been imprisoned for arguments or profanity used in the heat of private altercation, and even unexpressed thoughts have been prosecuted through an ingenious method of inquisition.<sup>119</sup> And although we are not at war with Russia, three men who opposed our intervention and compared our troops to the Hessians were condemned by Judge Clayton to imprisonment for twenty years. Judge Van Valkenburgh summed up the facts with appalling correctness in view of the long sentences imposed under the Espionage Act, when he said that freedom of speech means the protection of "criticism which is made friendly to the government, friendly to the war, friendly to the policies of the government."<sup>120</sup>

The United States Supreme Court did not have an opportunity to consider the Espionage Act until 1919, after the armistice was

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<sup>115</sup> BULL. DEPT. JUST., No. 106, p. 4 (W. D. Mo. 1917), *passim*, making use of Mrs. Stokes' declared sympathy with the Russian Revolution, an offense not punishable even under the 1917 Espionage Act, to show how dangerous it was for her to talk about profiteers. His vigorous denunciation of that Revolution, totally unconnected with the indictment, recalls Lord Kenyon's similar use of the massacres of the French Revolution in *Rex v. Cuthell*, 27 How. ST. TR. 642, 674 (1799). Utterances not covered by the indictment were also admitted in *Doe v. United States*, 253 Fed. 903 (C. C. A. 8th, 1918).

<sup>116</sup> *United States v. Rose Pastor Stokes*, *supra*, p. 8.

<sup>117</sup> *Fraina v. United States*, 255 Fed. 28 (C. C. A. 2d, 1918).

<sup>118</sup> *Rex v. Bertrand Russell*, LITTELL'S LIVING AGE, Feb. 15, 1919, p. 385.

<sup>119</sup> *United States v. Pape*, 253 Fed. 270 (1918). A German-American who had not subscribed to Liberty bonds was visited in his house by a committee who asked his reasons and received a courteous reply that he did not wish either side to win the war and could not conscientiously give it his aid. He was thereupon arrested and held in confinement until released by a district court.

<sup>120</sup> *United States v. Rose Pastor Stokes*, *supra*, p. 14. At least twelve persons have been sentenced for ten years, five for fifteen years, and twenty-one for twenty years.

signed and almost all the District Court cases had been tried. Several appeals from conviction had resulted in a confession of error by the government,<sup>121</sup> but at last four cases were heard and decided against the accused. Of these three were clear cases of incitement to resist the draft,<sup>122</sup> so that no real question of free speech arose. Nevertheless the defense of constitutionality was raised, and denied by Justice Holmes. His fullest discussion is in *Schenck v. United States*:<sup>123</sup>

"We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . *The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.* It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."

This portion of the opinion, especially the italicized sentence, substantially agrees with the conclusion reached by Judge Hand, by Schofield, and by investigation of the history and political purpose of the First Amendment. It is unfortunate that "the substantive evils" are not more specifically defined, but if they mean overt acts of interference with the war, then Justice Holmes draws the boundary line very close to the test of incitement at common law and clearly makes the punishment of words for their bad tendency impossible. Moreover, the close relation between free speech and criminal attempts is recognized by the use of a phrase employed by the Justice in an attempt case, *Commonwealth v. Peaslee*.<sup>124</sup>

If the Supreme Court had applied this same standard of "clear and present danger" to the utterances of Eugene V. Debs, in the remaining decision,<sup>125</sup> it is hard to see how he could have been held

<sup>121</sup> 32 HARV. L. REV. 420, note 22.

<sup>122</sup> *Sugarman v. United States*, 249 U. S. 130, 39 Sup. Ct. Rep. 191 (1919); *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. Rep. 247 (1919); *Frohwerk v. United States*, 249 U. S. 204, 39 Sup. Ct. Rep. 249 (1919).

<sup>123</sup> 249 U. S. 47, 39 Sup. Ct. Rep. 247, 249. The italics are mine.

<sup>124</sup> 177 Mass. 267, 272, 59 N. E. 55 (1901). See 963, *supra*.

<sup>125</sup> *Debs v. United States*, 39 Sup. Ct. Rep. 252 (1919).

guilty. The test is not mentioned, however, but Justice Holmes is willing to accept the verdict as proof that actual interference with the war was intended and was the proximate effect of the words used. The point is that Judge Westenhaver did not instruct the jury according to the Supreme Court test at all, but allowed Debs to be found guilty, in Justice Holmes's words, because of the "natural tendency and reasonably probable effect" of his speech,<sup>126</sup> and gave a fairly wide scope to the doctrines of indirect causation<sup>127</sup> and constructive intent,<sup>128</sup> so that the defendant could have been and probably was<sup>129</sup> convicted, merely because the jury thought his speech had a tendency to bring about resistance to the draft. If the Supreme Court test is to mean anything more than a passing observation, it must be used to upset convictions for words when the trial judge did not insist that they must create "a clear and present danger" of overt acts.

Justice Holmes seems to discuss the constitutionality of the Espionage Act of 1917 rather than its construction. There can be little doubt that it is constitutional under any test if construed naturally, but it has been interpreted in such a way as to violate the free speech clause and the plain words of the statute, to say nothing of the principle that criminal statutes should be construed strictly. If the Supreme Court test had been laid down in the summer of 1917 and followed in charges by the District Courts, the most casual perusal of the utterances prosecuted makes it sure that there would have been many more acquittals. Instead, bad tendency has been the test of criminality, a test which this article has endeavored to prove wholly inconsistent with freedom of speech, or any genuine discussion of public affairs.

Furthermore, it is regrettable that Justice Holmes did nothing to emphasize the social interest behind free speech, and show the need of balancing even in war time. The last sentence of the passage

<sup>126</sup> *Ibid.*, 249 U. S. 211, 39 Sup. Ct. Rep. 252, 254. The italics are mine.

<sup>127</sup> *United States v. Debs*, BULL. DEPT. JUST., No. 155 (N. D. Oh., 1918). See especially the last paragraphs on page 8.

<sup>128</sup> *Ibid.*, 15: "In deciding what the defendant's intention was, permit me to suggest to you these questions: Ought he not to have reasonably foreseen that the natural and probable consequences of such words and utterances would or *might* be to cause insubordination, etc.?"

<sup>129</sup> Ernst Freund, "The Debs Case and Freedom of Speech," 19 NEW REPUBLIC, 13 (May 3, 1919); and the correspondence in 19 *ibid.* 151 (May 31, 1919).



quoted from the Schenck case seems to mean that the Supreme Court will sanction any restriction of speech that has military force behind it, and reminds us that the Justice used to say when he was young, "that truth was the majority vote of that nation that could lick all others."<sup>120</sup> His liberalism seems held in abeyance by his belief in the relativity of values. It is not by giving way to force and the majority that truth has been won. Hard it may be for a court to protect those who oppose the cause for which men are dying in France, but others have died in the past for freedom of speech.

Inconclusive as the Supreme Court decisions are in many ways, there are three important facts about them. First, they lay down a good test for future free speech cases, "clear and present danger." Secondly, they involved three clear cases and one case close to the line. They do not justify the construction given the Act of 1917 in *United States v. Rose Pastor Stokes*. Finally, they do not touch the constitutionality of the Espionage Act of 1918. That Act came too late to be much discussed judicially in this war, but it applies in all future wars. It goes so far in punishing discussion for supposed bad tendencies without even recognizing truth as a defense that it is probably unconstitutional.<sup>121</sup>

<sup>120</sup> Oliver Wendell Holmes, "Natural Law," 32 HARV. L. REV. 40 (1918).

<sup>121</sup> For further consideration of the Act of 1918, see Z. Chafee, Jr., "Freedom of Speech," 17 NEW REPUBLIC, 66 (Nov. 16, 1918). Title I, § 3, as amended, reads as follows (Act of May 16, 1918, 40 STAT. AT L., 219, c. 75, § 1, U. S. COMP. STAT. 1918, § 10212 c):

"Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of his enemies, or shall willfully make or convey false reports or false statements, or say or do anything except by way of bona fide and *not disloyal* advice to an investor or investors, with intent to obstruct the sale by the United States of bonds or other securities of the United States or the making of loans by or to the United States; and whoever, when the United States is at war, shall willfully cause, or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States, and whoever, when the United States is at war, shall willfully utter, print, write, or publish any *disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States into contempt, scorn, contumely, or disrepute*, or shall willfully utter, print,

The federal government has restricted speech in two other ways besides punishment. It has excluded many publications from the mails. This is clearly previous restraint and might seem forbidden by the Blackstonian definition, which, however, is held not to apply to the postal power.<sup>132</sup> This power, like the war power, ought to be subject to the requirements of free speech and due process of law, and there are dicta of the Supreme Court that it is not unlimited.<sup>133</sup> Although the post-office may not be strictly a common carrier,<sup>134</sup> it is in the nature of a public service company. Its functions have been performed by private persons in the past, and probably would be shared by them now if it were not unlawful because of the greater speed possible.<sup>135</sup> According to the political theories of Leon Duguit,<sup>136</sup> the government in furnishing public service must be judged by ordinary standards of public callings. If the United States owned the railroads, it ought not to make unreasonable discrimination among passengers any more than a private railroad corporation, and a similar limitation should apply to the postal power. The congressional restrictions which have been upheld by the courts may be considered as reasonable regulations in view of the nature of the service. Even opposition to the government may be entitled to some consideration by the post-office as by the

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write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies, or shall willfully display the flag of any foreign enemy, or shall willfully by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in this country of any thing or things, product or products, necessary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, and whoever shall willfully advocate, teach, defend, or *suggest* the doing of any of the acts or things in this section enumerated, and whoever shall *by word or act support or favor the cause of any country, with which the United States is at war or by word or act oppose the cause of the United States therein*, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both."

The italicized words punish language for remote tendencies: Cf. the Sedition Act of 1798.

<sup>132</sup> *Masses Pub. Co. v. Patten*, 246 Fed. 24, 27 (1917), Rogers, J. The operation of our postal censorship is shown by William Hard's articles cited in note 1, *supra*.

<sup>133</sup> *Ex Parte Jackson*, 96 U. S. 727 (1877); *Public Clearing House v. Coyne*, 194 U. S. 497, 507 (1904).

<sup>134</sup> *Masses Pub. Co. v. Patten*, 245 Fed. 102, 106 (1917), Hough, J.

<sup>135</sup> Something like this happened when the Western Union Telegraph Co. recently tried to carry "night-letters" by messengers on trains.

<sup>136</sup> See H. J. Laski in 31 HARV. L. REV. 186; and his *AUTHORITY IN THE MODERN STATE*, p. 378.

judges, who frequently decide against the United States. It is clear that exclusion from the mails practically destroys the circulation of a book or periodical, and makes free speech to that extent impossible. To say, as many courts do, that the agitator is still at liberty to use the express or the telegraph,<sup>137</sup> recalls the remark of the Bourbon princess when the Paris mob shouted for bread, "Why don't they eat cake?"

Still another method of suppression of opinion has been used. Not only have we substantially revived the Sedition Act of 1798, but the Alien Act as well.<sup>138</sup> Aliens have been freely deported<sup>139</sup> under statutes passed during the war,<sup>140</sup> and even naturalized citizens or native American women marrying foreigners are within the reach of this power. A former German subject who was naturalized in 1882 refused in 1917 to contribute to the Red Cross and the Young Men's Christian Association because he would do nothing to injure the country where he was brought up and educated. His naturalization certificate was revoked after thirty-five years on the presumption that his recent conduct showed that he took the oath of renunciation in 1882 with a mental reservation as to the country of his birth. He may therefore be deported as an enemy alien.<sup>141</sup>

This completes the record of the restriction of speech in the United States during the late war, except for several decisions in the state courts which need not be discussed in detail.<sup>142</sup> Although we have not gone so far as Great Britain<sup>143</sup> in disregarding con-

<sup>137</sup> This alternative is even less valuable when the government controls the express and the telegraph. The NEW YORK WORLD was recently denied the opportunity to use the telegraph to distribute a criticism of Mr. Burleson. COLLIER'S WEEKLY, May 17, 1919, p. 16.

<sup>138</sup> See 952, *supra*.

<sup>139</sup> CHARLES RECHT, AMERICAN DEPORTATION AND EXCLUSION LAWS, Boston, League for Democratic Control, 1919.

<sup>140</sup> Act of Feb. 5, 1917, 39 STAT. AT L. c. 29, § 19, p. 889; U. S. COMP. STAT. 1918, § 4289¼ *jj*; Act of Oct. 16, 1918, c. 186.

<sup>141</sup> United States v. Wusterbarth, 249 Fed. 908 (N. J., 1918), Haight, J.; see also United States v. Darmer, 249 Fed. 989 (W. D. Wash., 1918), Cushman, J.

<sup>142</sup> *State Espionage Acts*: State v. Holm, 166 N. W. 181 (Minn., 1918); State v. Spartz, 167 N. W. 547 (Minn., 1918); State v. Tachin, 106 Atl. 145 (N. J., 1919). *Municipal Ordinance regulating newspapers invalid*: Star v. Brush, 170 N. Y. Supp. 987 (1918); 172 N. Y. Supp. 851 (1918). *Libel in war controversy*: Van Lonkhuyzen v. Daily News, 195 Mich. 283, 161 N. W. 979 (1917), 170 N. W. 93 (1918). *Expulsion of college student for pacifism*: not reviewed, Samson v. Columbia, 101 N. Y. Misc. 146, 167 N. Y. Supp. 202 (1917).

<sup>143</sup> The Defence of the Realm Consolidation Act, 1914, 5 GEO. 5, c. 8, § 1, gives His

stitutional guarantees, we have gone much farther than in any other war, even in the Civil War with the enemy at our gates.<sup>144</sup> Undoubtedly some utterances had to be suppressed. We have passed through a period of danger, and have reasonably supposed the danger to be greater than it actually was, but the prosecutions in Great Britain during a similar period of peril in the French Revolution have not since been regarded with pride. Action in proportion to the emergency was justified, but we have censored and punished speech which was very far from direct and dangerous interference with the conduct of the war. The chief responsibility for this must rest, not upon Congress which was content for a long period with the moderate language of the Espionage Act of 1917, but upon the officials of the Department of Justice and the Post-office, who turned that statute into a drag-net for pacifists, and upon the judges who upheld and approved this distortion of law. It may be questioned, too, how much has actually been gained. Men have been imprisoned, but their words have not ceased to spread.<sup>145</sup> The poetry in the Masses was excluded from the mails only to be given a far wider circulation in two issues of the *Federal Reporter*. The mere publication of Mrs. Stokes' statement in the *Kansas City Star*, "I am for the people and the Government is for the profiteers,"

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Majesty in Council power "to issue regulations." A very wide scope is given to this power by the House of Lords in *Rex v. Halliday*, [1917] A. C. 260, Lord Shaw of Dunfermline dissenting. See 31 HARV. L. REV. 296. Regulation 27 of the Orders in Council makes various forms of speech, writing, etc., offenses. Regulation 51 A provides for the seizure of publications on warrant, and Regulation 56 (13) for the punishment of press offenses. See Pulling, *Defense of the Realm Manual*, revised monthly. These regulations have been construed in *Norman v. Mathews*, 32 T. L. R. 303, 369 (1915); *Fox v. Spicer*, 33 T. L. R. 172 (1917); *Rex v. Bertrand Russell*, *supra*, note 128. The practical effect has been to establish an administrative censorship. H. J. LASKI, *AUTHORITY IN THE MODERN STATE*, 101.

<sup>144</sup> J. F. RHODES, *HISTORY OF THE UNITED STATES*, III, 553, IV, 245-253, 267 note, 467, 473, VI, 78, 96. For Lincoln's refusal to allow General Burnside and his subordinates to suppress the *Chicago Times* and other newspapers of Copperhead tendencies in Illinois, Indiana, and Ohio, see also *Official Record of the Rebellion*, Series II, Vol. V, 723, 741; Series III, Vol. III, 252.

The case of *Ex parte Vallandigham*, 1 Wall. (U. S.) 243 (1863), is sometimes supposed to support the unlimited exercise of the war power to restrict speech. See Ambrose Tighe in 3 MINN. L. REV. 1 (1918). The decision merely holds that the writ of *certiorari* does not lie to a military tribunal. Nothing is said as to the existence of some other remedy such as *habeas corpus*, or an action for false imprisonment. *Ex parte Vallandigham*, 28 Fed. Cas. 874 (1863), lends support to Mr. Tighe. The treatment of Vallandigham is considered illegal by Rhodes, *op. cit.*, IV, 245-52.

<sup>145</sup> Cf. a similar experience of the Emperor Tiberius, TACITUS, *ANNALS*, IV, c. 35.

was considered so dangerous to the morale of the training camps that she was sentenced to ten years in prison, and yet it was repeated by every important newspaper in the country during the trial. There is an unconscious irony in all suppression. It lurks behind Judge Hough's comparison of the Masses to the Beatitudes,<sup>146</sup> and in the words of Lord Justice Scrutton during this struggle against autocracy: "It had been said that a war could not be conducted on the principles of the Sermon on the Mount. It might also be said that a war could not be conducted on the principles of Magna Charta."<sup>147</sup>

Those who gave their lives for freedom would be the last to thank us for throwing aside so lightly the great traditions of our race. Not satisfied to have justice and almost all the people with our cause, we insisted on an artificial unanimity of opinion behind the war. Keen intellectual grasp of the President's aims by the nation at large was very difficult when the opponents of his idealism ranged unchecked while the men who urged greater idealism went to prison. In our efforts to silence those who advocated peace without victory we prevented at the very start that vigorous threshing out of fundamentals which might to-day have saved us from a victory without peace.

*Zechariah Chafee, Jr.*

CAMBRIDGE, MASS.

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<sup>146</sup> *Masses* Pub. Co. v. Patten, 245 Fed. 102, 106 (C. C. A. 2d, 1917).

<sup>147</sup> *Ronnfeldt v. Phillips*, 35 T. L. R. 46 (1918, C. A.).

# HARVARD LAW REVIEW

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Published monthly, during the Academic Year, by Harvard Law Students

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SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 25 CENTS PER NUMBER

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WILLIAM CHENEY BROWN, 1st Lieutenant, Quartermaster Corps, died of pneumonia, in the city of Washington, January 19, 1919. He was then on duty in charge of the Admiralty Section of the Embarkation Service, in the office of the Quartermaster General.

Brown was a graduate of Harvard College of the Class of 1914, and of the Law School of the Class of 1917. During his last two years at the law school he was an Editor of this REVIEW, and during his last year its treasurer. He left the Law School in the spring of 1917 as soon as the REVIEW could spare him, and attended the first Officers' Training Camp at Fort Myer, Va. He was there commissioned in the Quartermaster Corps, with which corps he served until his death. Brown was thus more than well started towards a position as one of those useful members of the bar, who are at once well trained and competent as lawyers, and intelligent as men of business. His friends, and among these his friends of the REVIEW are not the least, know best how ill his good sense and good humor can be spared.

THE Earl of Reading, Lord Chief Justice of England, has recently presented to the Harvard Law School a letter written by Will. Blackstone at the age of twenty-one from his lodgings in Arundel Street, London, to a legal friend in the country. The letter describes so well Blackstone's method of study, expresses so clearly, in words almost literally repeated in the Commentaries twenty years later, his view of the wholeness of the law, and is withal so pleasant a document that it has been thought worth while to print it in full here.

A passage from the letter is quoted in the account of Blackstone's life in D. N. B. and longer quotations are printed in volume 2 of the *LAW STUDENTS' MAGAZINE*, 1845-46. The original has been framed and hung in Langdell Hall South.

The letter follows:

"To Mr. Richmond  
at Sparsholt  
near  
Wantage  
Berks.

"DEAR SIR, — You have been so kind as to tell me, yt a Line now & then from me wd not be unacceptable to You. 'Tis this that has drawn upon You ye present Trouble, for wch You have Nobody but Yourself to blame.

"I have been in Town about ten Days, & am tolerably well settled in my new Habitation (wch is at Mr. Stokes's a Limner in Arundel-Street) The People of ye House seem honest, civil & industrious; & my Lodgings are in themselves chearful, retired, &, as every Body tells me, extremely reasonable. Nor I do want Opportunities of Gallantry (if I have Inclination to improve them) there lodging in ye same House a young Lady of extraordinary Accomplishments & a very ample Fortune; but alas! She has, together with ye Riches, ye Complexion also of a Jew. So that She is not like to prove a very formidable Rival to——Coke upon Littleton.

"Coke I have not yet ventured to attack, but have (according to Ch. J. Reeves's Plan) begun with Littleton only. Two together wd be too much for a Hercules, but I am in great Hopes of managing them one after ye other. I have stormed one Book of Littleton, & opened my Trenches before ye 2d; & I can with Pleasure say I have met with no Difficulty of Consequence; There is one thing indeed, & but one, I cd not understand in ye first Book, wch is a mere matter of Speculation: & is in short this. The Donees in Frank-Marriage shall do no Service (but that of Fealty) to ye Donor or his Heirs till ye 4th Degree be past. Of wch 4 Degrees ye Donee shall be said to be ye first. § 20. To prove wch last Assertion Littleton produces a Writ of Right of Ward (as you may see pag. 23. b.) Now with me ye Question is, how the Writ wch he produces proves ye Point he wd have it do, viz. that ye Donee in Frank-Marriage is ye first of ye four Degrees. You will observe that this is a Point of mere Curiosity, Frank-Marriage being now out of Use. But I don't love to march into an unknown Country, without securing every Post behind me: & it is a greater Slur upon a General to leave a slight Place untaken, than one more hard of Access. Besides, in my apprehension, (& I shd be glad to know your Opinion of ye matter) ye Learning out of use is as necessary to a Beginner as that of every Day's Practise. There seem in ye modern Law to be so many References to ye antient Tenures & Services, that a Man who wd understand ye Reasons, ye Grounds, & Original of what is Law at this Day must look back to what it was formerly; otherwise, his Learning will be both confused & superficial.

"I have sometimes thought that ye Common Law, as it stood in Littleton's Days, resembled a regular Edifice: where ye Apartments

were properly disposed, leading one into another without Confusion; where every part was subservient to ye whole, all uniting in one beautiful Symmetry: & every Room had its distinct Office allotted to it. But as it is now, swoln, shrunk, curtailed, enlarged, altered & mangled by various & contradictory Statutes &c; it resembles ye same Edifice, with many of its most useful Parts pulled down, with preposterous Additions in other Places, of different Materials & coarse Workmanship: according to ye Whim, or Prejudice, or private Convenience of ye Builders. By wch means the Communication of ye Parts is destroyed, & their Harmony quite annihilated; & now it remains a huge, irregular Pile, with many noble Apartments, tho' awkwardly put together, & some of them of no visible Use at present. But if one desires to know why they were built, to what End or Use, how they communicated with ye rest, & ye like; he must necessarily carry in his Head ye Model of ye old House, wch will be ye only Clew to guide him thro' this new Labyrinth.

"I have trespassed so far on yr Patience, that I am almost afraid to venture any farther. But I happen'd t'other day upon a Case in a Civil Law Book, wch I should be glad to know how you imagine Chancery wd decide. A Man dies & leaves his Wife with Child: & by his Will ordains that, if his Wife brought forth a Son; ye Son shd have 2 3ds & ye Mother one 3d of ye Estate: If a Daughter, then ye Wife to have 2, & ye Daughter 1 3d. The Wife brought Twins, a Boy & a Girl. Qu. How shall ye Estate be divided? NB. We must suppose a Jointure, or something, in Bar of Dower.

"We are quite in ye Dark as to Intelligence here in Town; You must observe what strange, perplexed, incoherent Accts ye Gazette affords us. I fear our Loss in Scotland was greater than they care to own. But at ye same time, even Victory must lessen ye Number of ye Rebels, while we are continually recruiting. There is a Talk of assessing all personal Estates & raising thereby 3 millions. If so ye Assessment must run high.

"I was sensibly concerned at hearing of Mat. [?] Richmond's Illness; but hope, by not hearing lately anything further, that all is well again. My hearty Goodwishes attend him, & my Cousin, who I shd think might take a Trip to Town this Spring. My Aunt of Worting [?] will be at Lincolns-inn-fields about Easter; & probably wd be glad of a Companion to partake of some of ye gay Diversions.

"Excuse, Sir, this tedious Length, wch I promise never to be guilty of again, & when You have an idle hour, be so good as to think of, Sir,

"Your most obliged humble Servant

"WILL. BLACKSTONE"

ARUNDEL-STREET  
Jan. 28. 1745

## BOOK REVIEWS

THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817-1917. Cambridge: Harvard Law School Association. 1918. \$1.50.

To an Englishman trained at Oxford or Cambridge, the Harvard Law School is by far the most interesting educational experiment in America. The average American college has contributed little to the technique of academic life. It has



invented no new tool. Its corporate life has no institutions about which an Oxford man could feel the excitement of original and valuable discovery. But of the Harvard Law School the reverse is emphatically the case. Its theory of teaching, its method of organization, its conception of the place of the law in university studies, are all of them genuinely novel. Its great personalities, Langdell, Thayer, Ames, Gray, are hardly less part of the traditions of English legal learning than of American scholarship; for gratitude has led to their annexation. Mr. Justice Holmes, in a special sense a Law School man, is the one American scholar that an Englishman would rank with Bowen in judicial, and Maitland in historical, eminence. A foreigner comes to the Harvard Law School, that is to say, in something of the same spirit in which he goes to Paris and Berlin. He is in the laboratory where great discoveries have been made.

This volume is an interesting monument to the first century of the school's life. It has value from many points of view. The History itself is a warning no less than an example of the difficulties in the path of original effort. The discussion of the library, with its almost nonchalant reference to its inexhaustible treasures, makes an Englishman almost ashamed of Codrington in Oxford and the Squire in Cambridge. The section on student life is perhaps less satisfactory. It describes, but it does not explain, why and how the indifference of the average American undergraduate to things of the mind is exchanged for an unlimited enthusiasm in the first few months of law-school life. The lives of the law-school teachers are of fascinating interest. Ames and Gray and Langdell begin to assume the majestic proportions of Mark Pattison and Jowett. One is struck by the wide territory from which the school has drawn its teachers, and by the width of the topics they have covered in their instruction. The bibliography of their writings must have been an immense labor; but it is a precious possession. It leaves one almost in despair to read of what Ames, Beale, Gray, and Pound somehow managed to get written alongside their actual instruction; and the despair is deepened by contact with their quality. One gets the sense that nothing can be done with the same depth of learning and yet consistent freshness that they bring to their work. A special word is due to the list of books on the case-system. For America, at least, this topic is now closed; but America has still to convert the parent of her law. It is greatly to be hoped that the Alumni Association will use this volume as an instrument for producing conviction.

For this is the real value of the book. It is essentially a study in the method of teaching law, and its thesis, to one reader at least, seems to be unanswerable. It has triumphed because it is the only way in which principles can be studied as dialectic instead of dogma. The student makes out his own certainties, and the assistance he receives from the teacher serves less to increase the information at his disposal — that depends upon his own effort — than for the deepening of his perceptions. He learns the law, in fact, not as a set of rules in a handbook, but as an attempt to clarify a branch of life. But the time has passed when the classic system of Langdell was adequate by itself. With the advent of the collectivist age, and the discovery of Europe by America, it has become essential to study law not merely in isolation but in relation to those collateral sciences which throw light upon its meaning. The study of Roman jurisprudence, of the canon law, of politics and economics, have become essential to the proper orientation of the Anglo-American system. They are advanced studies upon which embarkation is profitable rather when the common law is understood than concurrently with the attempt to understand it. Something of this, it is clear, was grasped by Ames, as also by Gray in that little book on jurisprudence which challenges preëminence with his work on perpetuities. But it has been reserved for Mr. Pound to see, in all its ramifications, the bearing of this new need. Mr. Justice Holmes apart, he has done more than any

living American to make law a philosophy of life, and the school is fortunate in possessing him at what is clearly destined to be a critical epoch in its fortunes. A stranger may be permitted the remark that the supremacy of Harvard among schools of law will in large part depend upon the support given to him by the alumni.

In the next edition it is greatly to be hoped that the portraits of Professors Hill and Frankfurter will be exchanged for something more nearly human. At present they are two distinct crimes.

H. J. L.

SELECT CASES ON TRUSTS. By Austin Wakeman Scott, Professor of Law in Harvard University. pp. i-xiii, 1-842.

In 1882 Professor James Barr Ames of Harvard Law School published the first edition of his *Cases on Trusts*. This was followed in 1893 by a second edition, which has become the standard case-book on the subject in practically all American law schools. The annotations in the second edition, and Professor Ames' theory of selection and arrangement of the cases, were an important contribution to legal scholarship; the annotations, supplemented by Professor Ames' published articles on the law of trusts, have influenced legal thought on this subject in the United States more profoundly than probably any other published discussion of it. There were, however, gaps in Professor Ames' case-book which, with the shifting emphasis on various phases of the subject, made its use as a textbook in law schools increasingly difficult. Especially inconvenient was the omission of cases dealing with the resulting and constructive trusts and charitable trusts. In order to fill these gaps and to present more adequately the development of the subject during the past twenty-five years Professor Scott has prepared the present volume. In performing this difficult task he has had the advantage of the free use of Professor Ames' notes in both published and manuscript form. He has made a painstaking search and selection of the more modern authorities and has added many valuable notes to those prepared by Professor Ames which for the most part have been retained. The practical result is that Professor Ames' case-book has been brought down to date, its most conspicuous omissions corrected, and it has been expanded from a volume of five hundred and twenty-seven to one of eight hundred and thirty-six pages. The new case-book is well indexed; it contains a table of cases, a table of statutes, a bibliography, and a chronological list of Lord Chancellors and Lord Keepers. The most notable additions are the cases on resulting and constructive trusts and on charitable trusts previously published in pamphlet form by Professor Scott. The cases on these subjects furnish two hundred and thirty-two additional pages. There is a new chapter on "The Termination of Trusts"; there is a very necessary addition of a number of important cases on "Who are Purchasers for Value"; there are added sections on "A Trust Distinguished from a Use," "A Trust Obligation Distinguished from Liability for a Tort," "A Trust Distinguished from a Condition," "A Trust Distinguished from a Mortgage or Pledge,"—all subjects which, in the interest of economy of time, most instructors will be inclined to treat without any extensive reading of cases.

The book in many respects is an improvement on Professor Ames' collection, prepared with a diligence and scholarly thoroughness for which Professor Scott is entitled to the commendation and hearty appreciation of teachers of this subject in American law schools. It was no light task to improve Professor Ames' case-book, even with the foundation which he laid and the aid of his notes and unpublished material. One would therefore offer any criticisms of Professor Scott's case-book with some hesitation without having first subjected it to the actual test of class-room use. There is, however, one feature of

its structure and arrangement about which there may be some difference of opinion, and this is the absence from the first part of the book of adequate material for the study of the distinction between the common-law fiduciary obligation and the strict trust, by the aid of which the student may trace historically the difference in origin of these two classes of obligations. One of the most puzzling experiences of the student in taking up the study of trusts is, that although he is taught that the trust is a creation of equity and is enforceable only by courts of equity, he finds a large class of fiduciary obligations to which the substantive law of trusts is applied but for which an action at law is the normal remedy. He finds in many such cases that the plaintiff not only has a legal action against the fiduciary but that he may proceed at law on claims owed by third persons to the fiduciary, whereas in the case of the strict trustee his remedy is exclusively in equity against the trustee. It is believed the student can grasp the significance of these peculiarities and understand adequately the relation of the fiduciary obligation or "common-law trust" to true trusts only by studying, early in the course, the scope of the common-law action of account and of debt and *indebitatus assumpsit* as successors to the action of account; the extension of the jurisdiction in equity over the fiduciary relation in bills for an accounting, and finally the use of trover, especially in actions against stock-brokers and agents to collect negotiable paper, as a substitute for a bill in equity. Professor Ames collected much valuable material dealing with this phase of the subject which he placed at the very beginning of his case-book. Professor Scott has compressed this material into two pages and it appears on pages 571 and 572 of his case-book. Many teachers of the subject who regard it as desirable to study the "common-law trust" in comparison with the equity trust, with reference to the procedural differences which have survived to the present day, will regret that this part of Professor Ames' case-book has not been expanded instead of contracted. This phase of the law has an important bearing on much of the litigation which arises out of banking and stock-brokerage transactions and the business conducted by consignees of merchandise and factors generally.

There are some other subjects which are usually taken up in class-room work, that have been omitted, such as the troublesome question (in some jurisdictions) of the trustee's power to delegate trust duties and the liability of one trustee for the default of his co-trustee. Some of the material in Professor Ames' collection which is of historical interest but of little practical value in modern law is also omitted. But when a case-book extends beyond eight hundred pages one cannot urge the treatment of additional subjects. It is inevitable that some selection should be made, and with the possible exception of the treatment of the law relating to common-law fiduciaries, the choice has been made judiciously and skillfully. Without attempting to refer in detail to the many valuable notes which Professor Scott has compiled, especial attention should be directed to the notes on the liability of trustees to third persons, on the distinction between latent and patent equities; to his notes on purchase for value, the statute of frauds, and the liability of agent and subagent banks receiving commercial paper for collection. They represent unusually thorough and patient research and contain much material which it would be difficult to find elsewhere.

DEAN H. F. STONE.

COLUMBIA UNIVERSITY.

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**AUTHORITY IN THE MODERN STATE.** By Harold J. Laski. New Haven: Yale University Press. 1919. \$3.00.

Fifteen years ago in the political science courses we were handed out the hard and fast propositions that the state was sovereign, and somewhere in

every state was located the center of sovereignty, the power to which all else must give way. Then followed the obvious illustration of the British Parliament, which could do anything it wanted except change a man into a woman. Some of us in a moment of rash inquisitiveness asked where this political superior existed in our own country. After an awkward pause we were assured that it consisted of Congress plus three-quarters of the states, since they alone could change the Constitution.<sup>1</sup> Those were the days before federal amendments chased each other like aeroplanes across the Atlantic, and we had already learned that the Constitution would probably never be altered again because of the great difficulties involved. Somehow we were not altogether satisfied to believe in a sovereign that slept like Frederick Barbarossa to awake once in a blue moon, and was, moreover, scattered in pieces across a continent. This alleged center of control seemed inadequate for a hundred million people, far less real than Tammany Hall, which was said not to be a part of our system of government at all. We should have been much better pleased with the explanation of John Chipman Gray, "The real rulers of a political society are undiscoverable."<sup>2</sup>

The problem of the location of sovereignty within the state was less simple than our teachers would have had us believe, and now we begin to doubt whether sovereignty belongs to the state at all. Is it the sole ruler of the people who dwell in the United States, or France, or any other demarcated portion of the earth's surface? Are there other forces operating in the same territory just as powerful in their own spheres as the state, which cannot struggle against them without going down to almost sure defeat? If so, those forces share the sovereignty and leave the state only a limited control of affairs within its borders. Such is Mr. Laski's conclusion.

To lawyers, of all men, this book is especially valuable, for it warns us not to exaggerate the importance of law. From a purely legal point of view, our teachers and John Austin, their master, may have been right. In our professional capacity as judges and practitioners we must acknowledge the men chosen under the Constitution as the supreme rulers of the land and assert that the Constitution is changed solely through the methods provided by its own terms. In that capacity we recognize the validity of the three amendments of 1865-1870 because of their formal adoption, and ignore the fact that they merely register the result of a four years' war, without which they would have been impossible. But just because this assumption that the lawgivers are the real rulers is an essential portion of our professional conduct, we ought to be careful lest we regard it as containing the whole truth. As thinkers and as citizens we must realize that there are powers behind the lawgivers, not mentioned in the Constitution, which shape their acts and sometimes successfully defy them. Law is oftentimes only the formal expression of reality. Any corporation embodies the will of a group of men with a definite purpose, and that group might continue to exist even though refused recognition by the state. The Adamson Law was made, nominally by Congress, actually by unelected bodies whose representatives sat in the gallery during its passage and whom Congress rightly or wrongly chose to obey. Formerly tariffs were regulated by very different unelected bodies whose representatives did not sit in the gallery. In the days of Jethro Bass, the government of New Hampshire was in his room in the Pelican Hotel. The Thirteenth Amendment was not created by Congress and the state legislatures, but by the Northern armies and the awakened conscience of a nation.

Even those who disagree with Mr. Laski and hold that the state as repre-

<sup>1</sup> For a similar view, that sovereignty is in the states collectively, see Irving B. Richman, "From John Austin to John C. Hurd," 14 HARV. L. REV. 371.

<sup>2</sup> THE NATURE AND SOURCES OF THE LAW, § 183.

sentative of all the people has no theoretical bounds will admit that there are practical limits beyond which it is not expedient for government to go, and will find in this book many interesting illustrations of those limits. One of the weaknesses of the study of politics in this country has been its concentration on American and English data, and even then without much consideration of the events of our own time. We have threshed over the old straw until we are sick of it. Unconsciously we have realized that the slavery question, which occupied the thought of our ablest men for forty years, has not much bearing on the problems of to-day. Mr. Laski's book has the great merit of freshness. He brings us a wealth of new facts from contemporary England and from the development of France during the last hundred years.

It must be said that the book is solid reading, and that portions of it were written for scholars, but those parts are easily passed over by the general reader. This is not so much a continuous discussion as a series of studies after the plan common in France. Each chapter is a unit and can be read by itself. It would, indeed, have been desirable to indicate more fully the interconnection and the bearing that all the studies have on the general problem. Persons who are not specialists in politics and history will get most pleasure from the first chapter on recent encroachments upon the traditional irresponsibility of the state, and the last chapter, "Administrative Syndicalism in France," with its side lights on civil-service difficulties in this country. The study of Lamennais adds for most of us a new figure to the great victims of persecution. Chapters two and four, on Bonald and Royer-Collard, may wisely be left till the last as more technical. Royer-Collard has great significance, however, for he faced intelligently the antinomies of order and freedom which confront us to-day, and Professor Freund has recently directed attention to his scientific scrutiny of the proper limitations of freedom of speech.<sup>3</sup>

As a foreign observer in our midst, the author's statements about the United States are full of interest. The list of Americans in the preface to whom indebtedness is acknowledged indicates the insight he has acquired as to our conditions. I shall briefly restate his theory with reference to his American illustrations.

We have long recognized in this country that certain individual interests ought to be free from legal control, which is therefore prohibited by our Bills of Rights. Fashionable as it has been to sneer at those documents in recent years, it may be "that with the great increase of state activity that is so clearly foreshadowed there was never a time when they were so greatly needed." Principles which are the result of social experience are thereby put beyond the reach of ordinary mischance.<sup>4</sup> We have, however, assumed that there is nothing which limits the government except these rights of individuals, ignoring the fact that the state is not the only association to which men are loyal. In his "Studies in the Problem of Sovereignty,"<sup>5</sup> Mr. Laski narrated several defeats suffered by the state when it forced men to choose between it and a church in matters of the spirit. In its own sphere the church would seem to be sovereign. We have not realized this in the United States, because religion has been protected from political interference by tradition and law, but it is disclosed by the way in which the Quakers won exemption from military service during the Civil War and were accorded it as a matter of course in 1917.<sup>6</sup> Other charities should also be allowed to live their own lives, growing unfettered by legal restrictions based on the real or supposed will of dead men,<sup>7</sup>—an inter-

<sup>3</sup> Ernst Freund, "Debs and Free Speech," 19 *NEW REPUBLIC*, 14 (May 3, 1919).

<sup>4</sup> Laski, *op. cit.*, 62, 101.

Reviewed in 31 *HARV. L. REV.* 1171.

<sup>6</sup> LASKI, *AUTHORITY IN THE MODERN STATE*, 45.

<sup>7</sup> Page 102.

esting principle to a lawyer who is considering whether a college can abandon the sectarian requirements in its charter. On the other hand, charities ought to bear the responsibilities of an ordinary corporate enterprise, including liability for the torts of their servants. "A negligently administered charity may aim at inducing us all into the kingdom of heaven, but it is socially essential to make it careful of the means employed."<sup>8</sup> The same duty of meeting its just obligations rests on the greatest association of all, the state.<sup>9</sup>

Thus the author, like Maitland and Gierke, regards the state as a large group, surrounded by other independent groups, which share in its sovereignty. This is a novel conception for American law, which has always failed to "recognize fully the existence of social groups and group relationships,"<sup>10</sup> especially that important group, the unincorporated trade-union. Mr. Laski points out that the state can only secure the loyalty of the unionist until he thinks that in the given situation the union has the superior claim. He may believe that the object of a railway strike is worth the temporary industrial dislocation it causes, just as a statesman is willing to involve the country in the sacrifices of war for purposes he considers good.<sup>11</sup> We may not approve the workingman's choice of class welfare over public welfare, but it does impose at least a practical limitation on the power of the state.

Courts of Conciliation, as in Australia,<sup>12</sup> might reconcile the conflict of loyalties, but Mr. Laski proposes an entirely different scheme. He considers that producers must take a direct part in the control of production, and not merely mingle in the general mass of electors. The government can never deal adequately with the interests of the trade-unions, for it naturally represents the whole body of consumers, whose position is irreconcilable with that of the producers. The state may yield an occasional industry to the strikers to secure the public supply of necessities, as a Russian sleigh-driver flings a baby now and then to the wolves, but eventually the electorate will force the government to use its powers to keep down the high cost of living. Of course, the workingman is also a consumer, but not on a large enough scale to outweigh his interest as a producer. The higher wages to be obtained by striking are tangible and immediate; the lower prices to be gained if nobody strikes are too uncertain to influence him. Consequently, Mr. Laski conceives a duplex organization of society. Men will continue as individual consumers to elect the government which will supervise the supply of their needs. On the other hand, the trade-unions, representing men as producers, will choose an independent legislature and executive to regulate remuneration and working conditions. This producers' system, like the hierarchy of the Roman Catholic Church, will be outside the state. It is a functional federalism, which will derive much help from the experience of federalism in the United States. And when the interests of producers and consumers conflict, a sort of Supreme Court will decide between them.<sup>13</sup> The difficulties of this plan seem enormous, but there will probably be ample time to consider them before the scheme is adopted. It certainly emphasizes factors which must enter into any system that is ultimately established.

Not only is there danger that the state may become unduly centralized, but the same is true of the churches and the trade-unions. The life of Lamennais is a strong argument for federalism within the Roman Catholic Church, and it is rumored that autocracy is not wholly unknown in the American Federation

<sup>8</sup> Pages 102-05.

<sup>9</sup> Pages 105-07.

<sup>10</sup> Hoxie, *TRADE UNIONISM IN THE UNITED STATES*, 216.

<sup>11</sup> Laski, *op. cit.*, 83, 84.

<sup>12</sup> H. B. Higgins, "A New Province for Law and Order," 29 *HARV. L. REV.* 13; 32 *HARV. L. REV.* 189.

<sup>13</sup> Laski, *op. cit.*, 85-89.

of Labor. This leads the author to emphasize the freedom of the individual as against both the state and the group. The problem is evidently to find a mean between despotic unity and disintegration. He does not, it would seem, solve this problem, but he blocks out the factors which will determine its solution. Devices like federalism and the separation of powers help keep authority within bounds, but liberty is less a tangible substance than an atmosphere. The most carefully planned machinery of government will break down unless it is operated by men who think. "Everyone who has engaged in public work is sooner or later driven to admit that the great barrier to which he finds himself opposed is indifference."<sup>14</sup> "Thought is the one weapon of tried utility in a difficult and complex world."<sup>15</sup> Consequently, the mental qualities and methods of the electorate, the three branches of the government, the leaders of industrial groups, and the civil service, become a decisive element in political life.

Repression of thought in the electorate and the civil service will produce in the end just the kind of spirit that we want to get rid of, — the revolutionary spirit. The experience of France, set forth in the last chapter of the book, shows this conclusively. It is all very well to say that men ought to be loyal to the state. What do we mean by the state? After all, it comes right down to the government that we deal with, and the government comes down to the human beings that we deal with, which means those who will on occasion put us into the hands of the police. If the individuals in the legislatures and the departments of justice and on the bench do not stand for the best things men stand for, — for the development of mind and spirit, and the search for truth, — men begin to wonder whether, after all, that government ought to endure. We cannot love the state as a mystical unity if that unity as we actually face it prevents us from living a true human life. So, in order to make people loyal to the state, you must make the state the kind of institution that they want to be loyal to. Such is the lesson of this very able book.

Z. C., JR.

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THE CONFLICT OF LAWS RELATING TO BILLS AND NOTES, preceded by a Comparative Study of the Law of Bills and Notes. By Ernest G. Lorenzen, Professor of Law in Yale University. New Haven: Yale University Press. 1919. pp. 337.

The principal part of this work consists of several articles recently printed in law magazines; but much additional value has been given to them by including the law of Latin-America and of Japan among those compared in the text. A lengthy Appendix has been added, containing the American Negotiable Instruments Act, the English Bills of Exchange Act, the Convention of the Hague on Bills and Notes, and the Uniform Law which formed part of it, together with very useful comparative tables of sections. An eight-page bibliography follows.

It is a pleasure to have so painstaking and scholarly a work. The concise pages of the text represent a thorough study of the subject, a careful thinking through, a clear and logical arrangement of the matter, a sufficiently full reference to authorities, and the matured conclusion of the author on every point. As one studies the work one wonders not that so much could be made out of a narrow subject, but that so much could be carefully stated and considered in so small a compass.

The usefulness of the book to the lawyer and the merchant is apparent. We look for a wonderful expansion of commerce; we are preparing for commercial relations with every part of the world. Whatever else this may entail, it cer-

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<sup>14</sup> Pages 107-108.

<sup>15</sup> Page 188.

tainly calls for an extensive exchange of bills, drafts, and credits with all countries. Here may be found the law to which these instruments must conform.

Professor Lorenzen's "Discussions," which follow in each case the collection of each country's rules for the Conflict of Laws, seem to be based upon a positivist philosophy: regarding each question in dispute between the different countries as a case for compromise, without regard to its effect upon the general body of any particular law. This is the principle upon which the Hague Conventions proceed. A Professor of Engineering once drafted a city charter on the principle, as he said, on which he would build a bridge; that is, he compared all existing city charters, and selected the provision which pleased him best for each paragraph of his own charter. A bridge is made; but law, like a city charter, is born, not made, if it is to prove viable. A sentence of Professor Lorenzen's is suggestive on this point: "Although the Convention of the Hague [of 1912] has not yet been ratified by any of the signatory powers, it expresses nevertheless the general point of view obtaining in foreign countries with reference to bills and notes." It may be doubted whether any power short of direct sovereign power can force upon a country outland ideas of law; sometimes not even that, as witness Professor Ehrlich's illuminating studies as to the law of Bukowina. May we not fear that any effort to create mechanical uniformity of law throughout the world is doomed to failure?

An excellent example of Professor Lorenzen's method is his discussion of the law governing the "Obligation" of the bill or note (page 108). He first marshals his evidence, — which is the opinion of a considerable number of continental writers, a few decisions of German courts, and an equal number of English and American decisions, together with references to Story. Long extracts are given from Savigny, Bar, Wächter, Story, Lainé, Hertius, Paul Voet, and Lord Mansfield's decision in *Robinson v. Bland*. All the arguments are weighed, and a final preference expressed in favor of the prevailing opinion, that the *lex loci contractus* should govern the obligation.

This method makes of law a series of dead rules. Law is not that; it is a living, growing thing, which may be changed in detail, but cannot be dismembered and live.

The same weighing of evidence, the same conclusion reached on the evidence, the preference for a compromise rule quite independent of any general principle and regardless of the general body of law appears throughout the work. It is the method of the bridge-builder. It may be admitted that this method is necessary if one is to bridge the gap between Anglo-American and Continental law; but such a bridge can never be built. Let us frankly admit that the Common Law is not the Civil Law; let us bewail the fact, if necessary; let us understand the Civil Law, with such sympathetic knowledge as one can acquire of a foreign system to which he was not born; but let us not try to create a legal Esperanto.

Professor Lorenzen's high powers, his scholarship, his industry, his patience, his judgment illumine his book, and he has written a work for which the profession owes him much; but not the least interesting thing about it is its promise of fine work to come, when he gives us more at length the results of his study in the strictly common-law doctrines of the Conflict of Laws.

JOSEPH H. BEALE.

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CONSTITUTIONAL POWER AND WORLD AFFAIRS. By George Sutherland, former United States Senator from Utah. New York: Columbia University Press. 1919. pp. 202.

The wars in which this country has been engaged have given rise to great questions of national policy, of political morality, and of constitutional power. With the Spanish War we definitely departed from our traditional policy of



isolation; the present war has shown us how complete that departure has become. In his famous discussion of "Our New Possessions," a legacy of the Spanish War, Professor James Bradley Thayer said: "If you ask what this nation may do in prosecuting the ends for which it was created, the answer is, It may do what other sovereign nations may do." Senator Sutherland, in a series of lectures delivered at Columbia University last winter, vigorously upholds the power of the national government to do in international affairs what other nations may do. In all matters of external sovereignty the powers of the nation are supreme and exclusive. The treaty-making power, he maintains, belongs to the nation as an attribute of sovereignty, and, except as limited by express provisions of the Constitution, extends to all matters which are within the proper scope of treaties. He contends that the nation is not helpless when a state attempts to exclude Japanese from the public schools or to forbid their owning land, or when foreign subjects are maltreated in any state; and that if in such cases a foreign nation has been aggrieved, "it is not from lack of power but from lack of action on the part of the national government." In time of war, he maintains, the nation has all powers necessary for national self-preservation. "The power to declare war includes every subsidiary power necessary to make the declaration effective. It does not mean the power of waging war feebly, with restricted means or limited forces. It means the power to proceed to the last extremity." Hence the various emergency statutes of the present war are within the constitutional power of Congress to enact. In particular Senator Sutherland exerts himself in upholding the Espionage Act, and he contends that not merely is the act constitutional, but that it does not go far enough. The book is an interesting and vigorous exposition of the point of view of an aggressive nationalist.

A. W. S.

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CASES ON NEGOTIABLE INSTRUMENTS, SUPPLEMENTARY TO AMES'S CASES ON BILLS AND NOTES. By Zechariah Chafee, Jr. Published by the editor. 1919. pp. vi, 106.

Dean Ames's case-book on Bills and Notes is the most exhaustive case-book that has ever been prepared for the use of students. At the time of its appearance it presented in its cases and notes a complete picture of the law of the subject with which it dealt. An index and summary at the end of the second volume stated the law with a combination of brevity, completeness, and exactness which has seldom, if ever, been equaled.

More than twenty-five years have elapsed since the publication of this book, and during that time the Negotiable Instruments Law has been enacted in most states of the Union, and many decisions have construed the act, as well as the common law. This has made it desirable, ultimately, to prepare a new case-book on the subject, and, in the meantime, to present in the pamphlet under review the most important recent decisions. The cases are well selected, and the annotations, though not attempting a full list of authorities, indicate the most significant articles and decisions.

S. W.

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YEAR BOOKS OF EDWARD II. Volume XV; 6 & 7 EDWARD II. Being Volume 36 of the Publications of the Selden Society, for the year 1918. By William Craddock Bolland. London: Quaritch. 1918. pp. lx, 294.

After a sad interval these records of the lives of men six centuries ago are issued again; in the old form, they take up the translation of the Year Books of Edward II, giving us in this volume the cases of a half-year. As has been true in the other books of the series, there is little to interest a modern legal

scholar; for the volume is mostly taken up with the niceties of the ancient land law, now quite obsolete. But for the historian of life the volume is full of interest. He shall see the Prior building a wall across the churchyard; the parishioners nursing their wrath for seven years and then throwing it down. He shall see a Prior and a Prioress contending for tithes of wheat cut on the Prioress' land. He shall hear oath for oath pass between bench and bar: "BEREFORD, C. J. *Nom de dieu* you will find it in the law of England. If . . . Margery had entered . . . would Alan's sister . . . have recovered? No. SCROPE. *Nom de dieu*, sir, no more could Margery." And he shall see case after weary case where one party or the other, claiming an inheritance, was alleged to have been born before marriage.

The Introduction touches on several interesting matters, but chiefly on the origin of attorneys, and the difference between them and responders, bailiffs, and essoiners. The meaning of "demi seal" or "pes sigilli" and the reasons for using the foot of the seal only, are considered, and the word "godhynch" is left unexplained. The entire Introduction shows Mr. Bolland's usual industry and acumen.

JOSEPH H. BEALE.

SPIRIT OF THE COURTS. By Thomas W. Shelton. Baltimore: John Murphy Company. 1918. pp. xxxvii, 264.

To interest the general public in specific questions of procedural law reform is no easy task. It is not that the public is not interested in the general situation. When the stage hero is convicted of a crime on perjured testimony or because his witnesses were kidnaped by the villain, and he exclaims, "It may be law but it isn't justice," he receives a rapturous response from the audience to whom the playwright has already shown the hero's innocence. But these people in the audience have a grievance, a real grievance, although they do not know exactly what it is. There are miscarriages of justice, not only miscarriages which are inevitable in any legal system, but also miscarriages which can be and ought to be avoided. These people have a right to demand of the legal profession that it find the proper remedies. It may happen, however, that although the lawyers offer a remedy, they have not the power to effect it. Statutes may have to be enacted, and for their enactment the interest and aid of the general public may be necessary. This aid will not be forthcoming unless the public is instructed, not merely in the need for a remedy (that they know all too well) but also in the nature of the remedy offered. Mr. Shelton, as Chairman of the Committee of the American Bar Association on Uniform Judicial Procedure has for years done excellent work in the cause of procedural reform. His book is the result of a series of lectures in which he has attempted to convince the public that a path out of our present difficulties lies in the enactment of a federal statute conferring upon the Supreme Court of the United States power to regulate by rule of court procedure in the federal courts, and of state statutes conferring similar powers upon the state courts which presumably would adopt rules based upon the federal model. That he is right seems clear to a majority of lawyers interested in the cause of procedural reform. Whether he has succeeded in so presenting his case as to interest and instruct the public is more doubtful. The presentation of his ideas is not clean cut. The ideas are often buried beneath a mass of discursive rhetoric which doubtless sounded better than it reads. But he brings great enthusiasm to a great cause, and all those who have at heart the just and effective administration of the law should join in giving him aid and comfort.

A. W. S.

**INCOME AND OTHER FEDERAL TAXES.** By Henry Campbell Black, LL.D. Fourth edition. Kansas City: Vernon Law Book Company. 1919. pp. xxi, 704.

The passage of the Revenue Act of 1918 [1919] required a new edition of Judge Black's standard treatise on the Income Tax. The new law, together with the decisions of two years and the rulings of the Department, has called for a twenty-per-cent increase in the size of the book. The work appears to be done with care, and the statements of the text are sound. If a case that might be discussed is occasionally omitted, it may be laid to the newness of the subject, and to the extreme pressure of time on an author who has to get out two new editions of a book within two years. In short, Black's "Income Taxes" is an excellent book on a puzzling subject of universal interest; and each successive edition makes it more valuable.

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**BARNES' FEDERAL CODE:** containing all federal statutes of general and public nature now in force. Edited by Uriah Barnes. Charleston, West Virginia: Virginian Law Book Company. 1919. pp. civ, 2831.

In the one hundred and thirty years during which Congress has been busily enacting statutes a vast mass of legislation has accumulated, contained in some forty bulky volumes, entitled the "Statutes at Large." So formidable grew the proportions of these books of statutes and so intricate and confused a body of law resulted, — part of the statutes being obsolete and half forgotten and other parts being mutually conflicting, — that as early as 1874 Congress authorized a revision of existing laws, and the publication in a single volume of the Revised Statutes, containing all the unrepealed laws in force up to December 1, 1873, to and including volume seventeen of the Statutes at Large. In 1878 a second edition of the Revised Statutes was published. This was followed in 1891 by a Supplement to the Revised Statutes, covering the period from 1874 to 1891, and comprising the statutes contained in volumes eighteen to twenty-six of the Statutes at Large. In 1901 a second volume of the Supplement was published; but since that time no further Revisions or Supplements have appeared.

With a view, however, of simplifying the arrangement and avoiding the perplexities and confusion of the law as set forth in the Statutes at Large, various collections of federal statutes, conveniently arranged and classified under leading topics, have been published from time to time under the name of United States Compiled Statutes.<sup>1</sup> "Barnes' Federal Code," published in 1919, is the most recent contribution in this field. It comprises a collection of all the United States Statutes of general and public nature in force at the present time, and follows in the main the order and arrangement of previous editions of Compiled Statutes. The marked and admirable quality of the book is its extreme compactness, — the great mass of existing statutes being contained in full within the limits of a single volume, attractive in appearance, and easily handled and carried. Through the means of thin paper and excellent typography the size of the book has been reduced to proportions never before attained in any previous edition of United States Statutes.

Parallel Reference Tables show the corresponding section numbers in the

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<sup>1</sup> These collections include the five-volume edition of Compiled Statutes of 1913 published by the West Publishing Company, the twelve volume edition of Compiled Statutes, 1916, Annotated, published by the same company, the five volume edition of Annotated Statutes published the same year by T. H. Flood and Company, and the recent single volume edition of Compiled Statutes, 1918, published by the West Publishing Company, — a compact, though somewhat large and bulky volume.

chronological list of laws, in the United States Revised Statutes, in the Federal Statutes Annotated (Second Edition, 1916), and in the United States Compiled Statutes (1916). A general index at the end adds to the value of the book. Some will be inclined to regret, however, the omission throughout the body of the book of lists of section headings following each title or chapter heading, — an omission doubtless due to the effort for extreme compactness.

FRANCIS BOWES SAYRE.

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**THE RESULTS OF MUNICIPAL LIGHTING IN MASSACHUSETTS.** By Edmond Earle Lincoln, M.A., Ph.D. Being No. XXVII of the Hart, Schaffner, and Marx Prize Essays. Boston and New York: Houghton Mifflin Company. 1918. pp. xx, 484.

A municipal plant is not expected to earn a profit, therefore it does not; that appears to be the result of this thorough comparative study of Massachusetts municipal electric-lighting plants, and of the same number of private plants comparable in size and general conditions and in extent of territory served. After a scholarly and impartial examination, the author concludes that both partisans and opponents of municipal commercial activities have been extravagant in their claims. Municipal plants are conservative; they do not reach out for new business, or seek to develop their own territory to the fullest extent. They are not very expertly managed; but they serve communities which might not be covered by private enterprise. They suffer waste by lack of enterprise, and by mistakes of management — seldom by actual dishonesty; but on the other hand they do not undertake to exploit their patrons for private gain.

The work is decidedly interesting to lawyers, since it concerns a controversy about city government in settling which lawyers take an active part. Its only strictly legal chapter is an excellent one on the history of Massachusetts legislation on the subject.

A full bibliography, a statistical appendix, and many tables and charts make this a work of scholarly value to anyone interested in the thorough and impartial study of the problem.

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**LEGAL AND POLITICAL STATUS OF WOMEN IN IOWA.** By Ruth A. Gallaher. Iowa State Historical Society.

**BROKEN HOMES.** By Joanna C. Colcord. New York: Russell Sage Foundation.

**AMERICAN MARRIAGE LAWS.** By Fred S. Hall and Elisabeth W. Brooke. New York: Russell Sage Foundation.







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